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FOREWORD

Elevation of Mrs. Ayesha A Malik to the August Supreme Court is an unprecedented event in the 74 years of existence of Pakistan. She is rewriting the history books by becoming the *first female Judge* of the Hon'ble Supreme Court of Pakistan. She is a gleaming real-life story of a phenomenal woman who is an epitome of grace, strength, intelligence, & fearlessness; one who had the nerves to navigate through unchartered waters and scale the heights that were once believed to be too sacrosanct for women to tread.

I have always seen her at the best of her abilities. Her humility; her unflappable patience; her humanity; her respectful demeanor irrespective of standing and status of the person with whom she is dealing with; her concern for the weak; her commitment to fairness; and her honesty is something that makes her a real asset to the judiciary. I admire her for her sincerity, diligence and desire to work out good ideas. She never bats an eyelid with any new responsibility. She courageously accepted the tasks assigned to her and accomplished them with great expertise. Her commitment, clear headedness, discipline and punctuality made her the outstanding Judge that she is today. She has always been faithful to the commitment of the delivery of justice

I am proud that she represented our judiciary at national and international forum and raised her voice on core issues pertaining to women, children, transgender and the environment. She has helped to educate our people towards the rights of the oppressed sections of our society and has played a tremendous role in the ongoing struggle for gender equality in Pakistan. She is a role model not only for women of this country but for all of us. She proved that to accomplish great things, we must not only dream but also act, not only plan but also believe.

Her contributions for softening the image of Pakistan in respect of women in Pakistan shall be remembered even centuries after. I hope that her elevation encourages and instills confidence in our women to pursue their dreams. Justice Ayesha has proven that no mountain is too high to climb.

Her involvements in administrative matters of Lahore High Court brought reformative and innovative changes. At judicial side, she has delivered several landmark judgments and decisions in many areas of our substantive and procedural Law. Through her industry, patience, sound knowledge of law, hardworking, diligence, adhering to the professional ethics and ability to work and fairness in conduct of cases, the trust that people repose in our judicial system has been greatly enhanced. Through her judgments, she led the government departments and guided the judges of district judiciary. She has dilated upon almost every area of law such as civil, criminal, banking, tax, family, election, service and constitutional.

Her generosity of spirit with every facet of work and life is something which I will truly cherish. I have seen her as family oriented women particularly as a concerned mother. As she has never compromised on her official duties, she has also never compromised on household duties. I have witnessed her commands at both positions side by side.

Having record of incalculable and invaluable contribution in Lahore High Court, she is moving towards the Supreme hub of judiciary. Her elevation is just another rung in the ladder and another feather in the flight. She is the lady with passion and ambition and many things are yet to be done by her. Her elevation is moment of proud for all of us as she surely belongs to Lahore High Court and she has added the glory & credit to this institution.

On behalf of my brother and sister Judges, I express my best wishes to her for future endeavors and the new ventures that life has in store for her. I wish that she come out with more flying colors of the whole nation.

MUHAMMAD AMEER BHATTI
CHIEF JUSTICE

PROFILE OF HON'BLE JUSTICE AYESHA A MALIK

Mrs. Justice Ayesha A. Malik, a symbol of enthusiasm, devotion, commitment and eminence. She is a role model for more than one half of the population of this country. She is breaking the glass ceiling and making history by becoming the *first women judge* of the Hon'ble Supreme Court of Pakistan.

She was born in 1966 in a highly respected and educated family. After completing her basic studies from private schools in London, Paris and New York, she did her Senior Cambridge from the Karachi Grammar School, Karachi. She did her A' Level from Francis Holland School for Girls in London and her B.Com from the Government College of Commerce & Economics, Karachi. Endeavoring to raise her voice for the marginalized section of society and strengthening women, she opted for legal education. She studied law at the Pakistan College of Law, Lahore and obtained an LLM from Harvard Law School, Cambridge, Massachusetts, U.S.A. where she was named a *London H. Gammon Fellow 1998-1999* for outstanding merit.

Thereafter she started her career as a lawyer at a time when a very few women were in the legal profession. She was enrolled with the Lahore Bar on 05-09-1998 and with the High Court Bar on 25-11-2000. During 1997 to 2001, she worked with Fakhruddin G. Ebrahim & Co., Karachi, where she assisted Mr. Fakhurddin G. Ebrahim. From 2001 to the date of her elevation, she worked with Rizvi, Isa, Afridi & Angell known as RIAA, initially as a Senior Associate and from 2004 as a Partner and was in charge of the firm's Lahore office. In this capacity, she spearheaded the corporate & litigation department of the firms Lahore Office. She represented and advised clients in constitutional petitions, banking & tax matters, corporate advisory, foreign direct investment mergers & acquisitions. She was called upon as an expert witness in family law cases conducted in England and Australia involving issues of child custody, divorce, women's rights and constitutional protection for women in Pakistan. During this period, she also taught law at the renowned Punjab University and College of Accounting &

Management Sciences, Karachi and spent many years' voluntarily teaching English language and development in communication skills at the Herman Meiner School in Lahore, being an SOS project. She was counsel for NGOs involved in poverty alleviation programs, micro finance programs and skills training programs.

She has a number of publications to her credit such as i) Why 'Trade' in Financial Services: An assessment of the Agreement on Trade in Financial Services under the GATS- *The Journal of World Investment, Vol 1 No.2, December 2000. 12th Edition of the Global Report 2004* on the Independence of the Judiciary-Pakistan Chapter. Pakistan Secular Laws; ii) *The Oxford International Encyclopedia of Legal History* published by Oxford University Press 2009, Volume 4; iii) She also compiled the *Supreme Court of Pakistan 1956-2006 Selected Cases* published by the Pakistan College of Law, published at the 50th anniversary of the Supreme Court of Pakistan; iv) She regularly contributed to the Merger Control, Getting The Deal Through, being an International Journal of Competition policy and Regulation *Global Competition Review.* v) She has contributed in the Oxford Reports on International Law in Domestic Courts, a publication of the Oxford University Press.

Owing to her outstanding impact in the legal sector, she was elevated as Judge Lahore High Court, Lahore on 26.03.2012. This was a significant elevation as after a span of 18 years a female was elevated in the Lahore High Court as a judge. As a judge, she has manifested the abounding spirit of inclusion, equality, non-discrimination and justice in our courts. She is known for maintaining decorum and discipline in Court. Her dealings with lawyers and litigants are known such that she considers diligently, understands rightly and decides justly cases before her which have led to her reputation of being an independent and law knowing judge. She inculcated discipline, honesty, ethics and confidence in her court. She has the ability of writing refined judgments in easy-to-understand terms. Her legal opinion, interpretation and analysis demonstrate her ability to foresee future controversies. Even in untouched areas of laws, she has developed new jurisprudence through

her judgments. All of her decisions are self-speaking of her legal wisdom, human approach and holistic attitude. She has heard constitutional petitions on a large variety of issues including tax, environment, regulatory and service matters. She has decided important issues in constitutional jurisdiction including issues related to the public at large specifically of women, children & the environment. She rendered judgments in almost every area of law such as banking, tax, family, election and service.

In her judgments, she has discussed the scope of numerous sections of statutes and vires of various provisions of law such as Competition Ordinance, NAB Ordinance, Sugar Factories Control Act & Rules, OGRA Ordinance, Election Act, DRAP Act, Recognition and Enforcement of foreign arbitral award Act, Sales Tax etc. She has rendered judgments pertaining to jurisdiction of various courts such as Gas Utility Court, Labour Court and Federal & Provincial Ombudsman in harassment matters. Through her judgment she introduced the policy of culling of stray dogs and directed the government to neuter and vaccinate stray dogs with a joint working by the livestock, local bodies and other departments concerned. She also dealt with matters of Haj Policy & Plans. The case "*Meezan Bank Limited v. Wapda First Sukuk Company Ltd*", for the first time discusses the scope of an interpleader suit and explains the concept of burden of proof. There are many noteworthy judgments in her credit on important issues such as the legality of conversion fee, advertisement fee, and issues in the tender process, regulatory function of Pakistan Medical Commission and enforcement of foreign awards as well as declaration of assets by those contesting the general elections.

She is often known for giving guidance to different regulatory authorities and government departments to enable them to fulfill their legal mandate. In this way she has redressed the grievance of the public at large through her judgments. In a case "*POP v. Kanwal Rashid*" a daughter was denied the pension of her mother on the ground that she was already receiving pension of her father. In this case, she settled the scope of two family pensions and held that when both parents are

civil servants then their legal heirs are entitled to two family pensions. In another case, "*Ch. Sabir Ali v. City District Government, etc*", she issued directions for regulating parking in public places. In the case of "*Kainat Akhtar v. Regional Headquarter NADRA etc*" she issued directions for registration of minor under guardianship with NADRA. In another case, *"Superior College for Girls Vs Govt of Punjab etc*" she issued direction to Registrar to make regulations and SOPs with reference to the registration process which was otherwise affecting future of a number of students. Similarly, in a case "*Johnson and Johnson Pakistan (Private) Limited v. Federation of Pakistan etc*.", direction was issued to DRAP to regulate medical devices & therapeutic goods involving health as the public is the ultimate beneficiary of the medical devices whether used at home or in a clinic or hospital, whether for cosmetics or in-vitro diagnostic purposes. Through another one of her judgment she determined the criteria for imposition of Pressure Factor Charges by SNGPL to save consumers from illegal charges. In another case *"LPG Association of Pakistan Vs Federation of Pakistan etc."*, she interpreted the article 151 of the Constitution setting out the constitutional mandate with respect to working of Federal & Provincial Government. In another case, *"Flying Cement Company v. Federation of Pakistan etc."* she found that the Federal Government charged the unconstitutional and illegal surcharges from the consumers of electricity, therefore she passed the direction to Federal Government to refund the amount of surcharges illegally extracted from the consumers. She has also settled through her another judgment the mandatory requirement of Environmental Impact Assessment (EIA) for poultry farms keeping in view the close proximity of the poultry farm from human settlement are a cause of great concern. In another case "*Qaiser Iqbal v. Member (Taxes), Board of Revenue, Punjab, Lahore etc"* she clarified that in a taxing statute an assessment order is necessary in order to support the demand raised and to ensure that the taxing officer has taxed a person as per the confines of the law. She also settled that agricultural income tax can only be levied prospectively and not retrospectively.

She has always taken keen interest in issues pertaining to women. In her landmark case *"Sadaf Aziz v. Federation of Pakistan etc",* which acquired international recognition, first time virginity test and hymen examination of rape victims for sexual abuse was banned virginity by declaring it unconstitutional and against the dignity of women. In another case "*Asma Javed v. Government of Punjab, etc"* an issue arose wherein 50% seats were reserved for male candidates and 50% seats were reserved for female candidates for admissions in medical and dental colleges. So, the females were declined admission and male candidates who have a lesser merit were offered admissions. Her ladyship declared the quota illegal and unconstitutional and declared that only merit should the deciding factor for admission in medical colleges. In another case "*Government of Punjab v. Qanoot Fatima"* women were not appointed against the open merit seats for the post of corporals in the Counter Terrorism Department, Punjab as 75 female corporals against a 5% quota for women were appointed but her ladyship declared that the Act of employing women only against 5% quota and ousting them from open merit is discriminatory and against the spirit of the Constitution. She also declared in case *"Nazar Elahi v. Govt of Punjab"* that an act of Government which aims to protect women and children will be affirmative action under article 25(3) of Constitution and such action will not offend equal treatment thus judicially endorsed the relaxation of age to female candidates.

Apart from her judicial duties, she has become a voice to call out the discrimination, call out stereotyping and bring out the gender perspective. She is the voice that nudges, reminds, and suggests ways to improve things with reference to the gender perspective and make our system more inclusive. To highlight the gender perspective, for the first time in the history of Pakistan, she organized the first Punjab Women Judges Conference in 2016 to open a dialogue on gender and judiciary and how to integrate gender within the existing structures and values. She highlighted that in order to be fair and just the gender perspective requires great inclusion. This was the forum where the women judges discussed

the problems of female judicial officers and highlighted them which resulted in formation of many policies to uplift the welfare and unity of female judicial officers. In the year 2017, second Women Judges Conference was held conferences in which IAWJ participated. This conference focused on improving access to justice and focused on the role female judges play and why there should be more representation. In the year 2019, she organized the Third Women Judges Conference which brought to the forefront discussions on how to improve access for female litigants and to reduce implicit biases. Other issues such as child abuse, domestic violence and transgender rights were also highlighted with special emphasis on providing better court environment. She chaired the Judicial "Female Supervisory Committee", first of its kind, to address the issues of women judges. She is also a part of the International Association of Women Judges (IAWJ), an initiative of women empowerment through equality and justice for every girl and woman. She also helped develop a course on gender sensitization for training judges at PJA for court processes and to sensitize judges to deal with the cases pertaining to women and children. This course was made part of the training of Judicial Officers at the Punjab Judicial Academy, Lahore. She has rendered lectures at national and international forums pertaining to women's rights, gender sensitivity and developing the gender perspective amongst others. She is one voice in the Judiciary who discusses gender sensitivity and breaking the stereotypes. Her objective has always been to help change the narrative, change the mindset, and make the vocabulary more inclusive. She is always passionate about developing gender-neutral sensitive language.

She has actively performed all administrative duties. She is a member of the Administrative Committee wherein she has dealt with core policy matters of high court and district judiciary. She was member of "National Judiciary Automation Committee" to improve existing automation and implement new installations in the Justice Sector. She was the inspection judge of several courts including Banking Courts, Special Courts Customs, Taxation & Smuggling, Child

Protection Tribunals and Environment Tribunals in Punjab. She conducted specialized workshops for training the judges of these courts including training for the environmental & banking judges as well as developing a Manual and Handbook on Environmental laws & Banking laws for the benefit of the courts. She has also played an active role in training judges on environmental justice and looking through the environmental lens. She remained member of the Board of the Punjab Judicial Academy and contributed for capacity-building for judges. She also supervised the use of information technology working on automation at the Lahore High Court and within the District Judiciary of Punjab. She was part of the Committee on Case Management of the Lahore High Court to oversee the pace of litigation for effective and speedy dispensation of cases. She remained member of Board of Governors of National College of Arts. Lahore College for Women University, Lahore & King Edward Medical University, Lahore; Member of Federal Revenue Board; Member of Confirmation Committee, Recruitment Committee, Performance Evaluation Committee, Expunction of Adverse Remarks Committee, IT committee/ IT procurement Recommendatory Committee (LHC), and Committee for preparation of booklet of Privileges of the Hon'ble sitting and former judges. She also remained inspection Judge of Districts Multan, Kasur & Pakpattan and as such she guided the judicial officers in day to day issues.

Having all traits of intelligence, deliberations and spiritual mentorship, she is graced with well-deserved elevation to August Supreme Court of Pakistan on 06th January 2022 by the Judicial Commission of Pakistan. This eventually has raised the grace of the institution and the whole judiciary as Lahore High Court is proud of her valuable contributions to this institution.

SENIORITY LIST OF HON'BLE JUDGES,
LAHORE HIGH COURT, LAHORE

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

Islamabad, the 26th March, 2012

NOTIFICATION

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

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

(IRFAN QADIR)
SECRETARY

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

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

Islamabad the 26th March, 2012

Copy to:-

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

RECEIVED

(Sarfraz Ahmed)
Section Officer

TO BE PUBLISHED IN THE GAZETTE OF PAKISTAN PART-III

Government of Pakistan
Law, Justice and Human Rights Division

*****

Islamabad, the 18th September, 2013

NOTIFICATION

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

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

JUSTICE (R)
(MUHAMMAD RAZA KHAN)
SECRETARY

The Manager,
Printing Corporation of Pakistan Press,
Islamabad.

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

Islamabad the 18th September, 2013

Copy to:-

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

(Muhammad Mush
Section Of

OATH OF JUDGE,
LAHORE HIGH COURT, LAHORE

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

I, Ayesha A. Malik, *do solemnly swear that I will bear true faith and allegiance to Pakistan:*

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

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

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

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

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

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

JUDGE

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

CHIEF JUSTICE

P L D 2012 Lahore 378
Before Ayesha A. Malik, J
MUHAMMAD SALAH-UD-DIN---Petitioner
Versus
NADRA---Respondent
Writ Petition No.11212 of 2012, decided on 4th May, 2012.

National Database and Registration Authority Ordinance (VIII of 2000)

----Ss. 9 & 5(3)---National Database and Registration Authority (NIC) Rules 2002, R.13---Constitution of Pakistan, Art. 199---Constitutional petition---Correction on National Identity Card issued by NADRA---Petitioner had sought correction on his national identity card on the ground that the name of his father had been incorrectly entered---NADRA (respondent) refused to make the necessary correction on the ground that for a change in the father's name; a court order was necessary---NADRA, to support such contention, relied on its Registration Policy and Standard Operating Procedures (SOPs)---Validity---Error was clearly a typographic mistake---National database was required to be maintained by NADRA, and every citizen was required to be registered and to effectuate such registration, every citizen was issued a national identity card---National Identity Card (CNIC) was a legal document for the identification of a citizen, and its issuance meant that the information contained therein was valid and correct---NADRA, by not correcting an error in its database or on the CNIC, was, in fact, going against the spirit of the Ordinance, and was not performing its primary function and was perpetuating a wrong in its own database, thereby negating the purpose of the national identity card---NADRA, was bound to maintain a correct database and was bound to print correct information on the CNIC and was obligated to correct any error in its database or the CNIC it issued to a citizen---Standard Operating Procedures (SOPs) and Registration Policy were internal instructions to enable NADRA to achieve optimum level of efficiency and to ensure consistency and infirmity in its procedure and process---Standard Operating Procedures (SOPs) did not have the force of law and were not binding on the NADRA---Standard Operating Procedures were internal documents, at best, and could not form the basis of denying the petitioner the right to have the correct information maintained in the citizen database and printed on the CNIC---Standard Operating Procedures could not form the basis for NADRA to refuse to correct an error in its record because if the error was not corrected, it would negate the very purpose of issuing a CNIC to a citizen---Delay in filing an application for correction of an office mistake could not hamper or prevent the process of actually correcting the NADRA database, or the CNIC---High Court directed NADRA to treat the pending request of the petitioner as a correction of an office mistake and to correct the petitioner's father's name in the database and issue him a new CNIC---Constitutional petition was allowed, accordingly.

Ghulam Subhani for Petitioner.

Badar Munir Malik, Standing Counsel with Jameel Khan, Legal Advisor, NADRA on court's call.

ORDER

AYESHA A. MALIK, J.---Through this writ petition, the petitioner seeks the correction of the error committed by the respondent when issuing the CNIC of the petitioner. The CNIC wrongfully mentions the name of father of the petitioner as "Haji Faiz Din" instead of "Haji Chanan Din". The petitioner prays for a direction to the respondent to correct the name of his father in their record.

2. Brief facts are that the petitioner, who is the son of late Chanan Din and Mst. Gulzar Begum applied for the computerized National Identity Card from the respondent in the year 2002. The petitioner stated his correct parentage on the CNIC form, showing his father's name as "Haji Chanan Din". At the time his mother, Mst. Gulzar Begum also submitted her documents for the CNIC. She stated her husband's name as "Haji Chanan Din". She was issued her CNIC on 16-2-2002 with correct particulars. Haji Chanan Din (deceased) was shown as her husband. The petitioner was also issued his CNIC on 16-2-2002 but with wrong particulars. His fathers name was printed as "Haji Faiz Din" instead of "Haji Chanan Din". In the year 2009 the petitioner applied to the respondent for the correction of the name of his father on the CNIC. This is apparent from the token receipt filed with this petition. Vide Form No.WH00047945 the respondent requested the petitioner to obtain a Court order for correction of his father's name. The petitioner has tried to reason with the respondent that this is not a case of change in name but a case of correction of office mistake of his father's name, as printed on the CNIC. However, the respondent has refused to correct his father's name on the CNIC. Hence this petition.

3. Learned counsel for the petitioner contends that name of father of the petitioner has been mistakenly written as "Haji Faiz Din" instead of "Haji Chanan Din" on his CNIC and he has requested the respondent to make the correction of office mistake. However, the respondent vide Form No.WH00047945, has required the petitioner to bring a Court order for change in the name of his father. Learned counsel for the petitioner also explained that the delay in filing this petition and for applying to the respondent for correction of office mistake is on account of the fact that he lives in the U.S.A along with his family.

4. Learned Legal Advisor for the respondent present on Court's call has shown and relied upon the Standard Operating Procedure/Registration Policy. This provides for the procedure for change of name of father as well as for correction of office mistake on the CNIC. So far as, correction of office mistake is concerned, the contention of the learned Legal Advisor for the respondent is that when a correction of office mistake is required to be made, the application should be made to the respondent within three months from issuance of CNIC. In this case the request for correction of office mistake was not made within the stipulated time. Hence the application cannot be entertained. Furthermore, he contends that for a change in

father's name a Court order is necessary. Since the petitioner sought change in his father's name, hence a Court order was required.

5. Heard the learned counsel for the parties and reviewed the record available on the file.

6. The documents available on the record show that the petitioner was issued National Identify Card on 22-1-1981, and his fathers name is printed as "Haji Chanan Din". Copy of the petitioner's passport also shows that his fathers name is "Haji Chanan Din". Application form for the computerized CNIC shows that he stated his fathers name as "Haji Chanan Din" (deceased). His mother's CNIC card shows her husbands name as "Haji Chanan Din" (deceased). The family numbers of both CNIC cards, being that of the petitioner and of his mother are the same. Two facts are apparent from a simple review of the aforementioned documents. First that the petitioner was issued NIC in 1981, which states his father's name as "Haji Chanan Din". Secondly, all the documents including the passport and application form state his father's name as "Haji Chanan Din". This means that this cannot be a case of change of name of the petitioner's father, it is clearly a typographic mistake while printing the required details of the petitioner on the CNIC. Hence it is a case of correction of office mistake on the CNIC of the petitioner.

7. Learned Legal Advisor for the respondent relied upon the terms of the Standard Operating Procedure/Registration Policy. He argued that the respondent was bound by the SOPs, which provides for a three month period for correction of office mistake. Since the application was made in the year 2009 and the CNIC was issued in the year 2002, the application of the petitioner was barred by time. Therefore, the respondent cannot entertain the request/application of the petitioner. Essentially the effect of the argument advanced by the learned Legal Advisor for the respondent is that an apparent mistake in the data base of the respondent or on the CNIC of the petitioner should continue. Meaning thereby, that the data and identity of the petitioner is factually incorrect and should remain incorrect. This goes against the very spirit of maintaining a national data base and issuing national identity cards. Hence, there is no merit in the argument of the learned Legal Advisor for the respondent.

8. The National Database and Registration Authority Ordinance, 2000 (Ordinance) provides for the establishment of a national data base and for a Registration Authority to facilitate the registration of all persons. The purpose, object, functions and powers of the respondent are provided for in section 5. Section 10 provides for the issuance of national identity card to any citizen. Section 9(1) of the Ordinance provides for the registration of all the citizen under the Ordinance and also provides that citizens registered under the previous law, being the National Registration Act, 1973 shall be deemed to be registered under this Ordinance. Section 9(1) of the Ordinance is reproduced below:--

"(1) Every citizen in or out of Pakistan who has attained the age of eighteen years shall get himself and a parent or guardian of every citizen who has not attained the

age shall, not later than one month after the birth of such citizen, get such citizen registered in accordance with the provisions of this Ordinance.
Provided further that all such citizens who stand validly registered under any law immediately before the commencement of this Ordinance shall be deemed to have been registered under this Ordinance and their registration shall, subject to sections 17, 18 and 30 remain valid till the expiry of two years from the commencement of this Ordinance, or such time as may be notified by the Federal Government, or till such time as such citizen is registered afresh as hereinafter provided, whichever is earlier."
The aforementioned provisions provide that a national data base is to be maintained by the respondent. This data base record maintains all the required data regarding a citizen, thus establishing a data base or information base known as the citizen data base. Every citizen is required to be registered with the respondent and to effectuate the registration every citizen is issued a national identity card. The national identity card is a legal document for the identification of a citizen. Its issuance means that the information contained therein is valid and correct. Therefore, by not correcting an error in its data base or on the CNIC the respondent is in fact going against the spirit of the Ordinance and is not performing its primary function. It is also perpetuating a wrong in its own data base, which negates the purpose of a national identity card. The respondent is bound to maintain a correct data base and is bound to print the correct information on the CNIC. Finally, since the petitioner was issued a national identity card in 1981, and the said card states his father's name as "Haji Channan Din", in view of section 9(1) he is deemed to be registered under the Ordinance and the respondent is obligated to correct any error in its database or on the CNIC it issues to a citizen.

9. On the issue of the SOPs and the argument that the respondent is bound by the same, it is seen that the NADRA (NIC) Rules 2002, provide for in Rule 13 that:-
"For the incorporation of a change in the card, the Authority may, on an application made in the appropriate form provided in the regulations and subject to surrender of the original card, issue a new revised card incorporating the change.
Furthermore, the respondent under the Ordinance, 2000 enjoys enabling powers under section 5(3):--
"The Authority may take such measures and exercise such powers and perform such functions as it considers necessary for carrying out the purposes of this Ordinance.

10. The Standard Operating Procedure/Registration Policy relied upon are internal instructions to enable the respondent to achieve optimum level of efficiency, and to ensure consistency and uniformity in its procedure and process. The SOPs do not have the force of law. Hence they are not binding on the respondent. At best it's an internal document and cannot form the basis of denying the petitioner the right to have the correct information maintained in the citizen data base and printed on the CNIC. The SOPs also cannot form the basis for the respondent to refuse to correct an error in its record because if the error is not corrected, it will negate the very purpose of issuing a CNIC to a citizen. Furthermore, delay in filing an application

for correction of an office mistake cannot hamper or prevent the process of actually correcting the database or the CNIC.

11. In view of the aforementioned, this petition is accepted, the respondent is directed to treat the pending request of the petitioner as a correction of office mistake and to correct his father's name, and issue a new CNIC with the correct particulars. Compliance report shall be submitted to Deputy Registrar (Judl) of this Court.

12. With the above directions, this writ petition stands disposed of.

.K.M.Z./M-195/L Order accordingly.

2012 P L C (C.S.) 1034
[Lahore High Court]
Before Ayesha A. Malik, J
NAVEED IQBAL
Versus
SECRETARY, GOVERNMENT OF PUNJAB and others
Writ Petition No.11490 of 2012, decided on 31st May, 2012.

(a) Constitution of Pakistan---

----Art. 199---Constitutional petition---Civil service---Recruitment---Merit list---Petitioner applied for the vacancy of "instructor" and after the interview was placed at number one on the merit list; after which the authorities cancelled the recruitment process on the ground that one of the respondents (officials) had placed his son at number 2 on the merit list using undue influence---Validity---No basis were available for the authorities to allege that a merit list was not prepared or that the existing list was provisional list---Entire irregularity was in relation to the said respondent and his son; and the inquiry report found that the son of the respondent ,at serial number 2 of the merit list, was not eligible for the post; therefore in view of the same the recruitment process was suggested to be cancelled and a fresh advertisement was recommended for the post---Inquiry process did not reveal any irregularity but instead showed how the respondent used his position to process his son's case and the same could not be termed as an "irregularity in the recruitment process"---In such cases it was necessary to arrest the abuse of authority by ensuring that the same did not prejudice the merit of a deserving candidate---Any allegation pertaining to undue favour advanced by the respondent for his son could not and should not be used to cancel the entire process---Vested right was created in favour of the petitioner and the allegations had nothing to do with the petitioner as he was neither involved in the matter nor there was any complaint against him---Authority passing or making the merit list had the power to recall, modify or cancel the same, however, such power was subject to the exception that it must be done in accordance with law and it should not be to the detriment of a right accrued---High Court directed that the post should not be re-advertised and that an appointment letter should be issued in favour of the petitioner---Constitutional petition was allowed, accordingly.

Shabana Akhtar v. District Coordination Officer, Bhakkar and 2 others 2012 PLC (C.S.) 366 and Hafiz Mukhtar Ahmad v. Government of the Punjab and others 2005 PLC (C.S.) 1449 rel.

(b) General Clauses Act (10 of 1897)---

----S. 21---Locus poenitentiae, principle, of---Civil service---Recruitment---Merit list---Authority passing or making the merit list had the power to recall, modify or cancel the same, however, such power was subject to the exception that it must be

done in accordance with law and it should not be to the detriment of the right accrued.

Zafar Iqbal Chohan for Petitioner.
Waqas Qadeer Dar, Asstt. A.-G. with Dr. Ayaz Ahmad Gulzar for Respondents.
Date of hearing: 31st May, 2012.

JUDGMENT

AYESHA A. MALIK, J.---- This writ petition impugns order dated 21-4-2012 passed by the respondent No.2 cancelling the recruitment process and the merit list for the post of Instructor Grade-II (BS-8) in the office of District Officer (Civil Defence) Bhakkar.

2. Learned counsel for the petitioner contends that the vacancy for Instructor Grade-II was advertised in daily "Nawa-e-Waqt", Lahore. The petitioner applied for the post on 8-3-2012. Candidates were interviewed and the final merit list was posted on 14-4-2012, which showed that the petitioner had secured 86 marks out of 100 and was placed at serial No.1 on the merit list. Therefore, the counsel submits that the petitioner should have been appointed against the vacancy of Instructor Grade-II. However, on 21-4-2012 the respondent No.2 issued a letter to cancel the process of recruitment for the said post. Learned counsel for the petitioner argued that apparently some inquiry was undertaken wherein it was disclosed that the candidate at serial No.2 was the son of respondent No.3, who had utilized his position to place the name of his son on the merit list at serial No.2 and was also trying to disqualify the petitioner from his position at serial No.1 on the merit list. He further submits that it is on account of the efforts of respondent No.3, that the impugned order was passed. Hence this petition.

3. Respondents have filed their reply and parawise comments. It is their case that no merit list was prepared and if at all there is a list, it was a provisional list and not a final list. Furthermore, it was argued that it was well within the discretion of the respondents to cancel the merit list, if it is concluded the recruitment process was full of irregularities.

4. Heard learned counsel for the parties and reviewed the record available on the file.

5. The basic legal question arising in this petition is that once the final merit list was issued whether the petitioner should have been considered for the appointment of Instructor Grade-II. In this regard the first requirement was to ascertain whether a final merit list was issued. Although the respondents have denied that any merit list was made, the fact of the matter is that the merit list was issued and this is borne out of the impugned order itself, which states that "complaints were received regarding defective preparation of education qualification marks list (merit list), as prescribed in the Recruitment Policy, 2004, for recruitment against the post of Instructor

Grade-II (BS-8) in the office of District Officer (Civil Defense), Bhakkar". The respondents were unable to establish any further steps required to finalize the merit list. As per the record, the procedure for recruitment was finalized and there was nothing outstanding in the process. Therefore, there is no basis for the respondents to allege that a merit list was not prepared or that the existing list is a provisional list.

6. The next question is, if the merit list was finalized what were the irregularities in the recruitment process so detected. As per the report of the respondents there were allegations against respondent No.3 for managing the recruitment of his son, who was shown at serial No.2 on the merit list. The entire objection, irregularity or illegality with the recruitment process is in relation to respondent No.3 and his son. In terms of the inquiry report, it was found that the candidate at serial No.2 of the merit list was not eligible for the post, yet his name is found on the merit list. Therefore, in view of this irregularity the recruitment process was suggested to be cancelled and a fresh advertisement was recommended for the post. The findings in the inquiry process do not reveal any irregularities but instead show how the respondent No.3 utilized his position to process his son's case. This cannot be termed as an "irregularity in the recruitment process". It reveals an abuse of authority, which offends the due process of law. Reliance is placed on a case titled "Shabana Akhtar v. District Coordination Officer, Bhakkar and 2 others" (2012 PLC (C.S.) 366). In such cases it is necessary to arrest the abuse of authority by ensuring that it does not prejudice the merit of a deserving candidate.

7. The case of the petitioner is quite simple; he applied in terms of the recruitment policy; was cleared by the competent authority after being interviewed and tested, and his name appeared at serial No.1 of the merit list. As such a right had accrued in his favour and he should have been considered for the appointment of the post of Instructor Grade-II. Any allegation pertaining to undue favour advanced by the respondent No.3 for his son at serial No.2 should not and cannot be used to cancel the entire process. Firstly, a vested right is created in favour of the petitioner when his name appeared at serial No.1 on the merit list. Secondly, the allegations raised have nothing to do with the petitioner. He is neither involved in the matter nor is there any complaint against him. Therefore, there is no reason to doubt his merit. Furthermore, since there is only one vacancy for the post of Instructor Grade-II, the person enjoying the top position on the merit list is entitled to the appointment. Accordingly, there appears to be no reason to cancel the recruitment process and the existing merit list. Hence there is no reason to re-advertise the post. In this regard, reliance is placed on a case titled "Hafiz Mukhtar Ahmad v. Government of the Punjab and others" (2005 PLC (C.S.) 1449), which holds that a right is seated in favour of the petitioner when his name is displayed on the merit list. There is no doubt that the authority passing or making the list has the power to recall, modify or cancel the same, however, such power is subject to the exception that it must be done in accordance with law and it should not be to the detriment of the right accrued. In the instant case, the petitioner's merit is not in question, as he was the deserving candidate. Notwithstanding the abuse of authority by the respondent

No.3, the recruitment process to the extent of the petitioner has been finalized. He has a right to be appointed as Instructor Grade-II, in terms of the final merit list.

8. For the foregoing reasons, this petition is accepted. The impugned order dated 21-4-2012 is set aside and the respondent No.2 is directed to issue an appointment order in favour of the petitioner against the post of Instructor Grade-II (BS-8) in the office of District Officer (Civil Defence) Bhakkar.

K.M.Z./N-39/L Petition allowed.

2012 P L C (C.S.) 1025
[Lahore High Court]
Before Ayesha A. Malik, J
ASMA HAFEEZ
Versus
CITY POLICE OFFICER, GUJRANWALA and others
Writ Petition No.14174 of 2012, heard on 11th June, 2012.

(a) Punjab Service Tribunals Act (IX of 1974)---
----S. 5---Constitution of Pakistan, Arts.199 & 212---Constitutional jurisdiction of High Court---Scope---Civil service---Service Tribunal, powers / jurisdiction of---Petitioner sought direction for implementation of the judgment of the Service Tribunal in her favour---Maxim: Quando lex aliquid alicui concedit concedere videtur et id , sine quo res ipsa esse non potest---Applicability---Contention of the petitioner was that the Service Tribunal did not possess the power to implement or enforce its own judgment under the Punjab Service Tribunals Act, 1974---Validity---Section 5(2) of the Punjab Service Tribunal Act, 1974 declared that the Service Tribunal had all the powers of civil court when it decided an appeal---Meaning of expression "deciding any appeal" was not limited to bare adjudication but included the power to ensure that the decision of the Service Tribunal was executed in letter and spirit and said rule was embodied in the maxim: "Quando lex aliquid alicui concedit concedere videtur et id sine quo res ipsa esse non potest (whoever grants a thing was deemed also to grant that without which the grant itself would be of no effect)"---Whenever anything was authorized or required to be done by a statute and it was found impossible to do that which was authorized, then the law will by necessary intendment provide the authorization to do that what was required to be done---Where a statute confers jurisdiction, it also conferred by implication, the power of doing all such acts or applying such means as were essential for its execution---Doctrine of implied powers could be invoked when giving interpretation to the jurisdiction conferred upon a tribunal under a statute---When section 5 of the Punjab Service Tribunals Act, 1974 conferred jurisdiction upon a Service Tribunal to decide an appeal, it also conferred the power to ensure that the decision was complied with---Constitutional jurisdiction of High Court could not be used to enforce or implement the judgment of the Service Tribunal under the bar created by Art.212 of the Constitution, which bar was absolute for any court including the High Court under Art.199 of the Constitution of adjudicating on the terms and conditions of service and such bar would also extend to executing the order/judgment of the Service Tribunal.
2003 PLC (C.S.) 1186; PLD 1996 SC (AJ&K) 29; 2008 PLC (C.S.) 517; 2012 PLC (C.S.) 106; Interpretation of Statutes, by N.S. Bindra, Eighth Edition and The Chief Secretary, Government of Punjab, Lahore and another v. Sara Bani and another Civil Appeal No.428-L of 2010 rel.

(b) Maxim:---
----Quando lex aliquid alicui concedit concedere videtur et id, sine quo res ipsa esse non potest---Interpretation and applicability---Scope.

(c) Interpretation of statutes---
----Whenever anything was authorized or required to be done by a statute and it was found impossible do that which was authorized, then the law will by necessary intendment provide the authorization to do that what was required to be done--- Where a statute confers jurisdiction, it also conferred by implication, the power of doing all such acts or applying such means as were essential for its execution--- Doctrine of implied powers could be invoked when giving interpretation to the jurisdiction conferred upon a Tribunal under a statute .
Interpretation of Statutes, by N.S. Bindra, Eighth Edition rel.

Shaukat Nadeem for Petitioner.
Waqas Qadeer Dar, Asstt. A.-G. with Abdul Wahid Inspector for Respondents.
Date of hearing: 11th June, 2012.

JUDGMENT

AYESHA A. MALIK, J.--- Through this petition, the petitioner prays for the implementation of judgment dated 9-12-2011 issued by the Punjab Service Tribunal, Lahore.

2. The basic issue of the petitioner is for the implementation of the judgment dated 9-12-2011 in her favour in Service Appeal No.385 of 2010. It is the case of the petitioner that the respondent has challenged the said judgment by filing C.P.L.A before the Hon'ble Supreme Court but so far no stay has been ordered against the said judgment. Hence it should be implemented.

3. Learned counsel for the petitioner has argued that the Service Tribunal does not possess the requisite power under the Punjab Service Tribunals Act, 1974 ("the Act") to implement or enforce its own judgment because the statute does not provide it with the necessary powers. He further argued that there is nothing in the Act which enables the Tribunal to execute its own judgment as it has no power to deal with contempt of court. He states that with the power of contempt, a court can ensure that its judgment is enforced. He also states that section 5 of the Act is limited to deciding the appeal. As such there is no power for enforcing the judgment in appeal.

4. Learned Law Officer argued to the contrary. He stated that the High Court in its constitutional jurisdiction is not an executing court. He argued that section 5 of the Act provides that a Tribunal shall for the purpose of deciding any appeal be deemed to be a civil court and shall have the same powers as are vested in a civil court under the Code of Civil Procedure of 1908. The Tribunal therefore, having all the powers of civil court can implement its own judgment. He places reliance on 2003 PLC (C.S.) 1186, PLD 1996 SC (AJ&K) 29, 2008 PLC (C.S.) 517 and 2012 PLC (C.S.) 106.

5. Heard learned counsel for the parties and reviewed the record available on the file.

6. The Punjab Service Tribunals Act, 1974 is an Act for the establishment of a service tribunal to exercise jurisdiction regarding matters relating to terms and conditions of service within the Province of Punjab. Section 4 of the Act provides for an appeal to the Tribunal against the final order, whether original or appellate, made by a departmental authority with respect to terms and conditions of service. The powers of the Tribunal are contained in section 5 of the Act, which reads as follows:---

"Power of Tribunals.--- (1) A Tribunal may, on appeal, confirm, set aside, vary or modify the order appealed against.

(2) A Tribunal shall, for the purpose of deciding any appeal, be deemed to be a civil court and shall have the same powers as are vested in such Court under the Code of Civil Procedure 1908 (Act V of 1908) including the powers of.

(a) enforcing the attendance of any person and examining him on oath;

(b) Compelling the production of documents; and

(c) issuing commission for the examination of witnesses and documents.

(3) No court-fee shall be payable for preferring an appeal to, or filing, exhibiting or recording any document in or obtaining any document from a Tribunal."

Section 5(2) of the Act provides that a Tribunal shall have all the powers of a civil court under the Civil Procedure Code. The language which is being stressed upon by the learned counsel for the petitioner and which requires consideration in this writ petition is "for the purposes of deciding any, appeal". Learned counsel for the petitioner reads this to mean that the Tribunal can only adjudicate upon an appeal and has no power to implement or enforce its judgment. This contention of the learned counsel for the petitioner does not cater to the correct interpretation of section 5. Section 5(2) declares that the Service Tribunal has all the powers of a Civil Court when it decides an appeal. The meaning of "deciding any appeal" is not limited to bare adjudication but will include the powers necessary to ensure that its decision is executed in letter and spirit. To achieve this, the Tribunal has all the powers available to a civil court to execute its orders/judgments and ensure its implementation. The rule is embodied in the maxim Quando lex aliquid alicui concedit concedere videtur et lid sine quo res ipsa esse non potest. This maxim provides that whoever grants a thing is deemed also to grant that without which the grant itself would be of no effect. N.S. Bindra in the Interpretation of Statutes, Eighth Edition explains that whenever anything is authorized, or required to be done by a statute and it is found impossible to do that which is authorized, then the law will by necessary intendment provide the authorization to do that what its required to be done. Therefore, where a statute confers jurisdiction, it also confers by implication, the power of doing all such acts or applying such means as are essential for its execution. Simply put the doctrine of implied power can be invoked when giving interpretation to the jurisdiction conferred upon a tribunal under a statute. So when section 5 of the Act confers the power on the Service Tribunal to decide an appeal, it also confers the power to ensure that its decision is complied with. If this interpretation is not given to section 5 it would render the power of adjudication by

the Tribunal as dead letter because it would not have the power to enforce its decisions.

7. There is also another reason why constitutional jurisdiction cannot be used to enforce or implement the judgment of the service tribunal. Article 212 of the Constitution provides that Administrative Courts or Tribunal shall have exclusive jurisdiction with respect to matters relating to the terms and conditions of service for persons in the service of Pakistan. Subsection (2) of Article 212 says that no other court shall grant an injunction, make any order or entertain any proceeding in respect of any matter to which the exclusive jurisdiction of Administrative Court or the Tribunal extends. It has recently been held by the Hon'ble Supreme Court of Pakistan in an unreported judgment passed in Civil Appeal No.428-L of 2010 titled "The Chief Secretary, Government of Punjab, Lahore and another v. Sara Bani and another" which reads as under:---

"a matter relating to her terms and conditions of service could only approach the Tribunal for redressal of her grievance on whatever grounds available to her including mala fides, but could not approach the High Court as the prohibition/bar contained in the Article was absolute."

As the bar is absolute for any court, including the High Court under Article 199 of the Constitution for adjudicating upon the terms and conditions of service, then such bar will also extend to executing the order/judgment of the Service Tribunal. As such Article 199 cannot be invoked for executing a decision that it is not competent to adjudicate upon.

8. The cases relied upon by the learned Law Officer were helpful. 2003 PLC (C.S.) 1186 holds that

"Under section 5(2) of the Punjab Services Tribunals Act, 1974, the Tribunal has been given the powers to decide an appeal as a Civil Court. The Tribunal will have all the powers of the Civil Court to bring issue before it to a logical end like the Civil Court. As under section 36 of the C.P.C, the Civil Court can get its orders implemented/executed under the provisions of the C.P.C. Likewise, the Tribunal also has the same powers to bring its decision to a logical end in the shape of its implementations in its letter and spirit.

In view of the above, the Punjab Service Tribunal being a Civil Court within the meaning of section 5(2) of the Service Tribunal Act, 1974, it can get its order enforced/executed as observed in the preceding paragraph."

PLD 1996 SC (AJ&K) 29 holds that

"The rule makes its clear that the law requires total obedience of orders passed by the Service Tribunal. In my view the Service Tribunal is possessed with adequate powers to see that its orders are implemented. It is an accepted principle of law that when a jurisdiction is conferred on a Court or Tribunal to pass an order the power to have the order implemented as implicit in that jurisdiction. In the interpretation of Statutes by Maxwell, 1962 Edition, at page 350 under monograph "Implied Powers and Obligations" there is a' statement to the following effect:---

Where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution.

Cui jurisdictio data est, ea quoque concessa esse videntur, sin quibus jurisdictio explicari non potuit."
This well known principle was upheld by the Supreme Court of Pakistan in Commissioner, Khairpur Division Khairpur v. Ali Sher Sarki PLD 1971 SC 242. Therefore, as I read it, the power of implementing its orders is available to the Service Tribunal"
2012 PLC (C.S.) 106 holds that:---
"The above provision of law leads us to conclude that since the Balochistan Service Tribunal is a civil Court for the purpose of deciding any appeal regarding the terms and conditions of a civil servant, therefore, it has all the powers of a civil court including those required to implement its judgments as provided under the provisions of the Code of Civil Procedure, 1908.
In view of the above legal position, the Balochistan Service Tribunal, being a civil court within the meaning of section 5(2) of the Balochistan Service Tribunal Act, 1974, in case of the disobedience of its judgment the same can be enforced under the applicable provisions of the Code of Civil Procedure, 1908 if the petitioner approaches the Tribunal. The petitioner, therefore, has an alternate and efficacious remedy available to him and in case he wants to seek enforcement of the judgment of the Balochistan Service Tribunal he may approach the Tribunal for enforcement thereof."

9. The Service Tribunal is therefore, vested with the power to do complete justice; adjudicate and then enforce. Since the Tribunal may on appeal confirm, set-aside, vary or modify the order appealed against, it can also implement such orders/judgments. There is nothing in section 5 which limits the powers of Service Tribunal to simply adjudicating upon an appeal. Article 212 of the Constitution read with Section 5 of the Act is absolutely clear; the Service Tribunal has exclusive jurisdiction to decide on matters relating to terms and conditions of persons in the service of Pakistan and have exclusive jurisdiction to ensure that their orders are duly implemented.

10. Finally to address the argument of the learned counsel for the petitioner that the Service Tribunal cannot implement its decision because it does not possess the power conferred on a court to take action for contempt of court. The said argument holds no force because the power of contempt of court is not used for implementing an order but is used to punish a person who abuses or obstructs the process of the court or in any way disobeys the order of the Court. In the instant case, the petitioner's grievance is that the respondents are not implementing judgment dated 9-12-2011.This grievance can be redressed by the Punjab Service Tribunal itself. The petitioner can seek implementation of the judgment before the Service Tribunal if he so desires.

.K.M.Z./A-111/L Petition dismissed.

PLJ 2012 Lahore 524
Present: Ayesha A. Malik, J.
MUHAMMAD IQBAL--Petitioner
versus
Mst. NASREEN AKHTAR--Respondent
W.P. No. 8293 of 2012, decided on 16.4.2012.

Constitution of Pakistan, 1973--

----Art. 199--W.P. Family Courts Act, 1964--S. 17--Civil Procedure Code, (V of 1908), S. 11--Principle of resjudicata--Applicability--Constitutional petition--Suit for recovery of maintenance allowance was decreed--Thereafter suit for enhancement of maintenance allowance providing for enhanced maintenance of Rs. 4000/- p.m. with 5% annual increase from date of institution till legal limitation of each--No bar in law against filing a fresh suit for enhancement of maintenance allowance due to change in circumstances, change in cost of living and additional needs of minor which father was under legal obligation to provide--Validity--In a suit for enhanced maintenance, growth of children, the cost of living, change in status of the parties, change in expenditures incurred based on needs of children are some of factors which either bring about change of cause of action or may make out even fresh cause of action for children to demand enhanced maintenance allowance--Fresh proceedings for maintenance allowance are maintainable before Family Court--Since enhanced maintenance was not a matter in issue between the parties, hence principle of res judicata will not apply. [P. 526] A

West Pakistan Family Courts Act, 1964--

----S. 17--Constitution of Pakistan, 1973--Art. 199--Constitutional petition--Suit for enhancement of maintenance allowance--Question of--Whether suit for enhancement of maintenance is maintainable under schedule--Principle of resjudicata--Validity--No bar on filing a suit for enhancement of maintenance--There are bound to be changes in circumstances and changes in requirements of the children--Naturally, as children will grow their needs will as grow. [P. 526] B
1999 CLC 1668, rel.

Maintenance Allowance--

----Unrealistic approach--Father was bound to maintain minor--Validity--Maintenance allowance should remain fixed throughout growing period of minor or that 5% increase should be considered sufficient--Father is legally bound to maintain minor in terms of requirement of minor and cost of living. [P. 526`] C

Mr. Muhammad Ehsan Gondal, Advocate for Petitioner.
Date of hearing: 16.4.2012.

Order

This petition impugns the judgments and decrees dated 25.07.2011 and 19.01.2012 passed by Judge Family Court and Addl: District Judge, Mandi Baha-ud-Din respectively as there are concurrent findings against the Petitioner.

2. Brief facts of the case are that Respondents No. 1 to 4 filed a suit for recovery of maintenance allowance, which was decreed on 26.02.2008 providing maintenance at the rate of Rs.2000/- per month. Thereafter, they filed a suit for enhancement of maintenance allowance on 05.04.2010, which was decreed on 25.07.2011 providing for enhanced maintenance at the rate of Rs.4000/- per month with a 5% annual increase from date of institution till legal limitation of each. Hence this writ petition.

3. Learned counsel for the Petitioner contends that the decree issued on 24.02.2008 has attained finality, hence the principle of `resjudicata' applies. Further contends that in view of the said principle the Respondent was not entitled to seek enhancement of maintenance allowance, that too within a period of two years. He relied upon Section 17 of the Family Court Act, 1964 which he states provides for the principle of res judicata and upon the Schedule which does not provide for a suit for enhancement of maintenance.

4. Heard the learned counsel for the Petitioner and reviewed the record available on the file.

5. The contention of the learned counsel for the Petitioner that the principle of res judicata will apply to order dated 26.02.2008, is legally flawed as the principle of res judicata will not apply to suit for enhancement of maintenance since the issues pertaining to the enhanced maintenance were not in issue between the parties in the previous suit. There is no bar in law against filing a fresh suit for enhancement of the maintenance allowance due to change in circumstances, change in cost of living and additional needs of the minor, which a father is under legal obligation to provide. Reliance is placed on Muhammad Ashraf vs. Mst, Nusrat Bibi and 3 others (2010 CLC 1411), In the case of Muhammad Akram vs. Addl: District Judge and others (PLD 2008 Lahore 560), this Court has held that Section 11 of the C.P.C in relation to the cause of action of suit codifies the doctrine of res judicata which operates when there is a judgment between the same parties and it prevents a fresh suit between them regarding the same matter. In a suit for enhanced maintenance, the growth of the children, the cost of living, change in the status of the parties, change in the expenditures incurred based on the needs of the children are some of the factors which either bring about a change of the cause of action or may make out even a fresh cause of action for the children to demand enhanced maintenance allowance. Thus fresh proceedings for maintenance allowance are maintainable before the Family Court. Since enhanced maintenance was not a matter in issue between the parties, hence, the principle of res judicata will not apply.

6. On the issue whether a suit for enhancement of maintenance is maintainable under the Schedule, the answer is that the same is maintainable. The Schedule provides for the matter over which the family Court should have jurisdiction. Maintenance is provided at Serial No. 3. As such there is no bar on filing a suit for enhancement of maintenance. There are bound to be changes in the circumstances and changes in the requirements of the children. Naturally, as the children will grow their needs will also grow. Reliance is placed on a case titled Arab Mir Muhammad Vs. Mst. Iram Iltimas and 4 others (1999 CLC 1668). It is noted that this is an unrealistic approach that the maintenance allowance should remain fixed throughout the growing period of the minor or that the 5% increase should be considered sufficient. A father is legally bound to maintain the minor in terms of the requirement of the minor and the cost of living.

7. For the forgoing reasons, the learned Court has exercised the powers in accordance with law. There is no illegality in the impugned orders, which merit interference by this Court in the exercise of its constitutional jurisdiction. The writ petition being without substance is hereby dismissed.

(R.A.) Petition dismissed

P L D 2012 Lahore 503
Before Ayesha A. Malik, J
Messrs TOYOTA GARDEN MOTORS (PVT.) LTD. through Chief Executive Officer, Lahore---Petitioner
versus
GOVERNMENT OF PUNJAB through Home Secretary, Punjab, Lahore and 2 others---Respondents.
Writ Petitions Nos.14645, 14360 and 14663 of 2012, heard on 22nd June, 2012.

(a) Punjab Procurement Rules, 2009

----R. 36---Constitution of Pakistan, Art. 199---Constitutional petition---Maintainability---Scope---Contract for procurement of ambulances---Petitioners, who had participated in the bidding process, impugned the decision of the Provincial Government whereby contract for procurement of ambulances was awarded to the respondent; on the ground that the said actions were contrary to the Punjab Procurement Rules, 2009---Maintainability---Constitutional petition was maintainable as the only issue to be decided was whether the contract awarded to the respondent was in accordance with the Punjab Procurement Rules, 2009 and no disputed question of fact was involved.
PLD 2001 SC 415 and Executive District Officer (Revenue) District Khushab at Jauharabad and others v. Ijaz Hussain and another 2011 SCMR 1864 ref.

(b) Punjab Procurement Rules, 2009--

----Rr. 36. 30 & 29---Constitution of Pakistan, Art. 199---Constitutional petition---Contract for procurement of ambulances---Bid---Lowest evaluated bid---Principles---Petitioners, who had participated in the bidding process, impugned the decision of the Provincial Government whereby contract for procurement of ambulances was awarded to the respondent; on the ground that the said actions were contrary to the Punjab Procurement Rules, 2009---Validity---Technical Scrutiny Committee rejected the bid of the respondent because they offered vehicles which did not conform to technical specifications and the bid of the petitioner was accepted, however, the Standing Purchase Committee objected to the report of the Technical Scrutiny Committee and decided that open competition be held which included vehicles offered by the respondent; and on the revised bid of the respondent, the contract was awarded to the respondent---Validity---Said procedure adopted by the Standing Purchase Committee and in the manner in which contract was awarded to the respondent were contrary to the Punjab Procurement Rules, 2009---Lowest evaluated bid must conform to the evaluation criteria and other conditions specified in the bidding document and it should be the lowest in terms of the costs---Bid of the respondent was not in accordance with the specifications provided in the bidding document and the respondent had offered a vehicle which was not specified in the bidding documents---Once the Technical Scrutiny Committee had rejected the bid of the respondent, the Standing Purchase Committee could not set out new specifications and then award the contract to the respondent---Standing Purchase

Committee did not have the mandate to overrule the findings of the Technical Scrutiny Committee and by ignoring the decision of the Technical Scrutiny Committee, the Standing Purchase Committee had violated the Punjab Procurement Rules, 2009---Decision taken by the Standing Purchase Committee in favour of the respondent was illegal and was set aside---High Court directed that fresh tenders be issued for the procurement---Constitutional petitions were allowed, accordingly.

(c) Punjab Procurement Rules, 2009--

----Scope and object---Punjab Procurement Rules, 2009 ensured transparency and open competitive bidding and provided a procedural safeguard to achieve value for money and prevent abuse in the procurement process---Awarding a contract to a rejected bidder negated the spirit of open competitive bidding.

Ahmad Waheed Khan for Petitioner (in W.P. No.14645 of 2012).
Ch. Khalid Masood for Petitioner (in W.P.No.14360 of 2012).
Muhammad Sultan Gujjar for Petitioner (in W.P.No.14663 of 2012).
Malik Asif Ahmad Nissoana for Respondents.
Ras Tariq Chaudhry for Respondent No.11.
Waqas Qadeer Dar, Asstt. A.-G. with Ali Hassan, Head of the Law Wing Rescue, 1122 for Respondents.
Date of hearing: 22nd June, 2012.

JUDGMENT

AYESHA A. MALIK, J.---This is a single judgment in Writ Petition Nos.14645, 14663 & 14360 of 2012. All three writ petitions impugn the decision of the respondents Nos.1 & 2 wherein a contract for the procurement of 112 Ambulances has been awarded to respondent No.3.

2. In the instant petition being Writ Petition No.14645 of 2012 the petitioner participated in the bidding process and is aggrieved by the decision of the respondents No.1 & 2, for being contrary to the Punjab Procurement Rules, 2009 ("PPRA Rules 2009"). The case of the petitioner is that the vehicle offered by the respondent No.3 is a Chinese vehicle named Panorama, which is neither a Panel A vehicle nor a standardized vehicle, as required in the bidding document itself. Therefore, the respondents Nos.1 & 2 could not have awarded the tender in favour of respondent No.3. The petitioner made an offer as per the specifications provided and its technical bid was approved by the technical committee. Yet, in sheer violation of the rules, the contract was awarded to the respondent No.3.

3. Writ Petition No.14663 of 2012 has been filed by the petitioner in public interest. It is the case of the petitioner that the manner in which the tender has been awarded to respondent No.6 (Respondent No.3 in the instant petition) is contrary to the PPRA Rules, 2009. It is also the case of the petitioner that respondent No.6 has

offered a substandard vehicle, which is not suitable for the job of emergency facilities and the people at large will suffer.

4. In Writ Petition No.14360 of 2012, the case of the petitioner is that he wanted to participate in the tender for the 112 Ambulances. However, he was informed that only standardized vans or Panel-A vehicles can be offered and that no Chinese brand will be considered. It was only later that petitioner came to know that the contract has been awarded to respondent No.11 for the supply of a Chinese brand which was neither Panel A nor standardized. It is the grievance of the petitioner that he was knocked out of the entire proceedings on account of the fact that he was willing to offer a Chinese vehicle. If Chinese vehicles were to be considered then he should have been allowed participation in the bidding proceedings.

5. The common issue in all three writ petitions is whether the tender awarded in favour of M/S Shahnawaz Motors (Pvt) Ltd respondent No.3 in W.P. No.14645-12, respondent No.6 in Writ Petition No.14663-12 and respondent No.11 in Writ Petition No.14360-12 (hereinafter referred as respondent No.3) was in accordance with the PPRA Rules, 2009. Before adhering to the merits of this case, the objections of the learned Law Officer should be considered. The Law Officer argued that disputed questions of fact arise in all three writ petitions, which cannot be decided in Constitutional Jurisdiction. He has placed reliance on PLD 2001 SC 415. He also argued that the petitioners have a remedy available to them under Rule 48 of the PPRA Rules, 2009, such that if they are aggrieved by any act of the procuring agency after the submission of the bid, a written complaint can be filed upon which a committee will investigate and decide upon the complaint. He further added that against this decision of the committee an appeal can be filed before a competent court. He has placed reliance on a case titled "Executive District Officer (Revenue) District Khushab at Jauharabad and others v. Ijaz Hussain and another" 2011 SCMR 1864. Finally, learned Law Officer argued that this is a matter of policy and policy cannot be challenged through Constitutional Jurisdiction. Reliance was placed on a case titled "Ijaz Ahmad v. The State" 2009 SCMR 98. He stated that it is for the Punjab Government to decide what its requirements are for the purposes of these Ambulances and if the Government wants to procure a Chinese Brand, there is no basis upon which this decision can be challenged.

6. I have given consideration to all the preliminary objections raised by the learned Law Officer on the maintainability of these three writ petitions. I am of the opinion -that all three writ petitions are maintainable as the only issue to be decided in the writ petitions is whether the contract awarded to the respondent No.3 was in accordance with the PPRA Rules 2009. Since the only question before the Court is whether the Respondents have acted in accordance with law, the same can be decided in Constitutional Jurisdiction. In this regard the law Officer has placed reliance on an unreported judgment dated 13-2-2012 passed by this court in Writ Petition No.23770 of 2009, which dealt with the issue of blacklisting and fresh bidding after awarding a contract. In the stated case, one of the issues was whether or not the contract executed in favour of respondent No.4 was backdated. The

learned Judge held that this is a disputed question of fact, which cannot be decided in Constitutional Jurisdiction. In the instant petitions there is no disputed question of fact involved, hence reliance upon the judgment of 13-2-2012 does not advance the argument of the learned Law Officer. Therefore these writ petitions are maintainable in their present form.

7. The brief facts of this case are that a tender was advertised in "The News" and daily "Nawa-e-Waqt" on 25-4-2012. It was also placed on the PPRA web site as per the PPRA Rules 2009. The tender notice dated 23-4-2012 provides for the procurement of 112 Emergency Rescue Cardiac Ambulances. As per the specifications provided the Ambulance was to be Panel-A vehicle or a standardized van. Standardization is done by the Services and General Administration Department, (Procurement Wing). A list of standardized vans has been provided by the respondents Nos.1 & 2 dated 17 December 2008. The bidding specifications provide that Panel-A includes European, American and Japanese origin firms. The tender was a two stage, two envelope bidding procedure as per Rule 36-d of the PPRA Rules 2009. The bids were opened on 10-4-2012. The technical information received from four firms was evaluated by the Technical Scrutiny Committee. Thereafter, in a meeting of the Standing Purchase Committee the decision to award the contract to respondent No.3 was made. Hence these petitions.

8. Learned counsel for the respondents along with the learned Law Officer have argued that the entire bidding process was in accordance with the PPRA Rules 2009 and the decision of the Standing Purchase Committee is also after giving due consideration to all the information submitted before it. The bidder with the lowest bid and most acceptable terms was awarded the contract. It was argued that the petitioners have no grievance whatsoever, as their bid did not meet the requirements of the respondents Nos.1 and 2.

9. Heard learned counsel for the parties at length and reviewed the record available on the file.

10. Rule 36 of the PPRA Rules 2009 provides the procedure of open competitive bidding. Rule 36(d) provides for the two stage two envelope bidding procedure. As per the Rules the bidder will provide two separate envelopes; one will contain a financial proposal and the other a technical proposal. In the first stage, the technical proposal shall be discussed with the bidder in terms of the procuring agency's technical requirements. Those bidders, who show willingness to meet the requirements of the procuring agency, shall be allowed to revise their technical proposal after the aforementioned discussion. Bidders not willing to conform to the technical proposal for the revised requirement can withdraw their respective bids. In the second stage, the bidders, who are willing to conform to the revised technical specifications and whose bids have not already been rejected shall submit a revised technical proposal and a supplementary revised financial proposal in accordance with the technical requirements. The revised technical proposal along with the original financial proposal along with supplementary financial proposal should be

opened at the date, time and place announced by the procuring agency. Finally, the procuring agency evaluates the entire proposal in accordance with the evaluation criteria and the bid found to be the lowest evaluated bid is accepted.

11. In the instant case, as per the documents provided by the petitioners and the respondents 1 & 2, the tender requirements were specified in the bidding documents. The bidding documents provided for the general conditions, special conditions and technical specifications for the emergency rescue cardiac ambulance required. The technical bids of four firms were evaluated by the Technical Scrutiny Committee in its meeting held on 11, 14 and 15 May, 2012. The Technical Scrutiny Committee rejected the bid of respondent No.3 because they offered Chinese vehicles, which did not conform to the technical, specification, being Panel-A or standardized vehicles. The bid offered by the petitioner in Writ Petition No.14645 of 2012 was accepted keeping in view past experience, durability reliability and easy availability of spare parts. The recommendation and evaluation report of the Technical Scrutiny Committee was considered by the Standing Purchase Committee, in its meeting held on 17th May and then again on 18th May, 2012. In the first meeting the Deputy Secretary, Finance Department objected to the report of the Technical Scrutiny Committee as he was of the view that technical report was not based on technical aspects but was based on operational requirements. It was also decided at that meeting that open competition should be held, which meant that all brands including Chinese Ambulances should have been considered. At this point, in terms of the arguments advanced by the respondents, revised bids were offered by three of the bidders to meet the revised technical requirements of the Standing Purchase Committee. However the petitioner in the instant writ petition did not revise its bid. On 18th May, the Standing Purchase Committee opened the financial bids and awarded the contract to the respondent No.3 who offered the lowest bid.

12. The procedure adopted by the Standing Purchase Committee and the manner in which they awarded the contract to the respondent No.3 is contrary to the PPRA Rules 2009. The Rules provide that the "lowest evaluated bid" shall be accepted. Lowest evaluated bid is defined in the definition clause as:--

"(i) a bid most closely conforming to evaluation criteria and other conditions specified in bidding document; and

(ii) having lowest evaluated cost;"

This means that the lowest evaluated bid must conform to the evaluation criteria and other conditions specified in the bidding document and it should be the lowest in terms of costs. Rule 30 provides for the evaluation of bids:--

"1. All bids shall be evaluated in accordance with the evaluation criteria and other terms and conditions set forth in the prescribed bidding documents. Save as provided for in sub-clause (iv) of clause (c) of rule 36 no evaluation criteria shall be used for evaluation of bids that had not been specified in the bidding documents.

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3. A bid once opened in accordance with the prescribed procedure shall be subject to only those rules, regulations and policies that are in force at the time of issue of notice for invitation of bids."
Rule 29 provides for the evaluation criteria being:-
"Procuring agencies shall formulate an appropriate evaluation criterion listing all the relevant information against which a bid is to be evaluated. Such evaluation criteria shall form an integral part of the bidding documents. Failure to provide for an unambiguous evaluation criteria in the bidding documents shall amount to mis-procurement."
In terms of the aforementioned Rules, the purpose of the bidding documents is to set out the requirement and the criteria against which the bids will be evaluated. In any bidding process it is vital that the terms and conditions and the specifications required are known to the bidder so that he can present his bid in accordance with the specifications and conditions laid out in the bidding documents. Accordingly all bids are reviewed against the same evaluation criteria in deciding which is the lowest bid.

13. Admittedly the bid of the respondent No.3 was not in accordance with the specifications provided in the bidding document. Essentially the respondent No.3 offered a vehicle which was not specified in the bidding documents. This is precisely why the Technical Scrutiny Committee rejected their bid, as their offer did not meet the technical specifications of the bidding documents. Once the Technical Scrutiny Committee rejected the bid of the respondent No.3, the Standing Purchase Committee could not set out new specifications and then award the contract to the respondent No.3, In doing so the Standing Purchase Committee did not per se revise the technical specifications, they changed the basic specifications. The required specifications were ignored and replaced by technical specifications which were neither present nor contemplated for in the bidding documents. The Standing Purchase Committee cannot set aside the findings of the Technical Scrutiny Committee nor can it replace the technical specifications. If after due consideration of the bids, the Purchase Committee was of the opinion that the financial proposal for Panel-A or standardized vehicles was on the higher side, they could have recommended re-bidding in terms of Rule 34. This would be in line with the spirit of the PPRA Rules 2009. However to simply set aside the report' of the Technical Scrutiny Committee and then award the contract to a person whose bid was rejected by the Technical Scrutiny Committee is a gross violation of Rule 36(d) (viii), which provides that revised bids will be submitted by bidders whose bids have not been rejected. The PPRA Rules 2009 ensure transparency and open competitive bidding. They provide the procedural safeguard to achieve value for money and prevent abuse in the procurement process. Awarding the contract to a rejected bidder negates the spirit of open competitive bidding.

14. In terms of the procedure followed, the Standing Purchase Committee does not have the mandate to over rule the findings of the Technical Scrutiny Committee. It is required to consider the recommendations and findings of the Technical Scrutiny Committee and take a decision accordingly. By ignoring the decision of the

Technical Scrutiny Committee the Standing Purchase Committee violated the PPRA Rules, 2009 and the objective of the said Rules. In terms of Rule 36(d) any revision in the technical specifications will be decided by the Technical Scrutiny Committee in consultation with the bidders. Such revisions should be in line with the basic specifications, conditions and evaluation criteria provided in the bidding documents. A revision in the technical specifications does not mean changing the entire basis of the specifications. In this case the specification was for Panel A or standardized vehicles. This specification set out the bench mark for the quality required. Any revision of the technical specifications should have been within the ambit of Panel A or standardized vehicles. As per the stated Rule once the revised technical bids are in place, the financial bids are to be considered. If the Standing Purchase Committee wanted to include Chinese firms then it should have called for re-bidding so that all persons, who wanted to participate in the bidding process and who could meet the new specification could have presented their proposal. This would have included persons like the Petitioner in Writ Petition No.14360 of 2012. This is also keeping with the spirit and purpose of the PPRA Rules 2009 which provides in Rule 2(c) that competitive bidding means "a procedure leading to the award of a contract whereby all the interested persons, firms, companies or organizations may bid for the contract and includes both national competitive bidding and international competitive bidding"

15. At this point it is pertinent to mention that the learned counsel for the respondent No.3 while defending the award of the contract in his favour stressed upon the reputation and the quality of the brand offered by the respondent No.3. He also argued that the respondent No.3 has been supplying Ambulances to the respondents Nos.1 & 2 previously. These arguments do not advance the case of the respondent No.3 as it is immaterial what the quality of the brand being offered by the Respondent No.3 is. Or that they have been providing such vehicles in the past. The only material issue is that the respondent No.3 offered a vehicle which was not specified or required under the bidding documents. The whole purpose of providing the bidding documents and the specifications, conditions and evaluation criteria is so that the public at large is informed of the intended procurement and interested parties can formulate their proposals in accordance with what has been specifically required.

16. An the light of the aforementioned the petitions are allowed. The decision taken by the Standing Purchase Committee in favour of the respondent No.3 is illegal and contrary to the PPRA Rules 2009. The procedure adopted by the Standing Purchase Committee is also illegal and contrary to the PPRA Rules 2009. The respondents Nos.1 & 2 may reconsider the specifications desired for the procurement of the emergency vehicles and thereby invite fresh tenders strictly in accordance with the PPRA Rules, 2009. Finally, all funds that have been processed in the name of the respondent No.3 may be set aside for the fresh bidding process and its successor. In this regard the respondents Nos. 1 and 2 are directed to ensure transparency and competitive bidding as contemplated under the PPRA Rules.
KMZ/T-21/L Petition allowed.

2012 C L C 1846
[Lahore]
Before Umar Ata Bandial and Ayesha A. Malik, JJ
MUHAMMAD YOUNAS----Appellant
versus
WARIS BAIG and 2 others----Respondents
Regular First Appeal No.585 of 2009, heard on 31st May, 2012.

(a) Specific Relief Act (I of 1877)---
----Ss. 8, 42 & 54---Civil Procedure Code (V of 1908), O.VI, R.4---Lease of land---Suit for possession, declaration and injunction---Fraud, plea of---Details of fraud, non-mentioning of---Plaintiff claimed to be owner of suit-land and alleged that he did not sell the land to defendant who committed fraud and cheating with him---Suit was decreed by Trial Court in favour of plaintiff---Validity---No detail of fraud and no date as to when he gained knowledge of fraud was on record---Plaintiff failed to explain why defendant had been depositing rent with authorities since year, 2001---Plea of plaintiff that lease was non-transferable was contrary to lease agreement, which allowed a transfer of lease hold rights subject to permission by the authorities---Basis of case of plaintiff was not in accordance with lease agreement---Plaintiff failed to prove his case of fraud and if no case of fraud was established then case of plaintiff on forgery also failed---Even though plaintiff denied signature on documents in question, he did not justify deposit of transfer fee, receipt of partial payment, refund of security deposit or the fact that defendant had deposited rent for five years---Plaintiff failed to make out case of fraud and as such was not entitled to possession---High Court in exercise of appellate jurisdiction, set aside judgment and decree passed by Trial Court and suit filed by plaintiff was dismissed---Appeal was allowed in circumstances.

2007 SCMR 1719; 2007 SCMR 1884; PLD 1971 SC 838; PLD 1989 SC 335 and Mst. Sahib Noor v. Haji Ahmad 1988 SCMR 1703 ref.

(b) Evidence---
----Facts, proof of---Principle---Evidence must relate to facts pleaded by a party as its purpose is to prove that fact---Evidence makes existence of fact or its non-existence more probable or less probable---Weightage given to evidence is based on its strength to prove fact or set of facts.
Nadeem-ud-Din Malik and Hamid Khan for Appellants.
Sharjeel Adnan Sheikh for Respondent No.1.
Sardar M.S. Tahir for Respondent No.3.
Date of hearing: 31st May, 2012.

JUDGMENT
AYESHA A. MALIK, J.--- This R.F.A. is filed against judgment and decree dated 15-12-2009 by the learned Civil Judge Lahore wherein the suit filed by the respondent No.1 was decreed in his favour.

2. The brief facts of this case are that the respondent No.1 filed a suit for declaration, possession and mandatory injunction in relation to a piece of land located in Fortress Stadium, Lahore Cantt. It is the case of respondent No.1 that he is the lessee of 16 Marlas of land adjacent to Shops Nos.5 and 6 and opposite Bundu Khan Restaurant in Bolan Block Fortress Stadium, Lahore under a Lease Agreement dated 18-7-1995. It is also his case that this land is non-transferable and that he never sold the said land to the appellants, never received any money from them and never sought transfer of the land in their favour through the respondents Nos.2 and 3.

3. On the other hand, it is the case of the appellants that the respondent No.1 sold them his lease hold rights under the Lease Agreement dated 18-7-1995 for Rs.7,000,000/-. In this regard an agreement to sell was executed between the parties on 29-7-2001 and payment was made in two instalments, Rs.3,000,000/- and Rs.4,000,000/- respectively. Transfer was made in favour of the appellant No.1 on the request of the respondent No.1 through the offices of the respondents Nos.2 and 3. To effectuate the transfer the respondent No.1 made a request for transfer in favour of the appellant No.1 dated 28-5-2001, Exh.D.3 and paid the transfer fee to the respondents 2 and 3, Exh.P.4/1 and Exh.P.4/2. After the transfer, the appellants have been paying the rent to the offices of the respondents Nos.2 and 3 and have been enjoying possession of the land in dispute. It was on 24-1-2006 that the respondent No.1 filed a suit against the appellants stating that he never sold any lease hold rights for the land to them.

4. Ten issues were framed in the suit, of which the relevant issue, as decided by the learned Civil Judge Ist Class, Lahore was issue No.8. It reads as follows:---
"Whether the so-called agreement is the result of collusion and connivance between the defendants? OPD

5. The respondent No.1 appeared himself as a witness and produced two other witnesses. He produced receipt of payment Exh.P.W.4/1 and Exh.P.4/2 showing payment to the respondents Nos.2 and 3 for transfer fee on 25-9-2001 and 10-10-2001. He says that this was actually for construction purposes. On the other hand, the appellant No.1 appeared in person and produced two witnesses. She produced letters and documents issued in her name by the offices of the respondents Nos.2 and 3 as Exh.D.1 to Exh.D.23. She produced receipts of payment of rent as Exh.D.21 to Exh.D.51 and she produced the register for issuance of stamp paper for the agreement to sell as Exh.D.52. The photocopy of the agreement to sell was produced as Mark A and receipt of payment of Rs.4,000,000/- in favour of the respondent No.1 was produced as Mark B. The original transfer letter was produced as Exh.D.53.
In its findings, the learned Judge decreed the suit in favour of the respondent No.1 on account of the following facts:---
(1) The original agreement to sell was not produced in court. In its place a Photostat copy was produced and referred to as "Mark-A".

(2) The payment made by the appellants could not be proved on account of the contradictions in the dates of the encashment certificates, showing the date when the payment had come into the account of appellant No.1 and the date of payment to the respondent No.1.
(3.) Original request for transfer issued by the respondent No.1 marked as Ex.D.3, from which the signature of the respondent No.1 could not be verified.
The findings on the basis of the aforementioned facts are as follows:--
"Therefore, the plaintiff has successfully proved that he is still entitled to hold the plot in dispute in his name and the transactions allegedly made by the defendants are void ab anitio and based on fraud /fictitious and alleged agreement Mark-A and transfer letter Exh.D.3 are declared to be the result of fraud, collusion and convenience of the defendants and hereby cancelled, hence this issue is decided affirmative in favour of the plaintiff and against the defendants. All other issues decided in favour of the plaintiff based on the findings of the aforesaid issue."

6. Learned counsel for the appellants argued that the impugned judgment and decree does not consider any of the evidence produced by the appellants. The learned Judge has simply relied upon the fact that the original agreement to sell was not produced in court and some minor contradictions in the dates of payment. Important documents produced by the appellants were totally ignored by the learned Civil Judge. He referred to Exh.D.1 being the letter requesting refund of security money in the amount of Rs.25,000/- by respondent No.1 to respondent No.2. He argued that this refund was made to the respondent No.1 since the lease hold rights were transferred to the appellant No.1. He further submitted that Exh.D.2 was ignored where respondent No.1 thanked the respondent No.2 for authorizing the transfer in favour of appellant No.1. Similarly Exh.D.8 was ignored where appellant No.1 applied for transfer in her favour and thereafter all correspondence with the respondents Nos.2 and 3 was with the appellate No.1, since she held the leasehold rights of the land.

7. Learned counsel for the respondent No.1 argued that the appellants could not produce the original agreement to sell because there was no such document and without the original document they have no case. He further argued that the appellants could not prove that any consideration was paid to the respondent No.1. It is the case of the respondent No.1 that the appellants have failed to prove the execution of the agreement to sell and payment of consideration, hence they have failed to prove a sale of the leasehold rights in their favour. He placed reliance on 2007 SCMR 1719 and 2007 SCMR 1884, PLD 1971 SC 838 and PLD 1989 SC 335.

8. We have heard the learned counsel for the parties and reviewed the record available on the file.
There are three essential questions which arise in this R.F.A.
(A) The case of respondent No.1 as pleaded and prayed for in his plaint and the evidence produced in terms thereof to prove his case.
(B) The loss of the original agreement to sell and its effect thereof.

(C) The appreciation of the evidence and the weightage given to the evidence under the law by the learned Civil Judge.

We will take up each of these questions separately.

A. The suit filed by the respondent No.1 was a suit for declaration, possession and permanent injunction restraining the respondents Nos.2 and 3 from executing any further document in favour of the appellants. Suit was originally filed in 2006 and an amended plaint was filed subsequently on account of order dated 5-3-2007. The case of the respondent No.1 as set out in the amended plaint is that he obtained lease-hold rights in the land vide a lease agreement dated 18-7-1995 and since then he has been the lessee of the land. He pleads that the respondents Nos.2 and 3 in collusion with the appellants committed fraud and transferred the property in favour of the appellants. He admits that some business deal related to the property was under negotiation with the appellants, however, since the deal never finalized no agreement to sell was executed. We have heard the counsel for the respondent No.1 at length. He has argued that the case of the respondent No.1 is one of fraud, possession and entitlement to title. The respondent No.1 states in his plaint that the transfer in favour of the appellant No.1 is fraudulent and that he was defrauded by the appellants and the respondents Nos.2 and 3. However, he has given no detail of the fraud, no description of how he was defrauded and has produced nothing in his evidence to establish a case of fraud. It is settled law that a person who takes a plea of fraud must prove each and every aspect of the fraud. Order VI, Rule 4 of the Civil Procedure Code 1908 provides that:---

"4. Particulars to be given where necessary.--- In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading."

When fraud is the basis of the action or defence then its particulars have to be furnished. Reliance is placed on a case titled "Mst. Sahib Noor v. Haji Ahmad (1988 SCMR 1703) wherein it was held that:---

"In the case of Eliza F.T. Higgs Vatcher and others v. Henry Paull and others AIR 1914 Privy Council 184 it was held that "their Lordships are of the opinion that where charges of fraud are intended to be made, full particulars thereof ought to be given in the pleadings, either as originally framed or as amended for that purpose." The ingredients of 'fraud' were enumerated as follows:---

"In order to establish fraud it must be proved first that a representation was made; secondly that this representation was untrue; thirdly that it was untrue to the knowledge of the person making it; and fourthly that it induced the contract."

On review of the plaint we note that the respondent No.1 has not explained anywhere in his plaint or even through evidence how the appellants took possession of the property. On being asked this question, counsel for the respondent No.1 argued that the appellants had illegally taken possession of the property and in fact were trespassers. This explanation cannot be accepted as there is a period of five years wherein the appellants had possession and for which the respondent No.1 claims they were trespassing. From July, 2001 to the date of filing of the suit, the appellants have paid the rent of the land. It is noteworthy that the respondent No.1 is

also the owner of Shops, Nos.5 and 6, adjacent to the land in dispute, for which he has been paying the rent. However throughout this time he has not paid the rent for the land. This means that he was fully aware of the fact that the rent for the land was being paid by the appellants. These are material facts, which are relevant to the case of the respondent No.1 and necessary to the case of the appellants. The learned Judge has totally ignored the material facts of the case. Also in the instant case, there is no evidence whatsoever to explain the refund of the security deposit by the Respondent No.1. There is no detail of the fraud, no date as to when he gained knowledge of the fraud. The respondent No.1 has failed to explain why the appellants have deposited rent with the respondents Nos.2 and 3 from July, 2001 to date. Also the respondent's No.1 case that the lease is non-transferable is contrary to section 8 of the Lease Agreement, which allows a transfer of leasehold rights subject to permission by the Fortress Stadium. Hence the very basis of his case is not in accordance with the Lease Agreement. Therefore we are of the opinion that the respondent No.1 failed to prove his case of fraud. As to his case of forgery on the agreement to sell, we are of the opinion that if no case of fraud was established between the respondents Nos.3 and 4 and the appellants then the case of the respondent No.1 on forgery also fails. This is because even though he denies signatures on Mark-A, Mark-B, Exh.D.2 and Exh.D.3, he does not justify the deposit of the transfer fee, the receipt of Rs.4,000,000/- the refund for the security deposit or the fact that the appellants deposited the rent for the five years. Hence we are of the opinion that the respondent No.1 has not made out his case of fraud and as such is not entitled to possession.

B. It has been argued that the original document being the original agreement to sell was not produced by the appellants; hence they had no legitimate defence in the suit of the respondent No. 1. The appellants case is that the original agreement to sell got lost and with the permission of the court, through secondary evidence, they were able to prove that a sale of the leasehold rights had taken place in favour of the appellant No.1. The record of this case shows that an application to allow secondary evidence was filed by the appellants on 21-6-2008. Reply was filed by the respondent No.1 on 25-6-2008 and an order was passed on 12-9-2009 allowing the appellants to produce secondary evidence. In the form of secondary evidence, the appellants set out their case. The execution of "Mark-A" was proved with the help of P.W.2 and P.W.3. Payment of Rs.7,000,000/- was proven with the help of Exh.D.6 and Exh.D.7 which shows the deposit of Rs.3,000,000/- into the account of appellant No.l. Balance payment of Rs.4,000,000/- was proved through Mark B being a hand-written receipt by the respondent No.l. Then the transfer of the leasehold rights was proved through a series of documents, right from a request by the respondent No.1 to transfer the land to the appellant No.1 being Exh.D.3, the claim for refund of security money by the respondent No.1 Exh.D.1 and Exh.D.2 being a request to start construction of the restaurant by the respondent No.1 wherein he thanks the respondents 2 and 3 for authorizing the transfer in favour of the appellant No.l. It is the case of the appellants that based upon the aforementioned documents they have made out a case that the agreement to sell was executed and that payment was received by the respondent No.1, hence the transfer in favour of the appellant No.1 favour was valid and legal.

A review of the judgment especially the findings on Issue No.8 shows that the learned Judge did not consider the evidence tendered by the appellants. The most striking feature is that much emphasis was placed on "Mark-A" whereas the original transfer letter was produced in Court as Exh.D.53 showing that the property in dispute was transferred in favour of the appellant No. 1. In the presence of the original transfer letter, the existence of and the proof of the agreement to sell becomes irrelevant. In fact, this case has been incorrectly decided under the provision of secondary evidence of the Qanun-e-Shahadat Order, 1984 when the original transfer letter was available on the record and there was other relevant evidence for the Court to consider. Furthermore, the learned Judge failed to consider the fact that the respondent No. 3 in his written statement categorically stated that the respondent No.1 requested for the transfer in favour of the appellants and that upon his request the transfer was executed. In our opinion, there was no need for the appellants to prove the agreement to sell in the presence of Exh.D.53 and Exh.D.10 being the letter issued by the Assistant Secretary Fortress Stadium confirming the lease in favour of the appellant No.1. Therefore, the learned Judge has erred by deciding the case simply on the basis of the agreement to sell.

C. With respect to appreciation of evidence, the learned Judge has failed to consider the entire evidence exhibited by the appellants. The appellant No.1 has a transfer letter in her favour. She has also proved the deposit of monthly lease from 2001 to date with the respondents Nos.2 and 3 and her possession of the property was admitted by the respondent No.l. She was also able to prove through evidence the correspondence with the respondents 2 and 3 regarding the transfer and the intended construction on the land. Conversely the respondent No.1 could not explain why he had written to the respondents regarding the transfer in favour of the appellant. The explanation regarding Mark B the refund of it security deposit and deposit of Rs.3,000,000/- as transfer fee are not satisfactory nor proved in evidence. As to the issue of payment of Rs.7,000,000/- to the respondent No.1, the evidence shows that payment of Rs.4,000,000/- was made on 26-9-2001 "Mark-B" to the respondent No.l. Exh.D.6 shows that Rs.3,000,000/- was transferred to the Account of appellant No.2, which as per appellant No.1 statement was paid to the respondent No.1. In this regard we note that respondent No.1 paid the transfer fee Exh.P.4/1 and Exh.P.4/2 on 26-9-2001 and 3-1-2001 after receipt of the said amount from the appellant No.1. Furthermore, his statement that this was actually payment related to construction is neither corroborated in evidence nor does it stand to reason that such a large sum is paid in 2001 and then no construction is undertaken by the respondent No.l. The appellant No.1 was able to prove through evidence that payment was made to the respondent No.1, that she enjoyed possession and that she paid the monthly lease amount to the respondents 2 and 3. The contradictions relied upon in the dates for the payments do not carry the weightage given thereto for proving the case of the respondent No.l. Meaning that the learned Judge, in the presence of the evidence produced by the appellants, should not have relied solely upon the receipts and its dates. The appellant No.1 had produced sufficient evidence to establish payment and transfer in her favour. As such to ignore this evidence shows that the learned Judge did not apply his mind to this case at all. Finally a review of the evidence of the respondent No.1 reveals that he appeared himself as a

witness, denied every aspect of the case of the appellants and stated that Exh.D.2 and Exh.D.3 do not bear his signature. There is nothing in the evidence whereby he has proved his case of fraud or explained the possession in favour of the appellants or the payment of the monthly lease by the appellants. Evidence must relate to the facts pleaded by a party as its purpose is to prove that fact. Evidence makes the existence of the fact or its non-existence more probable or less probable. Therefore the weightage given to the evidence is based on its strength to prove the fact or set of facts. Hence in the instant case the respondent No.1 had set out a case of denial as opposed to adducing evidence in support of his material facts. Furthermore, even though the respondent No.1 denied his signature on the letters, receipt and agreement to sell, once the appellants were able to establish the payment of monthly lease amount to the respondent 2 and 3 and the possession in their favour, the burden was on the respondent No.1 to prove his case. In this regard we are of the opinion that the respondent No.1 has failed to discharge his burden and has failed to prove his case. The evidence exhibited by the appellants carries more weight in establishing their case and the learned Judge could not have decided the entire case on the agreement to sell or the contradictions in the dates of the receipts.

9. In the light of the findings, this appeal is allowed, impugned judgment is set aside and the suit filed by the respondent No.1 is dismissed. No order as to costs.

MH/M-262/L Appeal allowed.

PLJ 2012 Lahore 778
Present: Ayesha A. Malik, J.
SAMINA ANWAAR ULLAH KHAN--Petitioner
versus
GENERAL MANAGER SNGPL, LAHORE, etc.--Respondents
W.P. No. 15232 of 2012, heard on 30.8.2012.

Constitution of Pakistan, 1973--

----Art. 199--Complaint Resolution Procedure, Regulations, 2003--Regl. 3(b)--Constitutional petition--Restoration of domestic gas connection--Two separate meters were installed for domestic gas connection but used for commercial purposes--Disconnected being used for commercial purposes and not for domestic purposes--Required factual inquiry--Efficacious remedy was available--Validity--Regulations 2003 provide for an adequate remedy in resolution to dispute of wrongful disconnection of service in supply of gas--Remedy of a statutory appeal was adequate and effective and such there was no basis to invoke extra ordinary jurisdiction of High Court--Prayer sought by petitioner cannot be granted without factual inquiry on issue of whether petitioner was using domestic connection for commercial purposed and also because an efficacious and adequate remedy was available to petitioner which she might avail if she so desired--Petition was dismissed. [P. 781] A & B

Mr. Ashfaq A. Malik, Advocate for Petitioner.
Mr. Umar Sharif, Advocate with Syed Ijaz Mehmood Billing Officer for Respondents.
Date of hearing: 30.8.2012.

JUDGMENT

Through this petition, the Petitioner has prayed for the restoration of the domestic gas connection installed at her premises.

2. Brief facts of the case are that Petitioner is a registered consumer of the Respondent gas company bearing Consumer No. 90635916415. Meter No. MG27030734 is installed at her premises for domestic gas consumption. On 25.05.2012 the said meter was disconnected and the Petitioner was deprived of the gas connection at her premises. Learned counsel for the Petitioner has also stated that the premises of the Petitioner is divided into two portions i.e lower and upper portion. Two separate meters have been installed for domestic gas connection in the said two portions. The dispute of the Petitioner pertains to Meter No. MG27030734, which is installed in the lower portion.

3. Learned counsel for the Respondents has filed the report and parawise comments and also placed on record certain documents to justify the disconnection. It is his case that the Respondents have acted in accordance with law. Both meters installed

at the premises of the Petitioner were for domestic consumption. However, they were being used for commercial purposes. Hence the Respondents were justified in disconnecting the gas supply. In this regard, they have placed reliance on the report of the inspection teams, which report shows that the Petitioner's consumption was not domestic but in fact being used for commercial purposes as it was being used by a restaurant.

4. The dispute between the Petitioner and the Respondent gas company is that the Petitioner is the consumer of the Respondent gas company bearing Consumer No. 90635916415 and accordingly Meter No. MG27030734 is installed in the lower portion of the premises of the Petitioner. The Petitioner occupies the lower portion and she has rented out the upper portion where the business of a restaurant is being conducted. Admittedly, the premises of the Petitioner has two gas connections. The aforementioned connection is in the lower portion and there is another connection which is for the upper portion of the premises of the Petitioner. It is the case of the Petitioner that there was a default with respect to the billing of the meter installed in the upper portion. However, in order to induce payment, the Respondents have disconnected the gas supply of the Petitioner's premises being the lower portion of the Petitioner's house.

5. Heard learned counsel for the parties and reviewed the record available on the file.

6. The basic dispute is in relation to the gas connection for the lower portion of the house i.e for Meter No. MG27030734 vide Consumer No. 90635916415. The Petitioner has placed reliance on bills for the months of March & May, 2012 to show that she is not a defaulter and there was no occasion to disconnect the gas supply. The Respondents have placed reliance on the report of Senior Distribution Engineer (UFG-C) which provides that on 25.05.2012 the meter of the Petitioner was disconnected as it was being used for commercial purposes and not for domestic purposes. In this regard, the report provides that one small tandoor and three star burners were being used by the Petitioner against the said meter. It has been argued that the said equipment was being used in the upper portion. When the meter was disconnected from the upper portion on 10.05.2012, the star burners were being used by the lower portion. Learned counsel for the Petitioner disputes this allegation and states that no such burner or tandoor was being used and that in fact this is only being alleged to ensure payment against the bill issued for the upper portion.

7. The dispute of the Petitioner requires a factual inquiry as to whether the Petitioner was using the domestic gas connection for commercial purposes. It is settled law that in Constitutional Jurisdiction detailed inquiry cannot be undertaken. Reliance is placed on a case titled "Anjuman Fruit Arhtian and other Vs Deputy Commissioner, Faisalabad and others" (2011 SCMR 279) wherein it was held that:-
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"This extraordinary jurisdiction is intended primarily, for providing an expeditious remedy in a case where the illegality of the impugned action of an executive or other authority can be established without any elaborate enquiry into complicated or disputed facts. Controverted questions of fact, adjudication on which is possible only after obtaining all types of evidence in power and possession of parties can be determined only by Courts having plenary jurisdiction in the matter and on such ground constitutional petition was incompetent."

In this regard, it is also noted that an efficacious remedy is available under the Complaint Resolution Procedure, 2003 (2003 Regulations) issued by the Oil and Gas Regulatory Authority. The 2003 Regulations provide for a complaint resolution system. Any person may submit an application for any act or thing done or omitted to be done by a licensee or dealer. The Regulations also provide for the redressal of the following under the Regulations :--

(b) Non-compliance by the licensee or dealer with the service standards in the areas including but not limited to;

(i) Billing and overcharging;
(ii) Connection and disconnection of service;
(iii) Metering;
(iv) Undue delay in providing service;
(vi) Safety practices; or
(vi) Quantity and quality of natural gas, LPG or CNG being supplied; or

The Petitioner's dispute should be redressed by this complaint cell as it involves a factual inquiry, possibly even evidence to determine whether or not there has been any non compliance in the service standards in the areas specified in Regulation 3(b). Furthermore, Regulation 9 provides for an appeal against the order, if the complainant is not satisfied with the decision under 2003 Regulations. Therefore, the 2003 Regulations provide for an adequate remedy to the Petitioner in relation to her dispute of wrongful disconnection of service in the supply of gas. The remedy of a statutory appeal is adequate and effective and as such there is no basis to invoke the extraordinary jurisdiction of this Court.

8. Therefore, in view of the aforesaid, the prayer sought by the Petitioner cannot be granted without a factual inquiry on the issue of whether the Petitioner was using the domestic connection for commercial purposes and also because an efficacious and adequate remedy is available to the Petitioner, which she may avail if she so desires.

9. In view of the aforementioned, this petition having no merit is dismissed.

(R.A.) Petition dismissed

P L D 2012 Lahore 353
Before Umar Ata Bandial and Ayesha A. Malik, JJ
MUZAMIL SULTAN---Appellant
versus
FEDERATION OF PAKISTAN and others---Respondents
I.C.A. No.746 of 2011, decided on 19th April, 2012.

(a) Law Reforms Ordinance (XII of 1972)---

----S. 3---Civil Procedure Code (Amendment) Ordinance (X of 1980), S.15---Constitution of Pakistan, Arts. 175(2) & 199---Intra-court appeal filed under S.15 of the Civil Procedure Code (Amendment) Ordinance, 1980, against an interlocutory order passed by the High court in a constitutional petition-Maintainability---Original civil jurisdiction and constitutional jurisdiction of High Court---Scope, interpretation and distinction---Present Intra-court appeal had been filed against an interlocutory order passed by the High Court in a constitutional petition---Contention of the appellant was that Intra-Court appeal was maintainable under S.15 of the Civil Procedure Code (Amendment) Ordinance, 1980, notwithstanding the fact that the impugned interlocutory order was passed in constitutional jurisdiction, and that the High Court when exercising jurisdiction under Art.199 of the Constitution, was exercising 'original civil jurisdiction'---Validity---Article 175(2) of the Constitution provided for two distinct jurisdictions; a constitutional jurisdiction and a jurisdiction conferred by or under any law---Constitutional jurisdiction was a unique jurisdiction as it was created and conferred by the Constitution---Original civil jurisdiction was a jurisdiction created and conferred by or under a law---Constitutional jurisdiction could not be taken away, curtailed or abridged by any other law whereas a jurisdiction created by or under a law could be taken away, abridged or curtailed by a law---Such clear distinction between the two jurisdictions rendered it impossible to read ordinary civil jurisdiction in the constitutional jurisdiction, therefore, even in the most general meanings, constitutional jurisdiction was very different from civil jurisdiction, and both could neither be equated nor could there be an overlap between the two---Distinction between the two jurisdictions as provided for in Art.175(2) of the Constitution had to be retained---High Court when exercising constitutional jurisdiction in a civil matter, was not exercising original civil jurisdiction---Original jurisdiction of a court conferred the power to hear a case for the first time, therefore, even though at times constitutional jurisdiction had been referred to as constitutional jurisdiction of an original "kind", it was not a court of first instance exercising civil jurisdiction---Judgment deciding a constitutional petition would not be a judgment in the exercise of the original civil jurisdiction of the High Court within the meaning of S.3(1) of the Law Reforms Ordinance, 1972---Fact that an aggrieved person came directly to the High Court under Art.199 of the Constitution did not mean that the court exercises original jurisdiction---Words, "original" and "civil" jurisdiction had specific legal meanings, which even in the most general sense should be interpreted in accordance to the meaning attributed to them---Interpreting original civil jurisdiction under S.15 of the Civil Procedure Code (Amendment) Ordinance, 1980,

so as to include constitutional jurisdiction would mean creating artificial categories within the constitutional jurisdiction, which clearly was not the intention of the Constitution---Intra-court appeal was not maintainable, in circumstances and was dismissed, accordingly.

Pakistan Fisheries Ltd., Karachi and others v. United Bank Ltd. PLD 1993 SC 109; Lahore Race Club through Secretary and others v. Raja Khushbakht-ur-Rehman 2008 CLD 1117 and Ahmad Khan v. The Chief Justice and the Judges of the High Court, West Pakistan, through the Registrar, High Court of West Pakistan, Lahore, The Member, Board of Revenue, West Pakistan Lahore and Muhammad Saeed PLD 1968 SC 171 ref.
Asad Ali and 9 others v. Settlement and Claims Commissioner, Karachi and another PLD 1974 Kar. 345 rel.
Brother Steel Mills Ltd. and others v. Mian Ilyas Miraj and 14 others PLD 1996 SC 543 and Hussain Bakhsh v. Settlement Commisisoner, Rawalpindi and others PLD 1970 SC 1 distinguished.

(b) Words and phrases---

---"Jurisdiction", meaning of--- Jurisdiction is the authority conferred upon a court to decide a matter before it and it enables the court to adjudicate on a particular subject matter in a given case.

(c) Constitution of Pakistan---

----Art. 199--- Constitutional jurisdiction of High Court--- Nature.
Under Article 199 of the Constitution, High Court has corrective and directory jurisdiction which has to be tampered with equity. It is discretionary jurisdiction and the High Court cannot go into disputed questions of fact. This jurisdiction provides expeditious remedy in a case where the executive or any other authority has acted illegally, without going into an elaborate inquiry as to the facts.
Syed Wajih-ul-Hassan. Zaidi v. Government of Punjab and others 1997 SCMR 1901; Secretary to the Government of Punjab Forest Department, Punjab Lahore through Divisional Forest 0fficer v. Ghulam Nabi and 3 others PLD 2001 SC 415 and Messrs Ittehad Cargo Service and 2 others v. Syed Tasneem Hussain Naqvi and others PLD 2001 SC 116 rel.

(d) Constitution of Pakistan---

----Art. 175---Jurisdiction of courts---Scope---Non-usage of expressions such as ordinary, extraordinary, statutory or special in relation to the jurisdiction of courts in Art.175 of the Constitution---Effect---Interplay of such words were just nomenclatures given to describe a jurisdiction and could be misleading.
Brother Steel Mills Ltd. and others v. Mian Ilyas Miraj and 14 others PLD 1996 SC 543 ref.

(e) Interpretation of statutes---

----Where words and phrases are used in a statute with a technical meaning then they must be interpreted with the technical meaning that they have acquired.
Maxwell, Interpretation of Statute 12th Edn. ref.

Salman Aslam Butt assisted by Muhammad Haroon Mumtaz for Appellant.
Shahram Sarwar Chaudhry, Jamil Ahsan Gill, Asim Hafeez and M. Ikram for Respondents.
M. Nasim Kashmiri, Deputy Attorney General for Pakistan for the State.
Date of hearing: 4th April, 2012.

JUDGMENT

AYESHA A. MALIK, J.--This is an Intra Court Appeal filed under Section 15 of the Code of Civil Procedure (Amendment) Ordinance, 1980 against an interlocutory order dated 15-12-2011 passed by the learned Single Judge in Chamber in Constitutional Petition No.270l3 of 2001.

2. Brief facts of the case are that the elections of the respondent No.3 were to be held on 19-12-2011. By virtue of an order dated 30-9-2011 passed by the DGTO all the actions taken by the respondent No.3 for conducting the elections were declared illegal and void. In this regard a show cause notice dated 25-11-2011 was issued. The said notice was assailed by the appellants through W.P. No.27013/2011. The learned counsel for the appellants also filed an application for the operation of the impugned show cause notice to be suspended as an interim measure during the pendency of the writ petition. The said application was dismissed by virtue of the impugned order. Hence this I.C.A. was filed.

3. The sole question which requires determination in this appeal is with reference to the maintainability of the I.C.A. filed under section 15 of the Code of Civil Procedure (Amendment) Ordinance, 1980 against an interlocutory order made in a Constitutional Petition.

4. Mr. Shahram Sarwar learned counsel for the respondents submitted that an appeal against an interlocutory order is not maintainable under the Law Reforms Ordinance, 1972 nor is it maintainable under Section 15 of the Code of Civil. Procedure (Amendment) Ordinance, 1980.

5. On the other hand Mr. Salman Butt learned counsel for the appellants argued that the I.C.A. is maintainable under Section 15 of the Code of Civil Procedure (Amendment) Ordinance, 1980 notwithstanding the fact that the impugned interlocutory order was passed in constitutional jurisdiction. It is his case that the High Court when exercising jurisdiction under Article 199 of the Constitution in relation to the enforcement of civil right, is exercising "original civil jurisdiction".

6. Section 15 of the Code of Civil Procedure (Amendment) Ordinance, 1980 and Section 3 of the Law Reforms Ordinance, 1972 is reproduced hereunder.

"ORDINANCE NO. X OF 1980
Code of Civil Procedure (Amendment) Ordinance, 1980.
An Ordinance further to amend the Code of Civil Procedure 1980 (Gazette of Pakistan Extra dated March 26th, 1980)

15. Appeal to High Court in certain cases.--Notwithstanding anything contained in Section 3 of the Law Reforms Ordinance, 1972 (XII of 1972), an appeal shall lie to a Bench of two or more Judges of a High Court from as interlocutory order made by a single Judge of that Court in the exercise of its original civil jurisdiction."

"LAW REFORMS ORDINANCE, 1972
Appeal to High Courts in certain cases.

(1) An appeal shall lie to a Bench of two or more Judges of a High Court from a decree passed or final order made by a Single Judge of that Court in the exercise of its original civil jurisdiction.

(2) An appeal shall also lie to a Bench of two or more Judges of a High Court from an order made by a Single Judge of that Court under clause (1) of Article 199 of the Constitution of the Islamic Republic of Pakistan not being an Order made under sub-paragraph (i) of paragraph (b) of that clause:
Provided that the appeal referred to in this subsection shall not be available or competent if the application brought before the High Court under Article 199 arises out of any proceedings in which the law applicable, provided for at least one appeal or one revision or one review to any Court, Tribunal or authority against the original order.

(3) No appeal shall lie under subsection (1) or subsection (2) from an interlocutory order or an order which does not dispose of the entire case before the case before the Court.

(4) Nothing contained in this Ordinance, shall be construed as affecting:--
(a) any appeal under the Provisions of the Letters Patent applicable to a High Court or under section 102 of the Code of Civil Procedure, 1908 (V of 1908) which was pending immediately before the commencement of this Ordinance; or
(b) any appeal or petition for leave to appeal from a decree, judgment or order of a single Judge of a High Court made to the Supreme Court before the commencement of the Law Reforms (Amendment) Ordinance, 1972 ."

7. The thrust of the arguments advanced by the learned counsel for the appellants is based on the interpretation of the words "original civil jurisdiction" in section 15 of Ordinance X. In order to substantiate this argument learned counsel for the appellants placed reliance on a case titled Brothers Steel Mills Ltd and others v.

Mian Ilyas Miraj and 14 others (PLD 1996 SC 543). In this case, the Hon'ble Supreme Court of Pakistan held that since the High Court exercises civil jurisdiction under the Companies Ordinance 1984 section 117 of the Code of Civil Procedure 1908 shall apply. The reasoning advanced in this case was that since the Companies Ordinance redresses a civil right hence the High Court when exercising jurisdiction under the Companies Ordinance is in fact exercising original civil jurisdiction. The term original civil jurisdiction was explained in detail as being a jurisdiction where the court is empowered to entertain a suit and a proceeding of a civil nature which is initiated before the court as a court of first instance. Such jurisdiction is in contradistinction to the appellate jurisdiction. Interestingly, the court has held:--

"Under Article 175 of the Constitution, a Court is vested with jurisdiction as is or may be conferred on it by the Constitution or by or under any law. Therefore, the jurisdiction can be conferred on any Court including a High Court by a statute which may provide for initiating the proceedings in that Court as a Court of first instance having power to entertain and decide it. Such Court will thus be vested with original jurisdiction. If it relates to civil dispute it will be termed as original civil jurisdiction. It is not uncommon that statutes are promulgated conferring jurisdiction on the High Court to initiate proceeding as a Court of first instance for purpose of exercises of jurisdiction.

Therefore, in the statute under consideration the term original civil jurisdiction has been used in the general sense."

Mr. Salman Butt argued that for the purposes of interpreting original civil jurisdiction as provided for in Section 15 of Ordinance X, it must be given a general meaning such that it is applicable to constitutional jurisdiction when redressing civil matters.

8. In order to determine whether the High Court exercises original civil jurisdiction under Article 199 of the Constitution the first question that arises is what is original civil jurisdiction and what is constitutional jurisdiction. Article 175(2) of the Constitution provides that no court shall have any jurisdiction save as may be conferred on it by the Constitution or by or under any law. A bare reading shows that the said Article provides for two distinctive jurisdictions; a constitutional jurisdiction and a jurisdiction conferred by or under any law.

9. It is settled law that jurisdiction is the authority conferred upon a court to decide a matter before it. It enables the court to adjudicate on a particular subject-matter in a given case. The Supreme Court has held that in exercising constitutional jurisdiction under Article 199 the High Court has corrective and directory jurisdiction which has to be tempered with equity. Reliance is placed upon a case titled Syed Wajih-ul-Hassan Zaidi v. Government of Punjab and others (1997 SCMR 1901). It is discretionary jurisdiction and the High Court cannot go into disputed questions of fact. Reliance is placed upon a case titled Secretary to the Government of Punjab

Forest Department, Punjab Lahore through Divisional Forest 0fficer v. Ghulam Nabi and 3 others (PLD 2001 SC 415). It has also held that this jurisdiction is to provide expeditious remedy in a case where the executive or any other authority has acted illegally without going into an elaborate inquiry as to the facts, disputed or complicated. Reliance is placed upon case titled Messrs Ittehad Cargo Service and 2 others v. Syed Tasneem Hussain Naqvi and others PLD 2001 SC 116).

10. Learned counsel for the respondents, Mr. Shahram Sawar has argued that the Lahore High Court does not possess original civil jurisdiction in the nature of a principal civil court of original jurisdiction. He relied on Pakistan Fisheries Ltd., Karachi and others v. United Bank Ltd. (PLD 1993 SC 109) to explain the meaning of original civil jurisdiction, and upon Lahore Race Club through Secretary and others v. Raja Khushbakht-ur-Rehman (2008 CLD 1117) wherein it was held that original civil jurisdiction of a court means that the court is empowered to entertain a suit and such proceedings of civil nature which are initiated before the said court. The jurisdiction can be conferred on any court including a High Court by a statute and such a court being a court of first instance would be vested with original jurisdiction. Where the matter relates to a civil dispute it will be termed as original civil jurisdiction. Mr. Asim Hafeez, learned counsel for the respondents elaborated this point and argued that there is distinction between ordinary original civil jurisdiction and extraordinary original civil jurisdiction. Both the jurisdictions were different from constitutional jurisdiction. Ordinary civil jurisdiction was confined to the trial of suits. Extraordinary original civil jurisdiction was given for the removal and trial of suits pending or falling within the jurisdiction of courts subordinate to the High Court. Therefore constitutional jurisdiction was neither ordinary nor extraordinary nor was it statutory jurisdiction. He argued that to refer to it as special jurisdiction would be to minimize its standing and importance, for it is given by an Article in the Constitution for the purposes of implementing the high directive in Article 2 that no person should be treated otherwise than in accordance with the law. The jurisdiction under Article 199 may at best be described as a constitutional jurisdiction of an original kind. Reliance was placed upon a case titled Ahmad Khan v. The Chief Justice and the Judges of the High Court, West Pakistan, through the Registrar, High Court of West Pakistan, Lahore, The Member, Board of Revenue, West Pakistan, Lahore and Muhammad Saeed (PLD 1968 SC 171).

11. We have heard all the counsel submissions and have gone through the case-law to which reference was made regarding the meaning of original civil jurisdiction. We have also reviewed Article 175(2) of the Constitution. The said Article provides for two clear jurisdictions. Constitutional jurisdiction and that jurisdiction which is conferred by or under any law. A bare reading of the Article leads us to conclude that these are two distinctive jurisdictions. Constitutional jurisdiction is a unique jurisdiction as it is created and conferred by the Constitution. Original civil jurisdiction is a jurisdiction created and conferred by or under a law. Constitutional jurisdiction cannot be taken away; curtailed or abridged by any other law whereas a jurisdiction created by or under a law can be taken away, abridged or curtailed by a law. This clear distinction between the two jurisdictions renders it impossible to

read ordinary civil jurisdiction in the constitutional jurisdiction. Hence even in the most general of meanings constitutional jurisdiction is very different from civil original jurisdiction. Simply put the two jurisdictions cannot be equated nor can there be an overlap.

12. We are also of the considered view that the High Court when exercising constitutional jurisdiction in a civil matter, is not exercising original civil jurisdiction. The original jurisdiction of a court confers the power to hear a case for the first time. Hence even though at times constitutional jurisdiction has been referred to constitutional jurisdiction of an original "kind" it is not a court of first instance exercising civil jurisdiction. A judgment deciding a constitutional petition would not be a judgment in the exercise of the original civil jurisdiction of this Court within the meaning of sub section (1) of section 3 of the Law Reforms Ordinance. Reliance is placed on a case titled Asad Ali and 9 others v. Settlement and Claims Commissioner, Karachi and another (PLD 1974 Karachi 345). The distinction between the two jurisdictions as provided for in Article 175(2) of the Constitution must be retained. The mere fact that an aggrieved person comes directly to the court under Article 199 does not mean that the court exercises original jurisdiction. Original civil jurisdiction when read with Article 175(2) of the Constitution will mean original jurisdiction when created by or under any law. Obviously the jurisdiction under Article 199 of the Constitution pertains to civil as well as other matters. Therefore the jurisdiction of the court will not be determined by the nature of the proceedings. The jurisdiction is conferred either by the Constitution or by or under a law. We note that interplay of the words, such as original, civil, ordinary and extraordinary are just nomenclatures given to describe a jurisdiction and can be misleading. In a very instructive judgment of the Supreme Court Brothers Steel Mills Ltd. (supra) it was held as under:--

"Article 175 of the Constitution does not use such expressions as ordinary, extraordinary, statutory or special in relation to jurisdiction or Courts. These expressions may have been useful in a particular context in the past, in the present context; they are equivocal and can, therefore, be misleading."

13. We are therefore not convinced by the cases relied upon by the counsel for the appellants especially the Brothers Steel Mills case as the same is related to a matter under the Companies Ordinance and does not directly answer the question raised in this ICA. We are equally not convinced by the reliance placed on Hussain Bakhsh v Settlement Commissioner, Rawalpindi and others (PLD 1970 SC 1) wherein the Hon'ble Supreme Court of Pakistan held that the High Court can review an order under Article 199 of the Constitution of Islamic Republic of Pakistan under section 114 of the Code of Civil Procedure on the grounds that there is no corresponding provision in the Constitution with regard to the High Court's jurisdiction to review its own decision. This judgment does not advance the case of the appellants' counsel as the said judgment does not give any findings in relation to the nature and the scope of constitutional jurisdiction or original civil jurisdiction. It simply provides for a procedural remedy as no parallel remedy was available for a review against an

order made under Article 199 of the Constitution. Finally the most elementary rule of construction is that if word and phrases are used with a technical meaning then they must interpreted with the technical meaning that they have acquired. (Maxwell; Interpretation of Statute 12th Edition). Both the words "original" and "civil" jurisdiction have specific legal meanings, which we might add even in the most general of sense should be interpreted in accordance to the meaning attributed to them. By interpreting original civil jurisdiction under section 15 of Ordinance X so as to include constitutional jurisdiction would mean creating artificial categories within the constitutional jurisdiction which clearly is not the intention of the Constitution.

For the foregoing reasons we find that the I.C.A. is not maintainable, hence dismissed.

M.W.A./M-129/L Appeal dismissed.

2012 P T D 1471
[Lahore High Court]
Before Ayesha A Malik, J
JAMAL SALAM
Versus
DEPUTY COLLECTOR CUSTOMS and others
Writ Petition No.9895 of 2012, heard on 29th May, 2012.

(a) Customs Act (IV of 1969)---

----Ss.179, 180 & 168---Constitution of Pakistan, Art.199---Constitutional petition---Maintainability---Adequate remedy---Petitioner, who held an import authorization permit for ammunition was issued with a show cause notice stating that he had exceeded his quota and used more than one NTN to import the ammunition---On basis of said show cause notice, his import authorization permit was withheld---Case of the petitioner was that the Customs officers had exceeded their jurisdiction and were acting contrary to the law---Validity---Remedy provided under the Customs Act, 1969 was not efficacious as the Customs Officers could not decide whether they had exceeded their jurisdiction or whether the Ministry of Commerce was the competent authority to withhold the original Import Authorization Permit---Constitutional petition was maintainable, in circumstances.
PLD 2008 SC 779 and PLD 2010 SC 969 ref.

(b) Customs Act (IV of 1969)---

----Ss.168, 180, 179 & 16---Import Policy Order, 2009 (as amended up to 15th March 2011), S.8---Constitution of Pakistan, Art.199---Constitutional petition---Import Authorization Permit---Petitioner, who held an import authorization permit for ammunition was issued with a show cause notice stating that he had exceeded his quota and used more than one National Tax Number to import the ammunition---Contention of the petitioner was that any dispute in relation to the import status of any item had to be resolved by the Ministry of Commerce as per S.8 of the Import Policy Order, 2009 and no Customs Officer had the authority to withhold the Import Authorization Permit---Validity---Ministry of Commerce as per the Import Policy Order merely prescribed the quota for the import of non-prohibited bore arms and ammunition through the Import Authorization Permit---Import per se would be regulated by the Customs Authority under the Customs Act, 1969---Mere permission by the Ministry of Commerce would not divest the Customs Authority from its jurisdiction---Section 16 of the Customs Act, 1969 envisaged the role of the Federal Government which was to prohibit or restrict the bringing into or taking out of Pakistan of any goods---Any prohibition or restrictions set out by the Federal Government would fall within the scope of the Customs Authority under the Customs Act, 1969---Issuance of Import Authorization Permit by the Federal Government did not take away the jurisdiction of the Customs Authorities to investigate, inquire and adjudicate under the Customs Act, 1969 in terms of any import into Pakistan---Customs Authorities were fully authorized to withhold the

original Import Authorization Permit pending an inquiry conducted under the Customs Act, 1969 and upon the conclusion of such an inquiry, they could send their recommendations to the Ministry of Commerce---Section 168(3) of the Customs Act, 1969 empowered the Customs Authorities to seize any document or thing which in their opinion would be useful evidence in any proceedings under the Act---Withholding of the Import Authorization Permit was in accordance with the powers conferred upon the Customs Officers under the law---Constitutional petition was dismissed in circumstances.

PLD 1961 SC 537; PLD 1963 SC 203; PLD 1965 SC 605; 1983 PCr.LJ 670; 1983 PCr.LJ 623; 1987 PCr.LJ 1091 and PLD 1991 Quetta 36 ref.
Adnan Ahmad Khawaja for Petitioner.
Ghulam Ali Raza with Miss Naeema Batool, Deputy Collector Custom and M. Naveed Chishti for Respondents.
Date of hearing: 29th May, 2012.

JUDGMENT

AYESHA A. MALIK, J.---This petition impugns the action undertaken by the respondents Nos.1, 2 and 4 of withholding the original import authorization permit issued by the respondent No.3 in favour of the petitioner.

2. It is the case of the petitioner that he holds an import authorization permit (IAP) for import of non-prohibited bore arms and ammunition. The IAP was issued by the respondent No.3 on 18-9-2007. The IAP provides for the annual quota to import non-prohibited bore arms and ammunition. As per the contention of the counsel for the petitioner, the sole authority to issue, withhold, suspend or revoke the IAP is the respondent No.3. On 17-1-2012, the petitioner received a show-cause notice from the respondent No. 1. In terms of the notice, the petitioner was informed that it has exceeded its quota limit as authorized by the respondent No. 3 for the import of non-prohibited bore arms. It is also alleged in the notice that the petitioner has used more than one NTN number to import the said ammunition, thereby attempting to hoodwink the custom authority. The petitioner filed his reply to the show cause notice and thereafter, has been making appearance in the inquiry proceedings. It is the case of the petitioner that under the pretext of this show cause notice, the respondents Nos. 1, 2 and 4 cannot hold on to the original IAP and as such they are required to return the same to the Petitioner. Reliance has been placed on PLD 1961 SC 537, PLD 1963 SC 203, PLD 1965 SC 605, 1983 PCr.LJ 670, 1983 PCr.LJ 623, 1987 PCr.LJ 1091 and PLD 1991 Quetta 36:

3. On the other hand, learned counsel for the respondents Nos. 1, 2 and 4 has argued that this writ petition is not maintainable as adequate remedy is provided under the Customs Act, 1969. For this he places reliance on PLD 2008 SC 779 and PLD 2010 SC 969. He has also argued that the respondents are in the process of conducting an inquiry on the excess import of the non-prohibited bore arms and ammunition. Reply and para wise comments have been filed in which they have stated that the

original IAP is evidence in the pending inquiry and as such during the course of these proceedings; the respondents can withhold the IAP. It is also their case that upon completion of the inquiry, a report will be sent to the respondent No.3, who will then finally decide on the matter. He has placed reliance on sections 168, 179 and 180 of the Customs Act, 1969.

4. Heard learned counsel for the parties and reviewed the record available on the file.

5. On the issue of maintainability, since it is the case of the petitioner that the respondents 1, 2 and 4 have exceeded their jurisdiction and are acting contrary to the law the remedy provided under the Customs Act, 1969 is not efficacious as the stated respondents cannot decide whether they have exceeded their jurisdiction or whether the respondent No.3 is the competent authority to withhold the original IAP, if required. Therefore this petition is maintainable and will be decided on its merits.

6. Learned counsel for the petitioner relies upon the Import Policy Order, 2009 (as amended up to 15 March, 2011) (IPO). It is his case that the IAP is issued pursuant to the IPO and any dispute in relation to the import status of any item has to be resolved by the respondent No.3. The matter in issue in this writ petition is whether the respondents 1, 2 and 4 can withhold the IAP of the petitioner given that the respondent No.3 is the issuing authority for the IAP.

7. The IAP allows the petitioner to import a given quantity of non-prohibited bore arms and ammunition on an annual basis. It provides the annual quota for the years 2008-2009, 2009-2010, 2010-2011 allowed in favour of the petitioner. The IAP refers to a notification issued by the respondent No.3 dated 25-1-2005. This notification provides for the procedure for import of non-prohibited bore arms and ammunition. As per the notification since this is a banned item, the respondent No.3 can authorize its import in terms of the guidelines provided under the said notification. In this regard the notification provides for an eligibility criteria in para 4 and the criteria in para 5. Subsequent to the 2005 notification, another notification was issued on 27-8-2007 regulating the existing entitlements issued by the respondent No.3. Para 2-c of this notification is of the particular importance as it provides that:--
"Custom will ensure that the importer was not involved in violation of law relating to custom".
Likewise Para 2-d provides that:-
"Bank will ensure that importer never indulge in violation of procedure of SBP foreign exchange regulation".
A review of both these notifications leads to the conclusion that since the import of non-prohibited bore arms and ammunition was banned, the said notifications prescribed the procedure relating to grant of permits for such imports. This means that it allowed respondent No.3 to permit the import of the non-prohibited bore

arms and ammunition, in a prescribed manner and by quantifying the import entitlement.

8. As part of the procedure regulating the issuance of import authorization permits, the 2007 notification provides that the customs authority will ensure that there has been no violation of any law relating to custom and the State Bank of Pakistan to ensure that there will be no violation of any foreign exchange regulation. This means that the respondent No.3 merely prescribes the quota for the import of the non-prohibited bore arms and ammunition through the IAP. The import per se will be regulated by the customs authority under the Customs Act, 1969. Mere permission by the respondent No.3 to import a fixed quota of the non-prohibited bore arms and ammunition will not divest the customs authority from its jurisdiction. Section 16 of the Customs Act, 1969 envisages the role of the Federal Government which is to prohibit or restrict the bringing into or taking out of Pakistan of any goods of specified description by air, sea or land. Any violation of the prohibition or restrictions set out by the Federal Government will fall within the scope of the customs authority under the Customs Act, 1969. The roles are distinctive as the Federal Government decides what import or exports to prohibit or restrict whereas the Customs Act controls and regulates the act of the import and the export. In furtherance of section 16 of the Customs Act, 1969 and in terms of Section 3 of the Import and Exports (Control) Act, 1950 the IPO is issued wherein the Federal Government provides the prohibition and restriction on imports. Section 6 of the IPO 2009 (as amended up to 15 March, 2011) provides that:--
"Notwithstanding anything contained in this Order, the prohibition, restriction, condition and requirements as prescribed under any law, Act or rules, for the time being in force, shall be applicable, mutatis mutandis, on specified imports."
Section 8 provides that:-

"Any dispute or clarification regarding import status of any item which cannot be resolved by the custom authority will be referred to the Ministry of Commerce for final decision."

The aforementioned provisions substantiate the case of the respondents 1, 2 and 4 that it is well within their jurisdiction to withhold the original TAP pending an inquiry. Section 8 of the IPO clarified that in case a dispute cannot be resolved by the customs authority, it may be referred to the respondent No.3. Meaning thereby that the dispute regarding import status is to be decided by the Customs Authority.
A reading of the Customs Act, 1969, the two notifications along with IPO leads me to conclude as follow:--

(1) The respondent No.3 issued the IAP dated 18th September, 2007 in favour of the petitioner in pursuance of the IPO and notification dated 2005 and 2007.
(2) The TAP provides for an entitlement to import a prohibited item and it quantifies the amount that can be imported on an annual basis.

(3) The IAP does not take away the jurisdiction of the custom authorities to investigate, inquire, adjudicate under the Custom Act, 1969 in terms of any import in Pakistan.
(4) The fact that the respondent No.3 issued the IAP does not mean that the respondents Nos. 1, 2 and 4 cannot withhold the original IAP or seize the original IAP. This stands to reason because if there is a violation of any custom law then it is for the custom authority to proceed under their Act and send a final recommendation to the respondent No.3 for cancelling the IAP, if required. In the same way, if there is a violation of any State Bank regulation it is for the State Bank to conclude its inquiry, investigation and send a recommendation in terms thereof to the respondent No.3.
(5) Respondents Nos.1, 2 and 4 are fully authorized to withhold the original IAP of the respondent No.3 pending an inquiry conducted under the Custom Act and upon its conclusion they can send their recommendation to the respondent No.3 along with original IAP.
(6) Section 168(3) of the Customs Act, 1969 empowers the stated respondents to seize any document or thing which in his opinion will be useful evidence in any proceeding under the Act.

9. The afore stated conclusions are fortified by the statement of the respondent No.3 through the Deputy Attorney General, who appeared in Court and stated that they are the issuing authority for the IAP and they can cancel the IAP if required. However they have nothing to do with the present dispute. The respondent No.3 also filed an application to have its name deleted from these proceedings as they are a pro forma party. The prayer of deletion from the petition is based on the following statement:--

"Messrs Yousaf Zai Arms and Ammunition Dealers Peshawar was issued import authorization of NPB arms and ammunition of Rs.04 Million on annual basis vide this Ministry Letter No.19 (132)/2005 Imp-I dated 18th September, 2007 (Annex-1). The detail particulars of Messrs Yousaf Zai Arms and Ammunition Dealers Peshawar were forwarded to custom authorities on their request. (Annex-II). Para wise comments from Ministry of Commerce may be treated as "NIL"."

10. If the matter of withholding the original IAP fell solely within the jurisdiction of the respondent No.3, then they would have asserted their position. To the contrary, they have forwarded the relevant information to the custom authority, meaning thereby that even they recognize that the custom authority is acting in accordance with the law and can withhold the original IAP.

11. As to the cases referred to by the counsel for the petitioner, the same do not advance his case as they do not pertain to the matter in issue. He has also placed reliance upon an order dated 27-3-2012 wherein the Deputy Collector has written that the original IAP may be returned to the petitioner. However, the respondents 1, 2 and 4 produced another order of 2-5-2012 which provides that the noting of the Deputy Collector was conditional to certain documents being provided. Since to

date the documents have not been provided, therefore it was advised that pending the inquiry the original IAP should not be returned to him. It is noted that the order of 27-3-2012 does not confer any right upon the petitioner that the original IAP has to be returned to it. Nor does it cast an obligation on the stated respondents to return the original IAP to the petitioner. Furthermore, the said order of 27-3-2012 cannot be read in isolation as it is part of the internal record of the respondents Nos. 1, 2 and 4 qua the inquiry pending against the petitioner. The same does not operate as an order which can be enforced. At best it is an observation by the Deputy Collector and that to a conditional observation. Since the conditions were never satisfied by the petitioner, he cannot seek its enforcement. Therefore the act of withholding the original IAP of the petitioner's in accordance with the powers conferred upon the respondents Nos. 1, 2 and 4 under the law.

12. For the aforementioned reasons, this petition is dismissed.

K.M.Z./J-18/L Petition dismissed.

2012 CLD 1966
[Lahore]
Before Ayesha A. Malik, J
WASEEM YAQOOB---Petitioner
versus
CHIEF COMMISSIONER, INCOME TAX and others---Respondents
W.P. No.18046 of 2012, decided on 16th August, 2012.

(a) Companies Ordinance (XLVII of 1984)---

----Ss.76, 155 & 156---Form-A filed by company for relevant year not reflecting name of petitioner as shareholder of company---Effect---Company could not register a transfer of shares or debentures without proper instrument of transfer duly stamped and executed by transferor and transferee and delivered to company along with scrips---Provision of S.76 of Companies Ordinance, 1984 being mandatory in nature, but default in compliance therewith, if any, would be a matter inter se between company and Security Exchange Commission, which could take its cognizance---Such Form-A would be prima facie evidence of matters contained therein, which could not be denied or refuted without cogent evidence---Petitioner for not being named in such Form-A ceased to be shareholder of company in relevant year---Principles.

Shahana Parvez and 2 others v. Messrs Goodluck Trade Impex (Pvt.) Ltd. Lahore and 6 others 1998 CLC 1157 ref.

(b) Income Tax Ordinance (XLIX of 2001)---

----Ss.2(66), 91, 138(1) & 139---Income Tax Rules, 2002, R.186---Constitution of Pakistan, Art.199---Constitutional petition---Failure of petitioner after attaining majority to pay tax due from him for assessment years during his minority as shareholder of company---Issuance of warrants of detention of petitioner under R.186 of Income Tax Rules, 2002 and demand notice under S.138(1) of Income Tax Ordinance, 2001---Petitioner's plea that for being minor during disputed tax years, he was not a tax-payer, thus, could not be made liable to pay such tax of company---Validity---No person could be made liable for tax of company for assessment years during which he either ceased to be its shareholder or was a minor---Record, in the present case, showed that petitioner was a minor during disputed years, thus, he could not be made liable for total income tax of company for such years---High Court set aside impugned order of detention while declaring same to be illegal in circumstances.

Shafqat Mahmood Chohan, Mian Muhammad Athar and Abdul Qaddus Mughal for Petitioner.
Asjad Yaqub with Zain-ul-Abadin Addl. Commissioner and Shahid Sattar, Deputy Commissioner, Inland Revenue for Respondents.
Date of hearing: 10th August, 2012.

JUDGMENT

AYESHA A. MALIK, J.---This writ petition impugns the warrant of detention issued under Rule 186 of the Income Tax Rules, 2002, the notice under section 138(1) of the Income Tax Ordinance, 2001 and the order dated 26-6-2012 issued by the respondent No.2.

2. The basic facts of this case are that the petitioner was a shareholder of a company namely, Irum Ghee Mill (Private) Limited ("the Company"). The petitioner owned 15% share of the Company in the year 1994. These shares were sold by the father of the petitioner in November, 1996 because at the time, the petitioner was a minor, his date of birth being 1-10-1981. The respondents issued a demand against tax due from the Company for the assessment period 1994 to 2003 in the amount of Rs.5,10,983,584. In this regard, notice under section 138(1) of the Income Tax Ordinance, 2001 ("ITO") was issued to the petitioner. Thereafter, on 16-6-2012 an order for the detention of the petitioner was made for not making the required payment of Rs.5,10,983,584. The petitioner filed a writ petition before this Court bearing No.16464 of 2012 wherein it was ordered on 25-6-2012 that the respondent No.2 should decide the case of the petitioner qua his detention within 24 hours in accordance with law after providing an opportunity of hearing to the petitioner. In terms of the said order on 26-6-2012, a decision was made by the respondent No.2 wherein it was held that the petitioner is liable to pay the income tax due from the Company for the period 1994-2003. Furthermore since the petitioner did not make the tax payment the order of detention was to continue.

3. Essentially, the case of the petitioner is that he was a minor at the time when he was a shareholder of the Company. He had no role to play in the administration of the company and after 1996 he seized to be a shareholder of the Company. Counsel for the petitioner argued that the petitioner was a minor for the period 1994-1996 when he was a shareholder. That he was not a tax payer in terms of section 2(66) of the Income Tax Ordinance, 2001. The income of the minor for a tax year is chargeable as tax of the parent of the child in terms of section 91 of the ITO. Hence, the petitioner is not liable to pay the tax of the Company. Finally, section 138 can only be used for recovering tax from a tax payer and since the petitioner is not a tax payer, he cannot be made liable to pay the tax of the Company.

4. As a preliminary objection, learned counsel for the respondents raised an objection with respect to the maintainability of this writ petition. He argued that due to the earlier writ petition filed bearing No.16464 of 2012 and a subsequent Writ Petition No.17666 of 2012, which was withdrawn by the petitioner, he is not entitled to any discretionary relief. In the event, that the petition is held to be maintainable, at best the case of the petitioner is limited to the order dated 26-6-2012 and its findings in terms thereof. On this issue, I find that the instant petition is maintainable as the earlier writ petition was filed in relation to the warrant of detention issued on 18-5-2012 and the notice under section 138(1) of the ITO. Thereafter in terms of the order of this court a decision was rendered on 26-6-2012

by the respondent No.2 justifying the detention and the claim for the tax of the Company from the petitioner. The instant writ petition impugns the order of 26-6-2012, such that this court is required to determine whether in terms of the said Order the petitioner can be made liable for the tax due from the Company and whether the petitioner can be detained in terms thereof.

5. On the merits of the case, learned counsel for the respondents has argued that the respondents are justified in recovering the tax amount due from the Company from the petitioner on account of section 139(1)(b) of the ITO. He argued that the petitioner, having attained majority is now liable to pay the entire tax, notwithstanding the fact that he was a minor at the relevant time. He further argued that the petitioner is still a shareholder of the Company as he has brought no document, especially the transfer deeds to evidence the fact that he is no longer a shareholder of the Company. He further argued that the national interest as well as modus operandi of the petitioner should be considered by this Court, being a court of equitable jurisdiction.

6. Heard learned counsel for the parties and reviewed the record available on the file.

7. The main issue in this petition is whether the petitioner is liable to pay the tax of the Company under section 139 of ITO. The entire case of the respondent is based on section 139(1) of the Income Tax Ordinance, 2001, which reads as follows:--
"Notwithstanding anything in the Companies Ordinance, 1984 (XLVII of 1984), where any tax payable by a private company (including a private company that has been wound up or gone into liquidation) in respect of any tax year cannot be recovered from the company, every person who was at, at any time in that tax year-
(a) a director of the company, other than an employed director; or
(b) a shareholder in the company owning not less than ten percent of the paid up capital of the company, shall be jointly and severally liable for payment of the tax due by the company."
By virtue of this section where any tax is payable by a private company, and cannot be recovered from the company, then every person, who was a Director of the company for the relevant tax period or a shareholder of the company, having not less than 10% shares of the company, for the relevant tax year, can be made liable for the payment of tax due by the company. In order to invoke the provision of this section, the respondents were required to show that the petitioner was a shareholder owning at least 10% shares of the Company for the assessment years 1994 to 2003. In this regard the respondents have argued that the petitioner is liable on attaining majority and that the petitioner continues to be a shareholder of the Company. Furthermore, the petitioner has placed reliance on his passport, CNIC Card and birth certificate to show that he was a minor at the time, since his date of birth is 1-10-1981.

8. On 2-8-2012, after hearing both the sides at length, this Court passed an order wherein the respondents were given one week's time to satisfy themselves on the

two grounds which form the basis of the petitioner's liability and detention. The first is with respect to the minority of the petitioner and the second is with respect to the petitioner being a shareholder of the Company. On 10-8-2012, the respondents submitted their report in terms of the order of 2-8-2012. I have reviewed the report which provides that in terms of the documents provided by the petitioner the respondents were satisfied that the petitioner continued to be a shareholder of the Company and that with reference to the issue of minority, the petitioner has not brought any cogent or reliable evidence in support of his claim.

9. In order to appreciate the arguments of both the parties, I will divide the matter in two parts, first on the minority issue and second on the transfer of share:

Minority

The petitioner submitted the documents available with him to show that he was minor at the time when he was shareholder of the company from 1994 to 1996. All documents show his date of birth as 1-10-1981. However, the respondents question the authenticity of the documents produced before them. The main objection is on the birth certificate, which was issued on 7-8-2012. The learned counsel for the respondents has stated that since this document has been issued recently and shows that the date of birth has been entered in the record late, hence it is not reliable. As to the copy of the old NIC and the passport submitted, the only objection raised by the learned counsel for the respondents is that the NIC looks suspicious. The petitioner also submitted a copy of the assessment order dated 12-3-2009 for the year 1998-1999 to the year 2000-2001 wherein the Taxation Officer of Income Tax found the assessee, being the petitioner, was a minor at that time. A review of the assessment order shows that it relates to the petitioner and that at the given time, as per the order, the petitioner was a minor. Learned counsel for the respondents does not deny this assessment order. Having reviewed the documents provided by the learned counsel for the petitioner as mentioned above, I am of the opinion that the respondents do not have any valid objection to the documents presented by the petitioner for establishing his date of birth. Every document presented by the petitioner shows his date of birth as 1-10-1981. The fact that the birth certificate was obtained as late on 7-8-2012 will not effect the claim of the petitioner that he was a minor as every other document, namely, his NIC and passport provides for the same date of birth being 1-10-1981. However, the more important document is the assessment order issued by a Taxation Officer wherein he has accepted the minority of the petitioner for the assessment years 1998-1999 to 2000-2001 for the purpose of wealth tax. Therefore, there is no basis on which the respondents can deny the fact that petitioner was a minor during the assessment period 1994, 1995 and 1996.

Shareholding

The respondents have argued at length that the petitioner continues to be a shareholder of the Company as he has not been able to show any transfer deed on the basis of which he claims that his shares were transferred in the year 1996. The respondents have placed reliance on section 76 of the Companies Ordinance, 1984

and a case titled "Shahana Parvez and 2 others v. Messrs Goodluck Trade Impex (Pvt.) Ltd. Lahore and 6 others" (1998 CLC 1157). In support of his case, the petitioner has placed reliance on the Form-A for the years 1994, 1995 and 1996, which show that the petitioner was a shareholder and the Form-A for the year 1997 which does not reflect the petitioner as a member of the Company. Section 76 of the Company Ordinance, 1984 (C.O. 1984) provides for the transfer of shares. No doubt, the provisions of section 76 are mandatory in nature, however, the default if any under section 76 is a matter inter se between the Company and the Security and Exchange Commission of Pakistan (SECP). Section 76(7) of the C.O. 1984 provides that "in the event of a default under section 76 the company will be liable to a fine and every officer who knowingly or willingly was a party to such default is also a liable to a penalty". This means that if there is any default in compliance with the provision of section 76, it is for the SECP to take cognizance of such a default and impose a penalty if required. Hence the discrepancies, if any, in the Form-As filed by the Company have to be reviewed for default by the SECP. The judgment relied upon by the learned counsel for the respondents also supports my understanding as it holds that "no company can register a transfer of shares or debentures unless proper instrument of transfer duly stamped and executed by the transferor and the transferee has been delivered to the company along with scrips." Furthermore, "It followed from the above, that in the absence of any instrument of transfer having been delivered to the respondent Company, the company was not justified in omitting the names of the petitioner and the respondent from the register of members and entering the names of respondents in their place as transferees". Thus in terms of the judgment, the company has to recognize the transfer of shares. In the instant case it has done so and accordingly, the Company filed the Form A for the year 1997. Furthermore, section 155 of the C.O. 1984 provides that the registers referred to in section 156 shall be prima facie evidence of the matters contained therein. Section 156(4) provides that all the particulars to be submitted under section 156(1) and (2) shall have been entered in the register maintained with the company. Reading both these sections together means that the Form A is prima facie evidence of the matters contained therein and if the respondents refute or deny the information then, it should be through cogent evidence supporting their stance. Since they have nothing in support of their claim that the petitioner is still a shareholder, based on the Form A of 1997 and those filed subsequently 1998-2000 by the Company, the petitioner ceased to be a shareholder of the Company in 1997.

10. Based on the above, the record shows that the petitioner was a minor for the assessment years 1994, 1995 and 1996. The record also shows that the petitioner ceased to be a shareholder of the Company for the assessment year 1997. Hence, he cannot be made liable for the tax of the Company for the assessment years 1994-2003. The only remaining issue is the argument raised by the respondents that the petitioner is liable for the tax of the Company upon attaining majority under section 139(1)(b) as the tax can be recovered from every person who was a shareholder, holding 10% shares in the relevant tax year. Learned counsel for the respondents argued that this is a continuing liability meaning that the minor, upon attaining majority became liable for the tax default of the Company. This argument does not

advance the case of the respondents nor does it justify the arrest and detention of the petitioner. The petitioner has been arrested on account of the total default in the payment of income tax for the years 1994-2003, yet he cannot be made liable for the tax default from 1997-2003 since he was not a shareholder for the said period. As to the period 1994-1996, the petitioner was a minor, and he cannot be made liable for the total income tax of the Company for the said period.

11. In view of the aforesaid this petition is accepted. The notice under section 138 issued on 18-5-2012 and the order for detention dated 16-6-2012 and the decision rendered on 26-6-2012 are declared to be illegal and hereby set aside. The petitioner shall be released forthwith if not required to be detained in any other case. No order as to costs.

SAK/W-12/L Petition accepted.

PLJ 2013 Lahore 9
Present: Mrs. Ayesha A. Malik, J.
Haji BASHIR AHMAD etc.--Petitioners
versus
CANE COMMISSIONER--Respondent
W.P. No. 11483 of 2012, heard on 26.9.2012.

Punjab Sugar Factories Control Rules, 1950--

----R. 17(2)--Petitioners supplied sugarcane to Sugar Mills--No payment was made--Matter was referred to cane commissioner to pass necessary orders--Failed to redress the grievance that cane commissioner to pass necessary orders--Failed to redress the grievance that cane commissioner was not competent authority--Challenge to--Cane Commissioner was competent person to decide claim as not only can be adjudicate on petitioner's claim but he can refer dispute to arbitration--If parties to dispute were unable to nominate a sole arbitrator, cane commissioner can refer dispute to board of arbitrators consisting of two arbitrators and umpire--Decision of cane commissioner was appealable under Rule 17(6) before Provincial Govt. [P. 11] A

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

----S. 80--Punjab Sugar Factories Control Rules, 1950--R. 17(2)--Power for recovery of arrears of land--Collector had sufficient powers for recovery of arrears of land revenue in modes prescribed--Such powers were available to cane commissioner--He can recover amounts due through modes prescribed in S. 80 of Act--Cane commissioner had power to adjudicate upon claim of petitioners--Petition should file their statement of claims with supporting document before cane commissioner--Sugar mills can file reply to statement of claim--Cane commissioner can adjudicate upon the matter--Decision of cane commissioner can be enforced by Civil Court as if his decision was decreed by that Court--Cane commissioner enjoys power u/S. 80 of Act, 1967 to recover amounts which were due and payable--Petition was allowed. [P. 12] B

Mr. Abdul Hameed Rana, Advocate for Petitioners.
Syed Nayyar Abbas Rizvi, Addl. A.G. along with Syed Sibt-e-Hassan, Superintendent for Respondent.
Date of hearing: 26.9.2012.

Judgment

Through this writ petition, the Petitioners have impugned order dated 25.2.2012 passed by the Respondent Cane Commissioner Punjab, Lahore.

2. Brief facts of this case are that the Petitioners are agriculturists who supplied sugarcane to Pasrur Sugar Mills Ltd. in the year 1998-1999. Despite the fact that

sugarcane was supplied valuing over Rs.55,35,000/- no payment was made to the Petitioners. The Petitioners filed W.P. No. 27387-2011 wherein the matter was referred to the Respondent to pass necessary orders after hearing all the parties. The Respondent failed to redress the grievance of the Petitioner on the ground that he was not the competent authority to decide the matter and the case should be filed before the Civil Court.

3. It is the case of the Petitioners that the Respondent is the competent authority to entertain the claim of the Petitioners and that he should discharge his duties in accordance with the law.

4. Report/parawise comments have been filed by the Respondent. An application under Order I, Rule 10, CPC was filed by G.B (Pvt.) Ltd. but no one has appeared on their behalf. It is the Respondent's case that the matter was decided on 25.2.2012 wherein he has found that he is not in a position to establish the claim of the Petitioners as it relates to the crushing season of 1998-1999 and the original owners are not available and that this matter should be taken up by the competent Civil Court.

5. I have heard the learned counsel for the Petitioners, the learned Law Officer and have examined the record available on the file.

6. In terms of the record, the Petitioners supplied sugarcane to Pasrur Sugar Mills Ltd. CPRs were duly issued. Thereafter the assets and liabilities of Pasrur Sugar Mills Ltd. were taken over by United Sugar Mills and then by G.B. (Pvt) Ltd. vide agreement dated 25.2.2002. The agreement clearly provides that liabilities provided in clause 1(b) shall be paid by the buyer. It also states that the record has been handed over to the new buyer. Therefore, there is no issue here with respect to the transfer of assets or liabilities upon which the Cane Commissioner is required to deliberate. The only issue is the claim of the Petitioners.

7. On the contention of the Respondent that the Cane Commissioner does not have the requisite-power to adjudicate on the Petitioners' claim, I have reviewed the Punjab Sugar Factories Control Rules, 1950. Rule 17 provides for the dispute resolution mechanism, which is re-produced hereunder:--

"Any dispute touching an agreement referred to in these rules shall be referred to the Cane Commissioner for decision or if he so directs to arbitration. No suit shall lie in a civil or revenue Court in respect of any such dispute."

Rule 17(8) reads as under:--

"On application to the Civil Court having jurisdiction over the subject matter of the decision or award, the decision of the Cane Commissioner, or the award of the arbitrator or arbitrators or the Provincial Government's order in appeal against an

award, shall be enforced by all Court as if such decision, award, or orders in appeal were a decree of that Court."

In terms of the Punjab Sugar Factories Control Rules, 1950, the Cane Commissioner is the competent person to decide the claim of the Petitioners as not only can he adjudicate on the Petitioners' claim but he can also refer the dispute to arbitration under Rule 17(2). In such a case if the parties to the dispute are unable to nominate a sole arbitrator, the Cane Commissioner can refer the dispute to a board of arbitrators consisting of two arbitrators and umpire. The decision of the Cane Commissioner or the arbitrator is appealable under Rule 17(6) before the Provincial Government. The decision of the Cane Commissioner or the arbitrator or arbitrators or the Provincial Government's orders in appeal can be enforced by all the Courts as of such decision or award or orders in appeal were a decree of that Court under Rule 17(8) of the Rules (ibid). Furthermore, Section 6(1) of the Punjab Sugar Factories Control Act, 1950 provides as under:--

(1) "The Provincial Government may by notification, appoint any officer, not below the status of a Collector, to be the Cane Commissioner to exercise and perform. In addition to the powers and duties conferred and imposed on him by this Act such powers and duties, as may be prescribed from time to time."

(2) The Cane Commissioner shall be deemed to have powers of a (Collector/DCO) under the Punjab Land Revenue Act, 1887, and the Punjab Tenancy Act, 1887 (or any other enactment relating to Land Revenue and Tenancy in force in any part of the Province.

8. A review of Section 80 of the Land Revenue Act, 1967 shows that the Collector has sufficient powers for recovery of arrears of land revenue in the modes prescribed. The same powers are available to the Cane Commissioner. He can recover amounts due through the modes prescribed in Section 80 of the Land Revenue Act, 1967. Therefore, in view of the aforesaid, the Cane Commissioner has the powers to adjudicate upon the claim of the Petitioners. The Petitioners should file their statement of claims with supporting documents before the Cane Commissioner. The sugar mills can file their reply to the statement of claim. Thereafter the Cane Commissioner can adjudicate upon the matter. The decision of the Cane Commissioner can be enforced by a Civil Court as if his decision was decreed by that Court. The Cane Commissioner also enjoys the powers u/S. 80 of the Land Revenue Act, 1967 to recover amounts which are due and payable.

9. In view of the aforesaid, this petition is allowed and order dated 25.2.2012 is set aside. The Respondent Cane Commissioner is directed to adjudicate upon the claim of the Petitioners and decide the same after hearing all the necessary parties. In this regard, the Respondent should also summon the G.B. (Pvt) Ltd. as they are a necessary party to the proceedings.

(R.A.) Petition allowed

2013 C L D 108
[Lahore]
Before Mrs. Ayesha A. Malik, J
ICI POLYESTER EMPLOYEES UNION (CBA) REGISTERED---Petitioner
Versus
TRUSTEES UNION and 2 others---Respondents
C.O. No.31 of 2009, decided on 19th December, 2012.

(a) Companies Ordinance (XLVII of 1984)---

----Ss. 7, 227, 229, & 476---Securities and Exchange Commission of Pakistan Act (XLII of 1997), S. 20---Employee's provident fund and securities---Petitioner (Employee's Union) under S.227 of the Companies Ordinance, 1984 sought direction for payment of loss and for furnishing all receipts of money deposited in the provident fund by the respondent company---Contention of the petitioner was that under S.7 of the Companies Ordinance, 1984 High Court could exercise jurisdiction in all civil matters under Companies Ordinance, 1984---Validity---Section 7 of the Companies Ordinance, 1984, no doubt, vested original civil jurisdiction with the High Court, however, context or meaning of original civil jurisdiction was that jurisdiction conferred by statute, and which was in contradiction to criminal jurisdiction---Companies Ordinance, 1984 specifically mentioned "the court" (High Court) where it empowered "the court" (High Court) to exercise jurisdiction---Expression "having jurisdiction" meant that the High Court was the authorized legal authority to hear and determine issues under the Companies Ordinance, 1984, but S.7 of the Companies Ordinance, 1984 did not necessitate the High Court to adjudicate upon all disputes which arose under the Companies Ordinance, 1984---Wherever it was required under the Companies Ordinance, 1984, specific sections provided that the High Court shall adjudicate upon a matter---Argument that High Court while exercising jurisdiction under S.7 of the Companies Ordinance, 1984 must adjudicate upon the present case was flawed as this interpretation went against spirit of the Companies Ordinance, 1984 and against the rationale for S.7 of the Companies Ordinance, 1984---Petitioner should have filed its grievance before the Securities and Exchange Commission of Pakistan which was the competent authority to adjudicate upon irregularities and management of a provident fund under S.227 of the Companies Ordinance, 1984---High Court under S.7 of the Companies Ordinance, 1984 could not direct the Securities and Exchange Commission of Pakistan to carry out an investigation under S. 227 of the Ordinance---Petition under S.227 of the Companies Ordinance, 1984 being not maintainable, was dismissed in circumstances.

Gulzar Ahmed v. The State 2003 CLD 981 and Lahore Race Club through Secretary and others v. Raja Khushbakht ur Rehman 2008 CLD 1117 ref.
Brother Steel Mills Ltd. and others v. Mian Ilyas Miraj and 14 others PLD 1996 SC 543 and Messrs Sunrise Textiles Ltd. and others v. Mashreq Bank PSC and others PLD 1996 Lah. 1 rel.

(b) Companies Ordinance (XLVII of 1984)---

----S. 7--- Interpretation of S.7, Companies Ordinance, 1984---Jurisdiction of High Court---Adjudication of dispute---Scope---Section 7 of the Companies Ordinance, 1984 no doubt vested original civil jurisdiction with the High Court, however, context or meaning of "original civil jurisdiction" was that jurisdiction as conferred by statute, and in contradiction to criminal jurisdiction---Companies Ordinance, 1984 specifically mentioned "the court" where it empowered "the court" to exercise jurisdiction---Expression "having jurisdiction" meant that the High Court was the authorized legal authority to hear and determine issues under the Companies Ordinance, 1984, but S.7 of the Companies Ordinance, 1984 did not necessitate the High Court to adjudicate upon all disputes which arose under the Companies Ordinance, 1984--- Wherever it was required under the Companies Ordinance, 1984, specific sections provided that the High Court shall adjudicate upon a matter. Brother Steel Mills Ltd. and others v. Mian Ilyas Miraj and 14 others PLD 1996 SC 543 and Messrs Sunrise Textiles Ltd. and others v. Mashreq Bank PSC and others PLD 1996 Lah. 1 rel.

(c) Companies Ordinance (XLVII of 1984)---

----Ss. 227, 228 & 229--- Securities and Exchange Commission of Pakistan Act (XLII of 1997), Preamble & S. 20---Employee's provident fund and securities--- Power to impose fine/penalty and conduct investigation into irregularities and mismanagement--- Jurisdiction---Jurisdiction under S.227 of the Companies Ordinance, 1984 vested with the Securities and Exchange Commission of Pakistan.
Haris Azmat for Petitioner.
Shahzad Ata Elahi for Respondents Nos.1 to 5.
Umair Mansoor, Assistant Director, Law, SECP for Respondent No.6 (SECP).
Date of hearing: 28th November, 2012.

JUDGMENT

MRS. AYESHA A. MALIK, J.---Through this C.O. instituted under section 227 of the Companies Ordinance, 1984 (the Ordinance), the petitioner has prayed that respondents Nos.1 and 2 be directed to pay the loss of money amounting to more than Rs.100 million in the Provident Fund to the members of the petitioner and furnish all receipts of money deposited in the Provident Fund in accordance with section 228 of the Ordinance. The petitioner has also prayed that respondent No.3 be directed to carry out a detailed investigation of the matter, especially regarding the careless and negligent conduct of respondent No.1 and take strict action against them in accordance with law and be granted costs of the case.

2. Two preliminary objections with respect to the maintainability of this petition were taken up by the counsel for respondents Nos.1 to 5. The first objection was that this Court does not have jurisdiction to decide this Petition. In this regard, he argued that an application under section 227 of the Ordinance lies before respondent

No.6. The jurisdiction conferred upon this Court under the Ordinance does not empower this Court to look into, investigate or adjudicate upon affairs of a company with regard to any alleged violation of section 227 of the Ordinance nor can this Court impose any fine or issue any direction under section 229 of the Ordinance. The second objection is that the petitioner has no locus standi to file the instant petition as any application referencing violation of section 227 of the Ordinance can only be made by a 'person' depositing money or making contributions to a provident fund in terms of section 227. In the instant case, the petitioner is not making any contribution to the ICI Pakistan Non-Management Staff Provident Fund (the Provident Fund) established by respondent No.5 pursuant to the deed of trust dated February 26, 1954. Hence the petitioner has no locus standi and is not entitled to claim any loss.

3. Learned counsel for respondent No.6 also raised objections on the maintainability of this Petition. He stated that in terms of sections 227 to 229 of the Ordinance read with section 476(1), no such petition can be filed before this Court and the remedy, if any, lies with the respondent No.6, who can take up such matters and impose penalty under the law. He argued that the petitioner has not filed any petition before respondent No.6 for redressal of their grievance, and as such, cannot seek a direction from the Court to conduct a detailed investigation against the respondent No.6.

4. In rebuttal to the preliminary objections, learned counsel for the petitioner argued that the High Court is vested with jurisdiction by virtue of section 7 of the Ordinance. He placed reliance on the law laid down in case 2003 CLD 981 (Gulzar Ahmed v. The State) to argue the point that the jurisdiction exercised by the Company Judge under section 7 of the Ordinance is a jurisdiction of civil nature. He argued that this means that the High Court as a Company Court exercises jurisdiction in all civil matters. Since the dispute is of a civil nature, hence it can be decided by this Court. He has also placed reliance on the law laid down in case 2008 CLD 1117 (Lahore Race Club through Secretary and others v. Raja Khushbakht ur Rehman) to advance his arguments that the High Court under the Ordinance has original civil jurisdiction. Meaning that this Court is the Court of first instance for the disputes in relation to and under the Ordinance. The thrust of his argument was that since the dispute of the petitioner is a civil dispute, hence this Court being the competent court has jurisdiction under section 7 of the Ordinance to grant the relief claimed by the petitioners.

5. Arguments heard. Record perused.

6. A petition under section 227 of the Ordinance is filed for ensuring deposits into the Provident Fund, and for safeguarding the said deposits. Any irregularities or failure by any company in this regard can be challenged or questioned under the said section. The question that arises in this petition is that who is to decide upon a petition filed under section 227, i.e. is it the Company Court or is it the respondent

No.6. Section 7 of the Ordinance provides for the jurisdiction of Courts. Section 7(1) provides that:--

"7(1) The Court having jurisdiction under this Ordinance shall be the High Court having jurisdiction in the place at which the registered office of the company is situate:

Provided that the Federal Government may, by notification in the Official Gazette and subject to such restrictions and conditions as it thinks fit, empower any civil court to exercise all or any of the jurisdiction by this Ordinance conferred upon the Court, and in the case such court shall, as regards the jurisdiction so conferred, be the Court in respect of companies having their registered office within the territorial jurisdiction of such court."

The section, no doubt, vests original civil jurisdiction with the High Court as was held in case PLD 1996 SC 543 (Brother Steel Mills Ltd. and others v. Milan Ilyas Miraj and 14 others). However, the context or meaning of original civil jurisdiction as decided in the case PLD 1996 Lahore 1 (Messrs Sunrise Textiles Ltd. and others v. Mashreq Bank PSC and others) is that jurisdiction is conferred by statute and is in contradiction to criminal jurisdiction.

7. A further review of the Ordinance shows that the Ordinance specifically mentions "the court" where it empowers "the court" to exercise jurisdiction. For example, section 152 of the Ordinance is the power of the court to rectify the register of members. Section 179 of the Ordinance is the power of the court to declare the election of directors as invalid, or section 305 is the Section where the court has the powers of winding up etc. The expression "having jurisdiction" means that the High Court is the authorized legal authority to hear and determine issues under the Ordinance, but section 7 does not necessitate the High Court to adjudicate upon all disputes which arise under the Ordinance. Where it is required under the Ordinance, specific Sections of the Ordinance provide that the Court shall adjudicate upon the matter.

8. The argument of the counsel for the petitioner that the High Court, while exercising jurisdiction under section 7, must adjudicate upon the instant Petition under section 227, being an original civil dispute is flawed as this interpretation goes against the spirit of the Ordinance and the rationale of section 7. I am of the opinion that the petitioner should have filed its grievance before respondent No.6, being the competent authority to adjudicate upon irregularities and management of a Provident Fund under section 227. A review of the petitioner's prayer will also testify to this fact as the petitioner itself seeks a direction to respondent No.6 to carry out a detailed investigation of the matter, and take strict action against respondents Nos.1 to 5. As such the Court, under section 7 of the Ordinance cannot direct the respondent No.6 to carry out an investigation under section 227 of the Ordinance.

9. In the case at hand, the petitioner has not moved any application or complaint before respondent No.6, yet they seek a direction from this Court that respondent No.6 conduct a detailed investigation in the matters. Without approaching the

respondent No.6 for adjudication on the dispute, there is no justification for seeking a direction from this Court in the manlier sought by the petitioner.

10. Even otherwise, a review of the prayer clause shows that the petitioner is not entitled to the prayer sought as this Court, vested with jurisdiction under section 7 of the Companies Ordinance, cannot direct respondents Nos.1 to 5 to pay the loss of more than Rs.100 million as claimed by the petitioner. In order to claim loss, evidence has to be led, and the petitioner would have to establish their relationship with respondents Nos.1 to 5, the terms of their relationship, the breach and the loss suffered. This Court cannot determine the loss suffered by the petitioner, if any, under a Petition under section 227 of the Ordinance.

11. Therefore, in view of the aforesaid, I find that the Petition is not maintainable.

12. The second objection was with reference to the locus standi of the petitioner. The petitioner is a registered union of respondent No.5. Since jurisdiction under section 227 of the Companies Ordinance vests with respondent No.6, I leave it for them to decide upon this issue, in the event that the petitioner files any petition before them.

13. In view of the aforesaid, this C.O. has no merit, hence dismissed.

KMZ/I-1/L Petition dismissed.

2013 P T D 713
[Lahore High Court]
Before Mrs. Ayesha A. Malik, J
ALIF PLASTIC INDUSTRY
Versus
FEDERATION OF PAKISTAN and others
Writ Petition No.20175 of 2012, decided on 23rd January, 2013.

Sales Tax Act (VII of 1990)---

----Ss. 38 & 25---Constitution of Pakistan, Art. 199---Constitutional petition---Investigative Audit under S. 38 of the Sales Tax Act, 1990---Scope---Notice containing specific allegation was not a random selection for audit---Petitioner (taxpayer) impugned notice of inquiry proceedings instituted against him under S. 38 of the Sales Tax Act, 1990---Contention of the petitioner was that Department could not select petitioner for audit without first completing audit under S. 25 of the Sales Tax Act, 1990---Validity---Department issued notice to the petitioner calling for record and as such did not act in a manner contrary to S. 38 of the Sales Tax Act, 1990 which specifically dealt with access into the premises of a registered person---Impugned notice had been issued as a preliminary step into an investigation by simply calling for the record and reference to S. 38 of the Sales Tax Act, 1990 made on the impugned notice puts the petitioner to notice that there was an inquiry or investigation for tax fraud and details of the nature of the fraud were also stated in the notice---Department, thus had a reason to investigate the record of the petitioner and therefore, the impugned notice did not offend the mandate of S. 38 of the Sales Tax Act, 1990---Present case was not a case of random selection or composite audit but one of tax fraud in presence of a specific allegation against the petitioner---Mere issuance of the impugned notice did not mean that a case of tax fraud had been decided against the petitioner and did adversely affect any right of the petitioner---Constitutional petition was dismissed, in circumstances.

Writ Petition No.393 of 2012 distinguished.
Muhammad Noman Yahya for Petitioner.
Sh. Nadeem Anwaar for Respondents.
Date of hearing: 15th January, 2013.

JUDGMENT

MRS. AYESHA A. MALIK, J.---Through the instant petition, the petitioner has impugned the notices dated 28-5-2012 and 24-7-2012 issued under section 38 of the Sales Tax Act, 1990 (the STA) by respondent No.4. The petitioner also impugns that the inquiry proceedings initiated by the respondent No.4 pursuant to the said notices for being illegal and contrary to the statutory provisions.

2. Brief facts of the case are that the petitioner is a taxpayer of respondent No.2 vide NTN No.0219047-8 and also registered with Sales Tax Department. He files his

sales tax returns regularly. Notice was issued to the petitioner on 28-5-2012 for conducting an investigative audit for tax for the period from 1-7-2009 to 30-4-2012. The petitioner filed reply to the said notice on 26-6-2012. The respondent No.4 declined the contentions of the Petitioner and issued another notice on 24-7-2012.

3. The case of the petitioner is that the respondents cannot select the petitioner for audit without completing the audit under section 25 of the STA. He argued that it is only upon the completion of the audit under section 25 that investigative audit can be initiated under section 38 of the STA. He next argued that in this regard, no audit has been made under section 25 on the basis of which the decision could have been made to conduct an investigative audit under section 38 of the STA. He argued that the purpose of the impugned notices was to defeat the parameters laid down in judgment dated 10-5-2012 passed in Writ Petition No.393 of 2012.

4. Learned counsel for the respondents argued that the notices under section 38 of the STA were issued to investigate the tax fraud committed by the petitioner. He maintains that the reasons have been stated in the impugned notices which inform the Petitioner about the reasons of conducting the said investigation. He also argued that the tax fraud does not fall within the parameters of the judgment dated 10-5-2012 passed in Writ Petition No.393 of 2012. The period for audit under section 38 of the STA may overlap the period under section 25 of the STA for the audit. However, the purpose of the audit is different and as such, the respondents are well within the mandate of the law to carry out the investigative audit in order to establish whether a case of tax fraud is made out or not. At this stage, it was just a notice calling for documents and as such, there is no basis for the petitioner to impugn the same as the petitioner is under a statutory duty to maintain his record and the respondents may call upon the petitioner to submit the relevant record. He argued that the petitioner is bound to produce its record for verification in terms of sections 22, 23 and 24 of the STA.

5. I have heard the arguments advanced by learned counsel for the parties and also reviewed the record.

6. It is noted that this case was argued along with Writ Petition No.19819 of 2012. Although it was a connected matter with Writ Petition No.19819 of 2012, yet learned counsel for the petitioner requested that his case be heard and decided separately from Writ Petition No.19819 of 2012.

7. The main issue in this case is with respect to the notices dated 28-5-2012 and 24-7-2012 that have been issued under section 38 of the STA. Review of the record shows that through the impugned notice dated 28-5-2012, the petitioner was informed that there is an allegation "making illegal input adjustments" against the petitioner, therefore, an inquiry has been initiated for which purpose, the record for the period from 1-7-2009 to 30-4-2012 in terms of the documents mentioned in the notice has been called for. Review of the reply filed by the petitioner to this notice shows that the petitioner essentially denied the submission of documents on the

basis of section 72 of the STA. In terms of the requirement for production of the record, the reply shows that the petitioner states that it is maintaining the record and tiling their tax returns. The respondents again replied to this letter by re-ascertaining the request to provide the relevant record as maintained by the petitioner.

8. The whole case of the petitioner is premised on the argument that the respondents cannot proceed under section 38 of the STA on account of the decision dated 10-5-2012 in Writ Petition No. 393 of 2012. As I have already stated in my judgment of even date in Writ Petition No.19819 of 2012 that the main issue in this case is with respect to the impugned notice issued to the petitioner under section 38 of the STA calling for documents to be produced by the petitioner for the period from 1-7-2009 to 30-4-2012. A review of the impugned notice dated 28-5-2012 shows that it provides that an investigation under section 38 of the STA has been initiated and the documents stated in the notice are required for the purposes of the said investigation. A reminder was issued to the petitioner on 24-7-2012, which also informs the petitioners that in the event of non compliance, proceedings under section 33(9) and 21(2) of the STA (suspension of registration) will be initiated.

9. The impugned notice was issued under section 38 of the STA, which provides that:--

"38. Authorized officer to have access to premises, stocks, accounts and record.---

(1) Any officer authorized in this behalf by the Board [or the Commissioner] [m] shall have free access to business or manufacturing premises, registered office or any other place where any stocks, business records or documents required under this Act are kept or maintained belonging to any registered person or a person liable for registration of whose business activities are covered wider this Act or who may be required for any inquiry or investigation in any tax fraud committed by him or his agent or any other person; and such officer may, at any time, inspect the goods, stocks, records, data, documents, correspondence, accounts and statements, utility bills, bank statement, information regarding nature and sources of funds or assets with which his business is financed, and any other records or documents, including those which are required under any of the Federal, Provincial or local laws maintained in any form or mode any may take into his custody such record, statements, diskettes, documents or any part thereof, in original or copies thereof in such form as the authorized officer may deem fit against a signed receipts.

(2) The registered person, his agent or any other person specified in sub-section (1) shall be bound to answer any question or furnish such information or 'explanation as may be asked by the authorized officer.

(3) The department of direct and indirect taxes or any other Government department, local bodies, autonomous bodies, corporations or such other institutions shall supply requisite information and render necessary assistance to the authorized officer in the course of inquiry or investigation under this section."

Section 38 of the STA essentially lets the authorized officer have access to business or manufacturing premises, stocks, record or documents required under the law or maintained by the registered person, required for an inquiry or investigation in any tax fraud committed by him, his agent or any other person. Therefore, section 38 of the STA requires that a notice be issued to the registered person before entering into its premises or the office or any other place where the stocks, accounts or record is kept. Such a notice must state the reasons for entering into the premises of the registered person. In terms of the two cases relied upon by the learned counsel for the petitioner, the requirement of a notice is essential under section 38 of the STA as the authorized officer must inform the registered person that he is going to enter upon his premises to remove goods or record from his premises and the reasons for needing to enter or seizing the record. As such section 38 of the STA and the case referred to do not relate to the case at hand, where a notice has been issued simply calling for the record of the petitioner.

10. Section 25 of the STA provides that a person is required to produce the record and the documents when required by the Commissioner, which are in his possession or control. Subsection (2) of section 25 of the STA provides that the officer of the Inland Revenue authorized by the Commissioner Inland Revenue may conduct an audit. The proviso of this section states that:--
"Provided that in case the Commissioner has information or sufficient evidence showing that such registered person is involved in tax fraud or evasion of tax, he may authorize an officer of Inland Revenue, not below the rank of Assistant Commissioner, to conduct an inquiry or investigation under section 38"

Therefore, the need to conduct an inquiry or investigation against a person thought to be involved in a tax fraud or evasion of tax is provided for under section 25 of the STA. This means that an inquiry can be initiated to investigate tax fraud. In the instant petition, the respondent No.4 issued notice to the petitioner, calling for the record. As such he has not acted in a manner contrary to section 38 of the STA, which specifically deals with access into the premises of a registered person. The impugned notice has been issued as a preliminary step to the investigation simply calling for the record. Reference to section 38 of the STA on the notice puts the petitioner to notice that there is an inquiry or investigation for tax fraud. It is noted that the show cause notice itself details the nature of the fraud that is under investigation. This means that the respondents have a reason to investigate the record of the petitioner. Hence the impugned notices do not in any manner offend the mandate of section 38 of the STA.

11. Furthermore, this is an investigative audit looking into a potential case of tax fraud. At this stage, the respondents are merely conducting an inquiry for which they require the documents. All the reasons necessitating the audit are contained in notice dated 28-5-2012. Hence the facts of this case do not attract the parameters of judgment issued in Writ Petition No.393 of 2012. The judgment passed in W.P No.393 of 2012 deals with the composite audit where the persons are selected randomly for audit under section 25(2) of the STA. This is not a case of random

selection or composite audit but one of tax fraud being a specific allegation against the Petitioner. Mere issuance of the impugned notices does not mean that a case of tax fraud has been decided against the Petitioner. As such the impugned notice does not adversely affect any right of the Petitioner. No illegality is made out. Case does not call for interference in constitutional jurisdiction.

12. Therefore, there is no merit in this petition and the same is dismissed.

KMZ/A-15/L Petition dismissed.

2013 P L C (C.S.) 538
[Lahore High Court]
Before Mrs. Ayesha A. Malik, J
MUHAMMAD SAEED AHMAD
Versus
SECRETARY TO GOVERNMENT OF PUNJAB HEALTH DEPARTMENTand others
Writ Petition No.28136 of 2012, decided on 7th February, 2013.

Punjab Civil Servants Act (VIII of 1974)---

----Ss. 8 & 3(2)---Constitution of Pakistan Art.199---Constitutional petition---Civil service---Upgradation in service grade---Alternate remedy---Petitioner sought upgradation of his post on the ground that in the year 1987 a letter was issued which updated technical posts in different departments and contended that he had been discriminated against---Validity----Petitioner was alleging discrimination against orders passed 14 years ago, and there was nothing on record to explain the delay incurred by the petitioner in agitating the issue---Petitioner was considered for upgradation and denied the same as the petitioner had a promotion channel available to him under the new 4-tier structure---Upgradation was a form of promotion and under S.8 of the Punjab Civil Servants Act, 1974, promotion was 'term and condition' of service---Civil servant would be eligible to be considered for promotion provided he possessed prescribed qualifications and under S.3(2) of the Punjab Civil Servants Act, 1974 the Service Tribunal had exclusive jurisdiction in respect of matters of 'terms and conditions' of service---Petitioner, therefore, had an effective, efficacious remedy available to him for redressal of his grievance and could approach the Service Tribunal---Constitutional petition was dismissed, in circumstances.

Abid Hussain and 5 others v. Secretary to Government of the Punjab, Finance Department, Civil Secretariat, Lahore and 5 others 2012 PLC (C.S.) 26 distinguished.
Government of the Punjab through Secretary Services, Punjab, Lahore and 4 others v. Muhammad Awais Shahid and 4 others 1991 SCMR 696 rel.
Syed Ikhtisar Ahmed for Petitioner.
Syed Nayyar Abbas Rizvi, Addl. A.-G. for the State.
Date of hearing; 7th February, 2013.

JUDGMENT

MRS. AYESHA A. MALIK, J.--- Through this Writ Petition, the petitioner seeks a direction to the respondents to grant him Selection Grade in BS-15 from BS-11.

2. Brief facts of the case are that the Finance Department issued a letter dated 27-7-1987 revising the pay and fringe benefits of the employees of the Government of the Punjab. Thereafter, in continuation of the said letter, another letter dated 21-1-

1988 was issued which upgraded technical posts in different departments and also allowed selection grades to the government servants subject to a minimum qualification. The case of the petitioner is that nearly all of the government departments have acted upon the said two letters and upgradation and selection grades were granted to the employees as per letter dated 21-1-1988. However, respondents Nos.1 and 2 have not upgraded the post of the petitioner even though he is entitled for the same. The petitioner made a representation before respondent No.1 for redressal of his grievance who vide order dated 16-6-2012 has rejected the representation of the petitioner. Hence this Writ Petition.

3. Learned Law Officer raised an objection that upgradation and award of selection grade is a matter of promotion, hence the case of the petitioner cannot be decided in a constitutional petition. That the petitioner should have filed an appeal before the Punjab Service Tribunal (the Tribunal) against the impugned order as the matter in issue relates to the terms and conditions of service, hence the bar of Article 212 of the Constitution of Islamic Republic of Pakistan, 1973 is applicable to the case of the petitioner. He also argued that the petitioner cannot be granted upgradation and selection grade as the scheme was abolished in the year 2001 and a new structure was subsequently put in place.

4. Learned counsel for the petitioner in rebuttal has relied upon the case-law cited at "Abid Hussain and 5 others v. Secretary to Government of the Punjab, Finance Department, Civil Secretariat, Lahore and 5 others (2012 PLC (C.S.) 26)" to argue that the cases of upgradation have been adjudicated upon in constitutional jurisdiction on the ground of discrimination. Since the petitioner also challenges discrimination, hence the bar of Article 212 of the Constitution is not attracted.

5. Arguments heard. Record perused.

6. The petitioner is a Laboratory Technician appointed in BPS-9 on 19-4-1993. The prayer of the petitioner is that he be awarded upgradation to BS-11 and selection grade of BS-15 from the date of his appointment. Essentially, the petitioner is seeking a higher grade for which a selection process is admittedly required. The petitioner's case was considered by the respondent No.1, but rejected as a 4-tier service structure has been created for paramedics. In terms of the order, the petitioner has available to him a promotion channel upto BPS-16 subject to availability of post, mandatory training and required length of service. However, the petitioner wants to be treated at par with the persons mentioned in para 6 of the instant petition. The record as appended with the Petition shows that the persons named in para 6 were upgraded in the years 1991 and 1994, whereas the petitioner's case was considered in the year 2012. Learned counsel for the petitioner contends that the petitioner has been agitating the matter for a long time, however, there is nothing on the record to substantiate the same. As per the record, he filed Writ Petition No.23321 in the year 2009 wherein a direction was given on 7-12-2011 to decide the representation of the petitioner. The petitioner is aggrieved by the impugned order as it denies him upgradation and selection grade. The case relied

upon cited at 2012 PLC (C.S.) 26 (supra) is one where the cadre was abolished and the petitioners were excluded from upgradation on the ground that their cadre was abolished. In the cited case, this Court held that they should be treated at par with their counterparts in the same department since they were all permanent government servants and the petitioner should not be denied upgradation solely on the ground that his cadre was abolished. Hence the cited case is distinguishable from the instant petition. In the instant case, the petitioner is alleging discrimination against the orders passed in the years 1991 and 1995 with respect to certain technical officers. There is nothing on the record to explain the long period of delay by the petitioner in agitating the issue. He filed Writ Petition No.23321 in the year 2009, some 14 years after the decision was made. Now at this belated stage, with a new structure in place, the petitioner has no grounds to agitate discrimination or otherwise. Furthermore, the petitioner has been considered for upgradation and denied the same as the petitioner has available a promotion channel under the new 4-tier structure and also since the selection grade scheme was abolished on 1-12-2001.

7. Be that as it may, the prayer of the petitioner is that he be awarded upgradation and selection grade from the date of his appointment. In terms of the dicta laid down in the case titled "Government of the Punjab through Secretary Services, Punjab, Lahore and 4 others v. Muhammad Awais Shahid and 4 others (1991 SCMR 696)" upgradation is a form of promotion. It was held by the Hon'ble Supreme Court of Pakistan that "Wherever there is a change of grade or post for the better, there is an element of selection involved that is promotion and it is not earned automatically, but under an order of the competent authority to be passed after due consideration on the comparative suitability and entitlement of those incompetent." Section 8 of the Punjab Civil Servants Act, 1974 (the Act) provides that promotion is a term and condition of service. Under Section 8 of the Act, a civil servant shall be eligible to be considered for promotion provided that he possesses the prescribed qualifications for promotion. As per section 3(2) of the Act, the service tribunal shall have exclusive jurisdiction with respect to matters of terms and conditions of service of civil servants. Since upgradation and award of selection grade is a form of promotion, therefore, in terms of section 3(2) read with Section 8 of the Act, the question of upgradation/grant of selection grade must be decided by the Service Tribunal. The petitioner has an effective, efficacious remedy available to him for redressal of his grievance by approaching the Service Tribunal which has exclusive jurisdiction to deal with such matters.

8. For the aforementioned reasons, this writ petition has no merit, hence dismissed.

KMZ/M-45/L Petition dismissed.

2013 P T D 391
[Lahore High Court]
Before Mrs. Ayesha A. Malik, J
Messrs LALA MUSA FLOUR AND GENERAL MILLS, GUJRAT through Managing Partner
Versus
CHAIRMAN, FEDERAL BOARD OF REVENUE, ISLAMABAD and 3 others
Writ Petition No.15432 of 2012, decided on 5th November, 2012.

Income Tax Ordinance (XLIX of 2001)---

----S. 177---Sales Tax Act (VII of 1990), S.25---Federal Excise Act (VII of 2005), S.46---Constitution of Pakistan, Art.199---Constitutional petition---Implementation of judgment---High Court in petitioners earlier constitutional petition had held that notices issued to petitioners by Commissioner Inland Revenue under S.177 of the Income Tax Ordinance, 2001; under S.25 of Sales Tax Act, 1990 and S.46 of Federal Excise Act, 2005 selecting their cases for audit of their tax affairs were illegal and without lawful authority and that such authority only lay with the Federal Board of Revenue through Computer Balloting---Petitioners sought implementation of the judgment passed by High Court in constitutional petition filed by it earlier---Validity---Held, authorities were essentially required to comply and follow judgment passed by High Court until and unless it was reversed or some interim relief was granted by the Supreme Court in favour of authorities, which did not exist till that date---High Court directed the authorities to comply with judgment passed by it in earlier constitutional petition---Petition was disposed of accordingly.
Tahir Mobeen Ashraf for Petitioner.
Saeed ur Rehman for Respondents.

ORDER

MRS. AYESHA A. MALIK, J.---The issue in this case is the compliance and implementation of the judgment dated 10-5-2012 rendered by this Court in Writ Petition No.393 of 2012 titled as "Messrs Chenone Stores Ltd. v. The Federal Board of Revenue etc." whereby it has been held that the notices issued by Commissioner Inland Revenue under sections 177, 25 and 46 of the Income Tax Ordinance, 2001, Sales Tax Act, 1990 and Federal Excise Act, 2005 selecting the petitioners in the said Writ Petition for audit of their tax affairs are illegal and without any lawful authority. It has further been held vide said judgment that such authority only lies with the Federal Board of Revenue through computer balloting and not with the Commissioner Inland Revenue.

2. Despite the clear and unambiguous findings of this Court in the aforementioned judgment, notices by Commissioner Inland Revenue selecting the taxpayers for audit of their tax affairs are continuously being issued which is contrary to the findings thereof.

3. The respondents are essentially required to comply and follow the above referred judgment untill and unless it is reversed or some interim relief is granted by the Hon'ble Supreme Court of Pakistan in favour of the respondents which undeniably does not exist till date.

4. In this view of the matter, the Writ Petition in hand is disposed of with the direction to the respondents to comply with the findings of the judgment dated 10-5-2012 passed by this Court in Writ Petition No.393 of 2012 titled as "Messrs Chenone Stores Ltd. v. The Federal Board of Revenue etc.".

MH/L-12/L Order accordingly.

P L D 2013 Lahore 289
Before Mrs. Ayesha A. Malik, J
SNGPL---Petitioner
Versus
OGRA and others---Respondents
OGRA Petition No.467 of 2012, decided on 15th February, 2013.

(a) Administration of justice---

----When something was required to be done in a certain way, then same must be done in such way---Any deviation from such prescribed way would render decision a nullity---Illustration.

(b) Oil and Gas Regulatory Authority Ordinance (XVII of 2002)---

----Ss. 7 & 8---Natural Gas Regulatory Authority Licensing Rules, 2002, R.3---Natural Gas Tariff Rules, 2002, Rr.4, 17 & 20---Decision of Oil and Gas Regulatory Authority determining unaccounted for Gas (UFG)---Scope---Tariff would be determined as per Oil and Gas Regulatory Authority Ordinance, 2002 and Natural Gas Tariff Rules, 2002---Authority for determining UFG component had to fix target for each financial year---Licensee succeeding to achieve such UFG target could retain gain on such account, otherwise loss on account of its failure to achieve such target would not be considered or made part of Estimated Revenue Requirement---Word "benchmark" as used in R.17(1)(c) of Natural Gas Tariff Rules, 2002 would mean setting of a standard by Authority to measure performance and efficiency of licensee---Benchmarks could not be set without yardsticks---Benchmarking through yardstick regulations set out by Authority to encourage/motivate optimum performance by licensee would need to be done annually---Principles.

PLD 1996 SC 324; PLD 2007 SC 323; 2004 SCMR 456; 2006 PTD 1132; 2004 PTD 1179; PLD 2001 SC 201; 2010 PTD 534; 1990 CLC 784; 2005 PTD 1663; 1984 MLD 468; 1998 CLC 1278; PLD 2005 Lah. 571 and 2001 PTD 19 ref.

(c) Oil and Gas Regulatory Authority Ordinance (XVII of 2002)---

----Ss. 7 & 8---Natural Gas Tariff Rules, 2002, R.17---Decision of Oil and Gas Regulatory Authority in respect of unaccounted for gas (UFG) by licensee---Jurisdiction of High Court to interfere into such decision---Scope---Authority could exercise its discretion to advance objects of Oil and Gas Regulatory Authority Ordinance, 2002, Natural Gas Tariff Rules, 2002 and Natural Gas Regulatory Authority Licensing Rules, 2002---Authority itself would determine factors to be relevant for UFG, but not licensee by putting forward its own factors---High Court could review decision making process, but could not direct Authority to change its decision, if having been made after following due process.

(d) Oil and Gas Regulatory Authority Ordinance (XVII of 2002)---

----Ss. 7 & 8---Natural Gas Regulatory Authority Licensing Rules, 2002, R.3---Natural Gas Tariff Rules, 2002, Rr.4, 17 & 20---Decision of Oil and Gas Regulatory Authority determining unaccounted for Gas (UFG)---Duty of Authority to maintain consultation process while making such decision---Scope---Authority in order to set targets to keep UFG within acceptable limits would be required to maintain a process of open consultation with experts and licensee---Such process must be meaningful in order to give the Authority information required for setting UFG targets---Such open consultation could not control decision of Authority to set UFG targets, but could shape its making.

(e) Oil and Gas Regulatory Authority Ordinance (XVII of 2002)---

----Ss. 7 & 8---Natural Gas Regulatory Authority Licensing Rules, 2002, R.3---Natural Gas Tariff Rules, 2002, Rr.4, 17 & 20---Fixation of tariff and prices for natural gas---Discretion of Oil and Gas Regulatory Authority determining unaccounted for Gas (UFG)---Scope---Object of Oil and Gas Regulatory Authority Ordinance, 2002 being to safeguard public interest and protect interests of all stakeholders including consumers and licensees---Such discretion not being open ended, rather would be regulated by Oil and Gas Regulatory Authority Ordinance, 2002, Natural Gas Tariff Rules, 2002 and Natural Gas Regulatory Authority Licensing Rules, 2002---Principle.

Tariq Aziz-ud-Din and others' case 2010 SCMR 1301 rel.
Mirza Mahmood Ahmad for Petitioner.
Salman Akram Raja, Abdul Basit Qureshi, Senior Law Officer, OGRA with Muhammad Yasin ED (Enforcement), Syed Abdul Hai Gillani, Addl. Attorney General with Bismillah Rai Director for Ministry for Petroleum.
Date of hearing: 3rd December, 2012.

JUDGMENT

MRS. AYESHA A. MALIK, J.---The instant Petition has been filed under section 12(2) of the OGRA Ordinance, 2002 against the decision dated 18th May 2012 passed by respondent No. 1 (Decision).

2. The basic facts are that the petitioner is a public utility company listed on three stock exchanges with its major shareholding held by the Federal Government being 55.27%. The petitioner has a License for Transmission, Distribution and Sale of Natural Gas (Licenses) issued by the respondent No.1. In terms of the License, the respondent No.1 makes an annual determination for the total revenue requirement of the petitioner for that year. The petitioner has impugned the decision of the respondent No.1 with respect to the determination made for UFG, non-operating income and provision for doubtful debt in the Estimated Revenue Requirement for the financial year 2012-2013.

3. The grievance of the petitioner is that the Decision made by respondent No.1 for the Estimated Revenue Requirement for the Financial Year 2012-2013 is not in accordance with the prescribed procedure; the penalty imposed is not in accordance with the law; the amount determined as penalty is far greater than the prescribed limit; non-operating income cannot be regulated by the respondent No.1 as it does not fall under the scope of regulated activities; that the Human Resource Cost and the provision for doubtful debts were not allowed by the respondent No.1 without consideration of the relevant and necessary factors required under the law.

4. The basic challenge is to the determination for Unaccounted For Gas (UFG) for the FY 2012-2013 which is set at 4.5% by the respondent No.1 in its decision. The petitioner projected its UFG for the FY 2012-13 at 10% and requested that the UFG for the said year be fixed in terms of the 2009-2010 determination wherein the UFG was set at 7%. It is the case of the petitioner that the respondent No.1 did not follow the prescribed procedure and failed to give due consideration to the issues raised by the petitioner whilst rendering its Decision related to UFG.

5. Learned Counsel explained that the Natural Gas Tariff Rules, 2002 (Tariff Rules), Rule 2(m) defines Unaccounted for gas as Unaccounted for gas means in respect of a financial year the difference between the total volume of metered gas received by a licensee during that financial year and the volume of natural gas metered as having been delivered by the licensee to its consumers excluding therefrom metered natural gas used for self-consumption by the licensee for the purposes of its regulated activity and such other quantity as may be allowed by the authority for use by the Licensee in the operation and maintenance of its regulated activity. UFG is therefore a part of the tariff as determined by the respondent No.1. The Learned counsel argued that the Oil and Gas Regulatory Authority Ordinance, 2002 (OGRA Ordinance) requires the authority, respondent No.1 to follow efficient practices and enforce the conditions of the license.

6. One of the grounds for challenge raised by the learned counsel for the petitioner was that the decision of the respondent No.1 was not in accordance with the required quorum. The OGRA Ordinance required a quorum of three members whereas the impugned decision was signed by only two members. However this objection was quickly dispelled by the respondent No.1 with the production of the original decision which was signed by three members. As such now this ground is not sustainable.

7. Learned counsel for the petitioner argued that the procedural requirements have been ignored by the respondent No.1 whilst setting UFG benchmarks. He argued as follows:--
(a) Rule 17(1)(c) of the Tariff Rules requires that UFG Benchmarks are set through yardstick regulation. The Rules contemplate that there be yardstick regulations on the basis of which UFG Benchmarks are set. The respondent No.1 has failed to follow the procedure and establish the yardsticks regulations which have resulted in an arbitrary exercise of power.

(b) Clause 21.1 of the License requires that the UFG Benchmark is set after consultation with the Licensee. Counsel argued that consultation has to be meaningful and purposeful. He placed reliance on PLD 1996 SC 324 and PLD 2007 SC 323. He argued that the respondent No.1 did not make any meaningful consultation with the petitioner. In fact he argued that the record will show that the said benchmarking was done in one go, for seven years, in the year 2005, effective till Financial Year 2011-2012. The case of the petitioner is that for each financial year a fresh benchmark through yardstick regulation is to be determined. For each determination respondent No.1 should consult with the petitioner.
The learned counsel argued that OGRA circulated a paper dated 12 April, 2012 and in the said paper proposed a benchmark of 5.46% for the said financial year. Yet in the decision the UFG is determined at 4.5%. The learned counsel argued that the arbitrary decision is best illustrated as the authority proposed a UFG of 5.46% on the 12th April, yet in the decision it came up with a benchmark of 4.5%.
(c) Clause 21.1 of the License also requires that there is consultation with experts for setting UFG Benchmarks. However counsel for the petitioner argued that no expert was consulted. The only time an expert was consulted was on the orders of the Lahore High Court passed in OGRA Petition 1068/2010. The expert recommended a benchmark of 7% however the respondent No.1 rejected the advice. Contention of the learned counsel is that it was rejected as it did not recommend the benchmark desired by the respondent No.1. Learned counsel argued that the consultation process is to take place every year when the respondent No.1 sets the benchmark.
(d) Benchmarks to be set for each financial year. The law requires all tariff related exercises to be carried out on a yearly basis. UFG Benchmarking has to be done in each financial year and the benchmark for one particular year has no relevance to the benchmarks for the previous years because the factors affecting UFG are numerous and vary from year to year. These factors include the size and age of network (since UFG is higher in large and old networks) the changing ratio between the volumes of bulk sales to retail sales (since UFG is higher in pipelines meant for the retail sector) expansion of network in remote areas (which causes increased leakages, thefts and monitoring issues) and the general security situation (the petitioners' network exists in the same threatened environment as the rest of Pakistan). However, despite these variable factors, respondent No.1 had illegally set UFG Benchmarks in 2005-2006 for the next 7 years, i.e. up to FY 2011-2012.
(e) Rule 17 of the Tariff Rules provides for the evaluation criteria for setting of tariff. UFG is a part of the tariff hence the requirements of Rule 17 should be followed. Most important requirement is that the respondent No.1 should strike a balance amongst the criteria specified in Rule 17(1) in order to optimize the benefits. This balancing factor is another requirement which has been ignored by the respondent No.1.

8. The case of the petitioner is that the process as defined by law was not followed by respondent No.1. Hence there is no valid determination for UFG. It is settled law that when law requires something to be done in a certain way, it has to be done in that manner. OGRA, being a statutory authority, is under a legal obligation to apply

and follow the law strictly. Any deviation for the same would render such decisions a nullity.

9. Learned counsel argued that the decision has also been impugned because it has imposed heavy penalties without any default on the part of the petitioner. He argued that a three tier process should be followed for imposing a penalty. First the benchmarks should be set, each year. Once the benchmarks have been set the authority has to determine whether there has been any breach of the benchmark and to what extent, and then to determine whether the licensee should be penalized. Before such penalty can be imposed the authority has to show cause the licensee; apply its mind to the arguments raised by the licensee; determine whether there was any wilful or preventable default on part of the licensee (2004 SCMR 456, PTD 2006 1132, 2004 SCMR 456 = 2004 PTD 1179); determine whether there has been any violation of a law (PLD 2001 SC 201); use a standard of proof of "beyond reasonable doubt" (as penal provisions are quasi-criminal in nature (2010 PTD 534); and apply the principle of proportionality. It was argued that this process is also enshrined in Rule 20(3) of the Tariff Rules. Once the authority has considered all the above factors, and comes to the conclusion that the breach is attributable and relatable to the actions and omission of the licensee, only then, can it impose a penalty through a reasoned order. In the instant case the petitioner was never afforded a proper opportunity to present its defence yet it has been burdened with heavy penalties.

10. The other ground for challenge to the decision is with regard to the quantum of penalty. The OGRA Ordinance under section 6(2)(p) authorizes the Authority to prescribe fines for contravention of the ordinance, rules, regulation, terms and conditions of the license and the decisions of the authority. A penalty has been specifically prescribed by the authority in Rule 20 of the Tariff Rules which lays down that a maximum of Rs.2 million per day for a continuing breach totalling Rs.730 Million for a financial year may be imposed. It was argued that Rule 20 is all encompassing and it includes violation of any Rules/Regulations as well as orders, determinations and even instructions passed by the authority. The penalty which the respondent No.1 has imposed on the petitioner in the instant case is more than Rs.11.782 Billion being fifteen times more than the maximum prescribed by the Rules. It is submitted that a penalty which exceeds the maximum prescribed by law is unlawful (1990 CLC 784, 2005 PTD 1663 and 1984 MLD 468). Even for the maximum of any lawful penalty to be imposed, it should be shown that the acts are such that they warrant that the maximum penalty be levied instead of any other lower figure. Penalty provisions are to be strictly construed in favour of the petitioner (1998 CLC 1278, PLD 2005 Lahore 571 and 2001 PTD 19).

11. The learned Counsel for the respondent No.1 set out his case by explaining the role of the respondent No.1. He explained that the respondent No.1 was established under the OGRA Ordinance to act as the regulator for the oil and gas industry in Pakistan. One of its functions is to determine the tariff at which gas should be sold by the petitioner. To set the tariff, the respondent No.1 conducts an annual exercise

to determine the Estimated Revenue Requirement (ERR) of the petitioner. The UFG is a component in determining the ERR for each year. When the UFG is high, the ERR is increased, meaning a higher gas price for the consumer. He explained that it has been the endeavor of the respondent No.1 to bring down the UFG rate of the petitioner so as to control the price of gas paid by the consumer. The respondent No.1 reviews the practices of the petitioner and all factors which affect the loss of gas in transmission so as to ensure that the loss of gas stays at a minimum and if there is loss on account of factors relatable totally to the petitioner or its inefficiency, then the respondent No.1 cannot allow the burden of such inefficiency to be passed to the consumer. He explained that the petitioner was required to control its loss of gas during transmission and that the decision under challenge considered all the factors raised by the petitioner, which were not accepted by the respondent No.1.

12. Following up on the role of the respondent No.1, he argued that the determination of UFG is a technical matter which falls within the jurisdiction of the respondent No.1. He argued that the Court should examine the procedure adopted, to ensure that the decision was made in accordance with law, that due process was followed and that the respondent No.1 has not acted arbitrarily or contrary to the statutory provision of the OGRA Ordinance.

13. He argued that the UFG benchmark was not an annual determination and that the respondent No.1 has carried out extensive research and work in order to set out the benchmarks and yardstick regulations. He argued that the petitioners understanding of yardstick regulation was contrary to Rule 17(1)(c) of the Tariff Rules and the concept of yardstick regulations in general. As per the understanding of the respondent No.1 setting of benchmarks through yardstick regulation means that the respondent No.1 sets standards for the petitioner to keep a control over its gas loss. In this regard a comprehensive exercise of studying international comparative industry along with local conditions is made by the respondent No.1. Thereafter, the benchmarks are set, which gives the target to be achieved over a period of time. In the instant cases, the benchmarks were set in the financial year 2005-2006 up till the year 2011-12 by an order dated 12-10-2005. He referred to paras 4.2.1.1 to 4.2.1.10 of the order dated 12-10-2005, which he stated was the evidence in data taken by the respondent No.1 when setting the benchmarks. He argued that review of the benchmarks would show that the respondent No.1 required the petitioner to progressively reduce its UFG over time. The 2005 Order set out the target for the petitioner for the upcoming years and they were not indicative. They were fixed through an elaborate procedure of benchmarking for UFG through yardstick regulation. He further argued that a fresh benchmark could not be set every year as it would defeat the purpose of this entire exercise as contemplated under Rule 17(1)(c) of the Tariff Rules read with condition 21.1 of the license. That condition 21.1 of the License did not require the respondent No.1 to carry out an annual factual inquiry in order to set an annual benchmark. He argued that annual benchmarking is contrary to the scheme for setting benchmarks under the OGRA Ordinance, the Tariff Rules and the License.

14. Learned counsel argued that the experts and the licensee and other stake holders were duly consulted. The consultation process adopted is meaningful and a great effort is put into studying international standards to achieve efficiency. He argued that the consultation is necessary in order to bring all possible opinion before the respondent No.1. However, this consultation does not mean that the respondent No.1 should not exercise its own independent judgment and balance the views of the individuals and experts consulted.

15. His main argument was that the petitioner was required to subscribe to the standards set out by the respondent No.1 for UFG and that the petitioner instead wanted to increase the UFG rate on the basis of a onetime benefit given to it in the financial year 2009-2010. He argued that the respondent No.1 cannot do its job successfully or efficiently if it maintains the UFG determined in the year 2009-2010.

16. The respondent No.3 submitted its statement in writing which provided that the Government of Pakistan owns 54% of SNGPL's and 80% of the SSGCL's shares. Out of 14 directors of the boards of both companies, in case of SNGPL, the Government has ten and in case of SSGC it has eleven directors. The efficient running of both these companies, the welfare of its staff and employees as well as providing gas to consumers at competitive and affordable rate, remains priority of Government of Pakistan. That while determining the final UFG benchmark, factors which are beyond the control of companies should also be considered.

17. Heard and reviewed the documents placed before the Court.

18. This is a petition filed under section 12(2) of the OGRA Ordinance, 2002. The petitioner prays for the decision to be set aside to the extent of its findings on UFG, treatment of Non-Operating Income, disallowing HR cost and the provision for doubtful debt. Although several grounds have been urged before this Court and a lot of material has been placed before the Court, the main ground urged is with respect to the procedure adopted by the respondent No.1 in making its Decision related to UFG, Non-Operating Income, HR Costs and doubtful debts. In terms of section 12(2)(a) the petitioner essentially seeks a direction from this Court to the respondent No.1 to refrain from doing anything it is not permitted by law to do or to do that which it is required by law to do. Therefore, for the purposes of this petition filed under section 12(2) of the OGRA Ordinance this Court shall review the decision making process adopted by respondent No.1 whilst rendering the decision specifically related to matters challenged.

19. The thrust of the arguments raised on behalf of the petitioner was that the process prescribed by law for determining UFG benchmarks was not followed. That the benchmark is an annual determination and that the 2005 benchmarks relied upon were at best indicative. That an annual determination was necessary to keep the benchmark abreast with the ground realities. The ground realities depended upon variable factors which may not be in the control of the petitioner. Such factors

included the changing ground realities, the size and age of the network, the changing ratio between the volumes of bulk sales to retail sales, expansion of network in remote areas and the general security situation where the petitioner's network system exists. The learned counsel also gave reference to the critical nature of service also being a factor which should be considered by the respondent No.1. He argued that the petitioner could not be made responsible for all the factors which affected and increased the UFG. Hence the respondent No.1 should set its guidelines to decide which factors are within the control of the petitioner and which factors are not in its control. To the extent of the UFG determination since the respondent No.1 did not follow any guideline, they failed to appreciate the variable factors and the critical nature of the service provided by the petitioner. Without giving due consideration to the variable factors, the critical nature of the service and without striking a balance between the criteria and by not revising the benchmarks annually the respondent No.1 has set an impossible target which cannot be achieved or maintained by the petitioner.

20. The basic issue for the petitioner is that the benchmark should be an annual determination and that the respondent No.1 should set guidelines to show what factors will be considered while determining UFG benchmarks. In this regard a review of the relevant law is necessary to determine the procedure set by law.

21. OGRA Ordinance:--
21.1 Section 7 provides that the Authority shall set the tariff for regulated activities. Section 7(2) (a to g) provides for the criteria for determination, approval, modification and revision of tariff which shall be prescribed in the rules in the terms and conditions of the license and shall include 7(2) from (a to g).
21.2 Section 8 provides for the pricing for retail consumers for natural gas. In terms of the section the licensee shall submit its total revenue requirement and the respondent No.1 shall determine the total revenue requirement in accordance with the rules.

22. The Natural Gas Regulatory Authority Licensing Rules, 2002 (Licensing Rules) provide in Rule 3 that the Authority while exercising its functions shall as far as practicable look after the interest of the consumer and the licensee along with the nation as a whole. The criteria for approval of the tariff is given in Rule 19(3) which essentially repeats the criteria provided for in section 7(2)(a through g) of the OGRA Ordinance.

23. The Natural Gas Tariff Rules 2002 (Tariff Rules) provide for the process to be followed by a licensee for determination of tariff. Rule 4 provides that every licensee shall file its petition by the first day of December of each year, to determine the estimate of the total revenue requirement for one financial year. In accordance with the procedure the petition has to be admitted, notices issued, replies and rejoinders filed and then a hearing by the authority. Rule 17 lays down the evaluation criteria for the Authority to follow whilst determining the Tariff. Rule 17(c) provides that tariff should include a mechanism whereby the licensee

can maintain or achieve the benchmarks set by the Authority through yardstick regulation for UFG.

24. The License:- Clause 5 provides that the Authority shall determine tariff or total annual requirement for each regulated activity in accordance with the relevant criteria laid down in the Ordinance and the Rules.
24.1 Clause 21.1 provides that the Licensee shall take all possible steps to keep the UFG within acceptable limits. The Authority for this purpose in consultation with Licensee and experts, shall fix target of UFG for each financial year. The Authority may fix UFG target separately for each regulated activity.
24.2 Clause 21.2 provides that the Licensee shall be entitled to claim the UFG to the extent of target fixed by the Authority under 21.1 for the purpose of determining its revenue requirement for each financial year.
24.3 Clause 21.3 provides that in case the Licensee improves upon the UFG target prescribed by the Authority under Condition 21.1 for any financial year, the Licensee shall be entitled to retain the gain on that account. Conversely if the Licensee fails to meet the UFG target the loss on that account shall be borne by the Licensee and shall not form part of its total revenue requirements.

25. To address the argument that benchmarking should be done annually so that it updates the factors affecting the UFG of the petitioner, I find that there is nothing in the OGRA Ordinance, the Tariff Rules and the Licensing Rules which requires benchmarking to be an annual determination. Reliance has been placed by the petitioner on Clause 21.1 of the License where it states that UFG shall be fixed for each financial year. Reliance has also been placed on the fact that the ERR is to be determined each year, hence they conclude that the UFG benchmarks should also be determined each year. I am of the opinion that the fact that the ERR is determined annually does not mean that the benchmark should be set annually. Clause 5 of the License when read with Clause 21 of the License clarifies this issue. It provides that tariff is to be determined as per the Ordinance and the Rules on an annual basis. For the purposes of determining the UFG component, the authority shall fix targets for each financial year. The licensee can claim UFG to the extent of the target fixed by the Authority for the purposes of determining its revenue requirement for each financial year. If the licensee improves on the UFG target it can retain the gain on that account. If it fails to meet the target then the loss cannot be considered or made part of the total revenue requirement. To my mind the fixation of the target as contemplated under Clause 21.1 when read with Clauses 21.2 and 21.3 makes it clear that the authority sets a target for the licensee for every year and in terms of the target set, the licensee can demand a profit or suffer a loss in its revenue requirement based on its performance. There is nothing in the license to suggest that targets should be set annually. Furthermore Rule 17(1) of the Tariff Rules lay down the evaluation criteria for determining tariff. These are the guidelines which are to be followed by the Authority, when determining the tariff. Rule 17(2) requires the Authority to strike a balance between all the criteria provided for in Rule 17(1). Hence the Authority has to consider all the elements given in Rule 17(1) and has to strike a balance between the criteria. One criteria that has been stressed upon is Rule

17(1)(c) which provides for benchmark through yardstick regulation. For the purposes of UFG, the Authority sets the benchmarks, so that the Licensee can keep a check on its costs, investment and return on assets such that it does not violate the terms of the license and also so that it protects the licensee from being penalized. The word benchmark as used in Rule 17(1)(c) of the Tariff Rules means that the Authority can set a standard against which performance of the Licensee can be measured. Essentially benchmarking is used to measure the Licensee's efficiency against a reference point such that the Authority monitors the Licensee's performance and also sets standards to achieve optimum efficiency. Yardstick regulations are the indicators set out by the Authority to measure performance for the purposes of benchmarking. It is a tool used by the authority to achieve efficiency. Hence benchmark through yardstick regulation is the scheme set out by the authority to motivate optimum performance by the Licensee. Since its object is to incentivize the industry there is no merit in the arguments raised that benchmarking is to be done annually.

26. Admittedly, a low UFG is the desired result. Hence by setting the benchmarks in 2005, the Authority informed the petitioner of what was expected from it qua UFG, over the years, up to 2012. The benchmarking process was thought through and UFG standards for the next seven years were given to the petitioner. It was now for the petitioner to work towards the standards. In doing so the respondent No.1 has not acted illegally or contrary to the OGRA Ordinance or Tariff Rules or terms of the License. The petitioner also stressed greatly on the fact that the respondent No.1 did not give due consideration to the variable and critical factors which cause a higher UFG. The entire controversy regarding UFG started with the determination for 2009-10. At the time, the UFG was set at 7%. This was a one time determination deviating from the given benchmarks. The petitioner uses this determination as a basis to justify and rationalize the fact that UFG rate cannot be lower than the 7%. In response, the respondent No.1 argued that 2009-2010 determination cannot form the basis for removing the targets set and for destroying the objective of reducing the UFG. A review of the decision shows that due consideration were given to the factors advanced by the petitioner which lead to a demand for a higher UFG. The decision also reveals that the respondent No.1 has rejected the factors put forward by the petitioner stating its reasons for doing so. I am of the opinion that it is for the respondent No.1 to determine what factors are relevant and what are not for the UFG. This Court can review the decision making process and cannot direct the respondent No.1 to change its determination where due process has been followed. The respondent No.1 has to exercise its discretion in a way to advance the objects of the OGRA Ordinance, Tariff Rules and Licensing Rules. Therefore benchmarks set in the year 2004-2005 are in accordance with the OGRA Ordinance, Rules and License.

27. On the issue that the respondent No.1 has not set the yardstick regulation on the basis of which benchmarks are set, no case is made out. The respondent No.1 has shown that the yardstick regulations were established with best international practices while accounting for local conditions. The yardstick regulations provide

an incentive to the petitioner to perform better and stay within the acceptable limits. Without the yardsticks the benchmarks could not be set. In fact the benchmarks encourage optimum performance, which means that the yardstick regulations are in place. Hence there is no merit that the yardstick regulations are not set by the respondent No.1.

28. On the argument related to the consultation process, Clause 21.1 provides for a consultation with the licensee and the experts to fix the targets of UFG for each financial year. Admittedly the process of consultation has taken place, but the grievance of the petitioner is that the consultation is an annual process and that the respondent No.1 has rejected the reports filed by the experts and that in doing so they have ignored the meaningful purpose of consultation as provided for under the License. Also argued was the point that the consultation was ignored in an arbitrary manner without cause and that the respondent No.1 first set the UFG at 5.67% and then at 4.7% again without any just cause. Furthermore it was argued that since benchmarking had to be done annually hence the consultation process was to be adopted annually as well. To my mind the arguments raised with respect to meaningful consultation and the law cited does not give credence to the basic argument of the petitioner, being that the respondent No.1 did not rely on any of the reports and advice provided by the experts. The authority is required to maintain a process of open consultation with the experts and the Licensee to set targets to keep the UFG within acceptable limits. The consultation process is meaningful as it gives the authority the information it requires to set the UFG targets. Clause 21 of the License also provides that the licensee shall take all possible steps to keep UFG within acceptable limits. Therefore, the requirement of consultation is guided by the duty of the Licensee, that is the duty of the petitioner, to maintain UFG within acceptable limits. Clause 21.2 provides that the target shall be fixed by the authority. The evaluation criteria provided in Rule 17 of the Tariff Rules guides the authority in setting its targets. Therefore the consultation provided for in the License is a tool used by the respondent No.1 to regulate the petitioner. Furthermore, admittedly consultation took place. However the grievance of the petitioner is that the consultation process should be undertaken annually and should be relied upon. The decision to set UFG target lies with the respondent No.1. It can consider the views of the petitioner and experts, but ultimately it has to set the UFG after evaluating the criteria provided in Rule 17 of the Tariff Rules. Therefore, open consultation can shape the decision making but it cannot control the decision of the respondent No.1. As I have already reasoned that clause 21.2 of the License does not require the process of benchmarking to be undertaken each year, in the same way the process of consultation is also not required to be taken each year.

29. The other challenge is to the Human Resource Cost (HRC) and the provision for doubtful debts which were not allowed by the respondent No.1. Again the argument is that it was done without consideration and the request of the petitioner was denied. It has been suggested that the respondent No.1 has concluded on the basis of an arbitrary exercise of discretion. A review of the decision reveals that in fact it is a reasoned decision on HR benchmark and doubtful debts. The respondent No.1 has

stated in para 9.1.9 of the decision that HR benchmark cost will be fixed after conducting a comprehensive and elaborate study in the matter. Till the final outcome of study, the increase of 10.80% was provisionally allowed, final adjustment to be after implementation of new benchmarks. In view of its findings, the respondent No.1 determined the HR cost at Rs.7.80 million. Since this is not a final determination and adjustment will be made after the new benchmarks have been determined, therefore, there is no basis to challenge this finding as the basic considerations have to be determined with respect to provision for doubtful debt as per para 9.1.65 of the decision. Furthermore, respondent No.1 has required the petitioner to reduce its provision for doubtful debts, yet the petitioner has not reduced this head. The respondent No.1 has given its findings on the issue, reasoning its decision. There is nothing in the Ordinance, Tariff Rules or License on the basis of which the petitioner can seek a direction to the authority to accept its figures for doubtful debts. This falls within the discretion guided under Rule 17 of the Tariff Rules. Hence there is no reason to set aside this finding.

30. On the issue of Late Payment Surcharge (LPS), the petitioner has argued that the respondent No.1 before 10-10-2010 used to treat LPS as operating income but after its decision of 15-10-2010, LPS became non-operating income. Since the respondent No.1 has already accepted that LPS is a non-operating income therefore, the decision with respect to LPS goes against the accepted position of the respondent No.1. A review of the decision shows that the 2010 decision was a one time allowance which the respondent No.1 did not want to grant any further. In para 7.3.10 of the decision the respondent No.1 has stated that LPS as non-operating income will be considered as part of the new tariff regime under consideration. However presently the existing regime treats it as operating income hence, the respondent No.1 rejected the request of the petitioner. Again, there is no procedural impropriety when concluding on LPS. Hence no reason to set aside the decision related to LPS is made out.

31. Finally on the issue of penalty, the petitioner argues that due process was not followed when imposing the penalty and that the quantum of penalty is not in accordance with the rules. Under the Tariff Rules, Rule 20 provides for the imposition of a penalty. Any licensee who contravenes any provision of the OGRA Ordinance, Rules, Order, determination, decision, direction or instruction of the authority shall be punishable with a fine, which may extend to one quarter of one per cent of the annual turnover of the licensee or 20 million rupees whichever is less. If the contravention is continuing with an additional fine, which may extend to one tenth of one per cent of the annual turnover of the licensee or Rs.2 million, whichever is less for every day during which such contravention continue. As per clause 20 (3) a show-cause notice is required so as to give the licensee an opportunity to show cause as to why the penalty should be imposed. The respondent argued that no penalty had been imposed and that the petitioner was interpreting UFG disallowance as a penalty. Hence there was no basis to this challenge. A review of the decision shows that there is no finding on a penalty under Rule 20 of the Tariff Rules. In terms of para 8.2.6 a determination has been made on UFG

disallowance. It is this disallowance factor which the petitioner is interpreting to be a penalty imposed under section 20 of the Tariff Rules. The decision does not show any working related to imposition of penalty as stipulated by the petitioner. Hence no ground is made out on this count.

32. The role and the functions of the respondent No.1 rests in its ability to make decisions that affect the petitioner's performance when providing a public utility, in this case its sui gas. It was established, as per its preamble, to protect public interest while respecting individual rights and to provide effective and efficient regulation. Section 6(2) of the OGRA Ordinance provides that it shall safeguard public interest, that it shall protect the interest of all stakeholders including consumers and the licensees. An important function of the respondent No.1 is the fixation of tariff and prices for natural gas. A critical element in fixing tariff is the exercise of discretion. The Hon'ble Supreme Court of Pakistan in case "Tariq Aziz-ud-Din and others (2010 SCMR 1301)" has laid down seven points for structuring discretion. In the words of the Hon'ble Supreme Court:--

"Wherever wide-worded powers conferring discretion exists, there remains always the need to structure the discretion and it has been pointed out in the Administrative Law Text by Kenneth Culp Davis (page 94) that the structuring of discretion only means regularizing it, organizing it, producing order in it so that decision will, achieve the high quality of justice. The seven instruments that are most useful in the structuring of discretionary power are open plans, open policy statements, open rules, open findings, open reasons, open precedents and fair informal procedure"
The discretion exercised by the respondent No.1 satisfied the test laid down by the Hon'ble Supreme Court of Pakistan. The discretion is not open ended but guided by the OGRA Ordinance, the Tariff Rules and the License Rules. Stakeholders have been consulted including the petitioner and opinions have been reviewed by the respondent No.1. Furthermore, the discretion exercised by the respondent No.1 was after giving due consideration to all the issues raised by the petitioner. Detailed reasons have been given in the decision for the determinations made. There is nothing on the record to show that the respondent No.1 has acted unfairly, unreasonably or contrary to the law and principles of natural justice. The respondent No.1 has applied its mind and reasoned its Decision. Therefore no case for a direction under section 12(2) of the OGRA Ordinance is made out. Consequently, this petition is dismissed.

SAK/S-25/L Petition dismissed.

PLJ 2013 Lahore 250
Present: Mrs. Ayesha A. Malik, J.
AMMARIS MEHTAB CHAUDHRY--Petitioner
versus
VICE CHANCELLOR, SARGODHA UNIVERSITY, etc.--Respondents
W.P. No. 30214 of 2012, decided on 22.2.2013.

Educational Institution--

----Cancellation of admission--Gross violation in admission process--Admission in university, deposited requisite dues with university--Admissions were cancelled at the time when admissions in other universities had already been closed--Question of--Whether university could have cancelled admission--No allegation of procuring admission through chairman admission committee--Validity--Case against petitioner was based on presumption, being that since chairman of admission committee acted contrary to rules, hence, petitioners must have been involved in process of getting admission unlawfully--Neither any show-cause notice was served nor investigation was made against petitioner linking directly to fact of over admission of students by Chairman Admission Committee--No cavil to proposition that once a student was granted admission, a vested right is created in her favour--When a right is created, then admission can only be cancelled by due process of law--Chairman of admission committee acted negligently or against policy but petitioners cannot be held responsible for acts of chairman admission committee--Although it was not computer error nonetheless it is an act stated to be contrary to policy committed by chairman of admission committee--In order to cancel admission, university was obligated to follow due process and prove their case involvement in obtaining admission with connivance of committee for admission for which they were not entitled--Petitioners knowingly got admission contrary to admission policy--University cannot cancel admissions of petitioner, therefore, order cannot be sustained in eye of law--Petition was accepted. [Pp. 253 & 254] A, B, C & D

Mian Jameel Akhtar and Azmat Ali Chohan, Advocates for Petitioner.
Syed Zulfiqar Ali Bokhari and Mian Muhammad Shahid Nazeer, Advocates and Prof. Dr. Muhammad Afzal, University of Sargodha for Respondents.
Syed Nayyar Abbas Rizvi, Addl. A.G. on Courts Call for Respondents.
Date of hearing: 7.2.2013.

JUDGMENT

Through this consolidated judgment, I intend to dispose of Writ Petitions Bearing Nos. 30214/2012, 30569/2012, 30570/2012 and 2029/ 2013 as common questions of law and fact are involved therein.

2. There are 13 Petitioners in the above mentioned Petitions. Facts of the case are almost similar in all the cases. Brief facts are that the Petitioners applied for their

admission in B.S./M.A. English Session 2012-2016/2012-2014 at University of Sargodha, deposited the requisite dues with the University and joined their respective classes. Thereafter, Respondent No. 5 vide order dated 28.11.2012 cancelled the admission of the Petitioners stating that the admissions were given to them without observing the merit policy of the University. Hence these petitions.

3. Learned counsel for the petitioners inter alia contended that the impugned order was issued without any notice to the petitioners. That the petitioners were attending classes, when their admissions were cancelled. He also argued that the order impugned is a non-speaking order. That the admissions of the petitioners were cancelled at the time when admissions in all universities had already closed, therefore, with the cancellation of admission of the petitioners, their one educational year is lost and they would suffer irreparably. Learned counsel for the petitioners prayed that this writ petition be allowed, the impugned order dated 28.11.2012 be set aside and the Petitioners be allowed to join their respective classes.

4. On the other hand, learned counsel for the respondents opposed these petitions on the grounds that the petitioners were admitted to the University against the merit policy and in addition to the approved number of seats mentioned in the Admission Regulations, University of Sargodha. That the names of the petitioners were not on any merit list, hence their admissions were against the University Policy. That the University is well within its right to cancel an admission made contrary to the merit. In this regard, learned counsel relied upon Regulation 4.2.1 of the Admission Regulations 2011 (Amended) 2012 which provides that the admissions contrary to the Regulations are void. That the admission of the petitioners was cancelled in accordance with law and no illegality, whatsoever, has been committed by the respondents, therefore, the instant writ petitions in hand be dismissed.

5. Arguments heard. Record perused.

6. The matter in issue in these petitions is whether the respondent University could have cancelled the admission of the petitioners. The petitioners were granted admission in September, 2012. They attended classes till 28.11.2012 when their admissions were cancelled. Pursuant to a complaint with respect to the admissions in BS and M.A. English Program of the University, a committee reviewed the admission process and came to the conclusion that the Chairman of the Admission Committee admitted 60 students beyond the approved number of seats. These students did not satisfy the merit requirements and were not included in the merit lists issued by the University. The Committee came to the conclusion that a gross violation in the admission process was committed by the Chairman Admission Committee and it was recommended that action be taken against the Chairman of the Admission Committee and the admissions of those students who were admitted without merit be declared null and void. Learned counsel for the respondent-University argued at length. He stated that the admission process was flawed. That the petitioners did not come on any merit list, hence the respondents were well within their right to cancel the admission of the petitioners.

7. The record shows that the Committee which reviewed the admission process did not call the petitioners to inquire as to whether they were involved in any wrongful act for the purpose of procuring admission in the BS English and M.A. English Program of the University. On a query put by this Court, learned counsel for the respondent-University admitted that the petitioners were never called and no inquiry took place in this regard. As a consequence, neither the petitioners were called to explain as to how they got admissions nor their involvement in getting admissions with the connivance of the Chairman Admission Committee was investigated.

8. This Court gave the respondents an opportunity on 21.01.2013 to inquire from the petitioners about their admissions. The transcript of the questions asked by the respondents from the petitioners has been provided to the Court. Review of the transcript shows that the petitioners were asked five questions by the respondent No. 1 but not a single question imputing any fraud or misrepresentation was put to the petitioners with respect to their admissions. No allegation of procuring admission through the Chairman Admission Committee was put to the petitioners. Consequently, the respondents have not been able to show to this Court what illegal act was committed and how they managed to get admissions with the connivance of the Chairman Admission Committee at the relevant time. The entire case of the respondents is based on their understanding that the previous Chairman of the Admission Committee, without adhering to the rules and policy, admitted 60 students over and above the approved number of seats. Essentially, the case against the petitioners is based on a presumption, being that since the Chairman of the Admission Committee acted contrary to the rules, hence the petitioners must have been involved in the process of getting admission unlawfully in the University. Admittedly, neither any show-cause notice was served on the petitioners nor investigation was made against the petitioners linking them directly to the fact of over admission of students by the Chairman Admissions Committee. There is no cavil to the proposition that once a student is granted admission, a vested right is created in his/her favour. As such, when a right is created, then admission can only be cancelled by following due process of law.

9. Cancellation of admission tantamounts to a penalty. In order to impose a penalty, it was necessary for the respondents to follow due process which involved an inquiry, a show-cause notice, hearing and a decision by the competent authority after having heard all those concerned. In this case, the respondents themselves concluded upon an act of over admission and cancelled the petitioners' admissions. As such, they have not proven that the petitioners, in any manner, were involved in obtaining their admissions contrary to the merit and policy.

10. The record produced by the respondents shows that they put up five different merit lists wherein the petitioners' names were not included in any of the merit lists. However, hearing was given to the petitioners at the direction of this Court made vide order dated 21.01.2013. On a question as to how they came to know about the admission, most of the students replied that they were informed telephonically. On the basis of this response, the respondents concluded that the petitioners obtained

their admissions by using unlawful means. At this point, it is necessary to note that during the course of arguments, it was revealed that one of the petitioners namely Suba Khan was adjusted in the L.L.B. Program as his merit satisfied the requirements of the said program.

11. Learned counsel for the respondent-University also argued that he who seeks equity must do equity and must approach this Court with clean hands. He argued that ill-gotten gains cannot be protected through an order of the Court. He placed reliance on the dictums laid down in case titled "Muhammad Ali and 11 others Vs. Province of KPK through Secretary, Elementary and Secondary Education, Peshawar and others (2012 SCMR 673)." I have reviewed the judgment cited by learned counsel for the respondent-University and found that the petitioners of that case admittedly got their appointment from the back door without advertising vacancies calling for applications and their appointments were made without observing codal formalities. Based on this information, the Hon'ble Supreme Court of Pakistan concluded that they could not challenge the termination letters issued to them. The case of the petitioners of the instant petitions is distinguishable from the case cited as there is no admission on the part of the petitioners and there is no proven case against the petitioners by the respondents. The admission was liable to be cancelled if the petitioners were found guilty of suppression or misrepresentation of material facts or it was proven that they were involved in procuring their admissions by using unlawful means. In this case, it may be said that the Chairman of the Admission Committee acted negligently or against the policy but the petitioners cannot be held responsible for the acts of the Chairman Admission Committee. Reliance is placed on the ratio laid down in case titled Chairman, Selection Committee/Principal, King Edward Medical College, Lahore and 2 others Vs. WASIF Zamir Ahmad and another (1997 SCMR 15)" wherein it was held that the petitioners of that case were not at fault, hence a vested right was created in their favour which could not be taken back arbitrarily. In the said case, the admission was given, fee was accepted and classes were attended. Subsequently, the University cancelled the admission of the students stating that the petitioners were granted admission through unfair means. It was on account of a computer error that the admission was given, hence the Hon'ble Supreme Court held that for a mistake or negligence on the part of the University, the students could not be made liable. Although in this case, it is not a computer error, nonetheless it is an act stated to be contrary to the policy committed by the Chairman of the Admission Committee. In order to cancel the admission of the petitioners, the respondents were obligated to follow due process and prove their case with respect to the involvement of the petitioners in obtaining admission with the connivance of the Chairman of the Admission Committee for admissions for which they were otherwise not entitled to.

12. There is nothing on record to show that the petitioners knowingly got admission contrary to the admission policy. Without such proof, the respondents cannot cancel the admissions of the petitioners, therefore, the impugned order cannot be sustained in the eye of law.

13. For what has been discussed above, this writ petition is accepted, the impugned order dated 28.11.2012 is set aside and the petitioners are allowed to continue their classes. It is clarified that the petitioners in the interregnum will be treated as they were attending their respective classes and their absence for the said period will not make basis to stop them to appear in the examination for want of attendance.

(R.A.) Petition accepted

2013 C L C 868
[Lahore]
Before Mrs. Ayesha A. Malik, J
Rana SIKANDER HAYAT----Petitioner
Versus
PROVINCE OF PUNJAB through Secretary Irrigation and Power, Punjab and 13 others----Respondents
Writ Petition No.9522 of 2012, heard on 12th February, 2013.

(a) Punjab Irrigation and Drainage Authority (Pilot Farmers Organizations) Rules, 2005---

----R. 16(2)---Constitution of Pakistan, Art.199---Constitutional petition---Maintainability---Disputed questions of fact---Availability of alternate remedy for resolution of dispute---Effect---Dispute concerning election of Chairman of Area Water Beard---Plea of petitioner (candidate for the post of Chairman) was that both he and opposing candidate (respondent) got equal votes during the election, but competent authority declared opposing candidate as the Chairman due to political influence---Plea on behalf of respondents was that petitioner did not even tender his candidacy for Chairmanship of the Board on the day of the election---Validity---Plea of petitioner was denied altogether by the respondents, therefore, disputed questions of fact had arisen, which needed recording of evidence for their resolution---Constitutional jurisdiction of High Court could not be invoked in such circumstances---Even otherwise, Rule 16(2) of Punjab Irrigation and Drainage Authority (Pilot Farmers Organizations) Rules, 2005 provided a remedy for settlement of disputes, which had arisen during the election process---No such remedy had been availed by the petitioner---Constitutional petition was not maintainable in circumstances and was accordingly dismissed with the observation that petitioner was at liberty to avail the remedy available to him in accordance with the law.

(b) Constitution of Pakistan---

---Art. 199---Constitutional jurisdiction of High Court---Scope---Disputed questions of fact---Where such questions arose, constitutional jurisdiction of High Court could not be invoked.

(c) Punjab Irrigation and Drainage Authority (Pilot Farmers Organizations) Rules, 2005---

----R. 16(2)---Dispute concerning election of Chairman of Area Water Board---Resolution of such dispute---Scope---Rule 16(2) of Punjab Irrigation and Drainage Authority (Pilot Farmers Organizations) Rules, 2005 provided a remedy for settlement of disputes, which had arisen during the election process---Such dispute had to be decided by the Authority, a duly authorized officer of the Authority or by

a dispute resolution committee constituted by the Authority on the application of an aggrieved person.

Barrister Muhammad Ahmad Pansota for Petitioner.
Ghazanfar Pasha and Javed Akhtar Program Director for Respondents.
Date of hearing: 12th February, 2013.

JUDGMENT

MRS. AYESHA A. MALIK, J.--- Through this Writ Petition, the petitioner has prayed that the Verbal Declaration dated 11-4-2012 made by respondent No.2 declaring respondent No.9 as Chairman of Area Water Board, Lower Bari Doab Canal (LBDC) be declared illegal, void and without any lawful authority.

2. Brief facts of the case as narrated in the Writ Petition are that under Punjab Irrigation and Drainage Authority Act, 1997 (the Act), the Pilot Area Water Boards have been established in LCC(E) Circle, Faisalabad, CRBC area of D.G. Khan comprising farmers of the distributaries duly elected by the farmers of the area. The process of establishing Area Water Board Sahiwal Circle was initiated by the respondents and 12 farmers namely respondents Nos.4 to 14 were elected as Members Area Board, LBDC Circle, Sahiwal. The petitioner Rana Sikandar Hayat is the elected member of the Area Water Board Unit One Balloki. Respondent No.2 under Punjab Irrigation and Drainage Authority (Pilot Farmers Organizations) Rules, 2005 called a meeting for 11-4-2012 vide letter dated 28-3-2012 to elect the Chairman and Vice-Chairman of the Area Water Board, LBDC (the Board). The petitioner along with 5 other Members of the Area Water Board, LBDC namely respondents No.4 to 8 reached the PIDA Building, Sahiwal at 11 a.m. and orally announced his candidacy for the Chairmanship of the Area Water Board, LBDC. Respondent No.9 namely Rai Habib Ullah also declared his candidacy for the chairmanship. Both the candidates got equal 5 votes each but respondent No.2, without any lawful reason, declared respondent No.9 as the successful candidate verbally, the same day, i.e. 11-4-2012 which is under challenge in this writ petition.

3. Learned counsel for the petitioner inter alia contended that respondent No.2 has acted illegally and unlawfully and has, under political influence, declared respondent No.9 as the successful candidate of the Board. He averred that six Members of the Board were on petitioner side, therefore, respondent No.9 could not be declared as the successful candidate for the chairmanship. He pointed out that in the event of absence of consensus, written nominations under Rule 6 of the Election Manual were required but neither written nominations were sought nor submitted by the candidates. He maintained that Rule 2 of the Election Manual was also ignored altogether as no written consent of the Members was obtained by respondent No.2. Learned counsel prayed that this writ petition be allowed and the impugned declaration dated 11-4-2012 be declared null and void.
Conversely, learned counsel for the respondents vehemently opposed this writ petition. He stated that there is nothing on record to show that the petitioner even

tendered his candidacy for the chairmanship of the Board. He further states that nomination papers for the election were duly sought and submitted only by respondents Nos.9 and 13 for chairmanship and vice-chairmanship respectively. Learned counsel for the respondents submits that on the fateful day, eight members were present but the petitioner and respondent No.4 left the room where the election was to be conducted. That after about half an hour of their leaving the room, announcements for conducting election were made but the said two persons did not enter in the election room. That the election was conducted and respondents Nos.9 and 13 were declared Chairman and Vice-Chairman respectively. Learned counsel for the respondents avers that no illegality was committed in the election process and this Writ Petition having no force is liable to be dismissed.

5. Arguments put forth by both sides have been heard and record made available before me also reviewed.

6. The grievance of the petitioner is that in pursuance to letter dated 28-3-2012 issued by respondent No.2 went into a meeting held on 11-4-2012 to elect Chairman and Vice-Chairman of Area Water Board, LBDC. He as well as respondent No.9 being elected members presented themselves as candidates for the chairmanship of the Board. According to the petitioner, the votes were cast wherein both the candidates for the chairmanship got equal 5 votes each but respondent No.2 under the influence of respondent No.8 who is an MPA of the area declared respondent No.2 as the Chairman unlawfully and illegally. However, the whole story narrated by the petitioner has been denied altogether by the respondents saying that there were only eight elected members present in the meeting out of which the petitioner and respondent No.4 left the room where the election was to be conducted and did not come back. Learned counsel for the respondents has also submitted before the Court that the election was conducted fairly and justly in the presence of the members. In the circumstances, since the plea taken by the petitioner is denied altogether, therefore, disputed questions of fact have arisen which need recording of evidence for their resolution. It is settled law that where disputed questions of fact arise, constitutional jurisdiction cannot be invoked.

7. Even otherwise, under subsection (2) of section 16 of the Punjab Irrigation and Drainage Authority (Pilot Farmers Organizations) Rules, 2005, a remedy has been provided for settlement of dispute if any arises during the election process. Section 16 of the said Rules is reproduced as under:---
"16. Elections.--- (1) Elections under these rules shall be held and the lists of the eligible voters shall be prepared and revised in accordance with the regulations.
(2) All election disputes and disputes relating to the voter lists shall be decided by the Authority, a duly authorized officer of the Authority or by a dispute resolution committee constituted by the Authority on the application of an aggrieved person."
Bare reading of subsection (2) above shows that in the event of any dispute arising out of the election process, the matter will be referred to the Authority, a duly Authorized Officer of the Authority or by a dispute resolution committee constituted by the Authority on the application of an aggrieved person for its

resolution. No such remedy has been availed by the petitioner rather this Writ Petition has been preferred. Since remedy for redressal of a dispute has been provided in the Act, section 3 of Law Reforms Ordinance, 1972 is fully attracted in the case which provides that where remedy of appeal, review, revision or so has been provided, constitutional jurisdiction cannot be invoked. As such, this writ petition is not maintainable.

8. For the aforementioned seasons, this writ petition is dismissed. The petitioner is, however, at liberty to avail the remedy available to him in accordance with law.

MWA/S-26/L Petition dismissed.

P L D 2013 Lahore 476
Before Mrs. Ayesha A. Malik, J
TAHIR RIAZ CHAUDHRY---Petitioner
Versus
CHANCELLOR, UNIVERSITY OF THE PUNJAB, LAHORE and 3 others---Respondents
Writ Petition No.16961 of 2012, decided on 15th January, 2013.

(a) Constitution of Pakistan---

----Art. 199---Writ of certioraie---Petition for writ of certiorari could be filed by an "aggrieved person".

(b) University of the Punjab Act (IX of 1973)---

----Ss. 11-A, 11(8), 10(i), 11(1) & 11(2--6)---Constitution of Pakistan, Art.105---Functions of Chancellor of the Punjab University (Governor of the Province)---Advice of Chief Minister---Governor of the Punjab as Chancellor of the University was an "officer of the University"---Chancellor would act and be bound in the same manner as Governor of a Province would act and was bound under Art.105 of the Constitution.

(c) University of the Punjab Act (IX of 1973)---

----S. 11(8)---All functions performed by the Chancellor of the University were either executive or judicial and there was no legal basis upon which, the functions of the Chancellor could be so distinguished.

(d) University of the Punjab Act (IX of 1973)---

----S. 11(8)---Constitution of Pakistan, Art.105---Functions of Chancellor (Governor of the Province)---Advice of Chief Minister---Chancellor of the University (Governor), while performing his functions, was bound in the same manner as the Governor of the Punjab---Article 105 of the Constitution provided that the Governor, while performing his functions would act on and in accordance with the advice of the Chief Minister and said Article did not distinguish the functions of the Governor.
Messrs Norwich Union Fire Insurance Society Ltd. v. Muhammad Javed Iqbal and another 1986 SCMR 1071 ref.

(e) University of the Punjab Act (IX of 1973)---

----Ss. 11-A & 11(8)---Constitution of Pakistan, Art.105---Functions of Chancellor (Governor of the Province)---Advice of Chief Minister---Powers and functions of the Chancellor of the University were subject to the advice of the Chief Minister as provided by the Constitution and Constitution had not drawn any distinction

between the executive and judicial functions of the Governor, hence no distinction would be read into S.11(8) of the University of the Punjab Act, 1973---To read the distinction, drawn with reference to the functions of the Chancellor, in S.11(8) of the Act, would go against the mandate of Art.105 of the Constitution.

(f) University of the Punjab Act (IX of 1973)---

----S. 11-A---Constitution of Pakistan, Art.105---Advice of the Chief Minister---Chancellor (Governor of the Province) was bound by the advice of the Chief Minister.

Hafiz Tariq Naseem for Petitioner.
Ch. Amir Rehman for Respondent No.5.
Shahzad Shaukat for Punjab University.
Aatir Mahmood for Respondent No.1.
Syed Nayyar Abbas Rizvi, Addl.A.G.
Date of hearing: 21st December, 2012.

JUDGMENT

MRS. AYESHA A. MALIK, J.---This writ petition impugns Order No.GS (Univ)3-12/2012-266 dated 6-6-2012 (Impugned Order).

2. The brief facts of this case are that the petitioner is an Assistant Professor in the department of Social Work, University of the Punjab, New Campus, Lahore. He was appointed Teacher Incharge Department of Social Work w.e.f. 27-12-2011. Respondent No.5 was appointed as Associate Professor on 21-11-2007 w.e.f 30-10-2005 by the Vice-Chancellor of the University. His appointment was challenged in W.P No.319 of 2008. In terms of order in Writ Petition No. 319 dated 27-9-2011, the matter was taken up by the Syndicate of the University. On 27-12-2011 the Syndicate decided that the appointment of respondent No.5 was not in accordance with the law, hence the appointment order was withdrawn with immediate effect. The petitioner was appointed Teacher Incharge on 27-12-2011 vide Order No. D/20912/Est-1.

3. Against the order of 27-12-2011, the respondent No.5 filed a departmental appeal. The appeal remained pending and the respondent No.5 filed a revision petition under section 11-A of the University of Punjab Act, 1973 (the Act). The respondent No.1 accepted the revision petition of the respondent No.5 by his order dated 6-6-2012. The respondent No.5 was restored to his original position with all back benefits.

4. The petitioner challenged the said order dated 6-6-2012 through instant petition. Learned counsel for the petitioner states that the case of the petitioner is that the respondent No.1 being the Governor of the Province of Punjab and the Chancellor of the University of Punjab is bound by section 11(8) of the Act, such that the

respondent No.1 can only exercise powers upon the advice of the Chief Minister, in terms of Article 105 of the Constitution of the Islamic Republic of Pakistan, 1973 (the Constitution). The petitioner has placed reliance on a case titled as "Aamer Raza Ashfaq and another v. Dr. Minhaj Ahmad Khan and another" (2012 SCMR 6), wherein it has been held that the powers of Chancellor of the University have been defined under the Act. The judgment holds that section 11(8) of the Act incorporates a constitutional provision by reference. It explains that:--

"When construing such a piece of legislation, the Court has to examine and keep in mind three things, the statement of reasons and objects given therein, the statement of objects given in other laws in pari materia to the one under consideration and the mandate of the Constitutional provision which stands adopted by way of reference."

To interpret section 11(8) of the Act the Supreme Court held that:--

"Verba relata hoc maxime operantur per referentiam ut in eis inesse vindentur i.e. words to which reference is made in an instrument have the same effect and operation as if they were inserted in the clause referring to them."

On the functions of the Chancellor under the Act the Supreme Court held that:--

"Except otherwise so provided under the Constitution, the President and Governor are bound by the advice tendered by the Prime Minister and the Chief Minister respectively and in the manner as provided in the afore-referred provisions of the Constitution. The Governor while acting as Chancellor is a statutory functionary. By specific mention of Article 105 of the Constitution in section 11(8) of the Act and in laying down that "in the performance of his functions under the Act, the Chancellor shall act and be bound in the same manner as the Governor of a Province acts and is bound under Article 105 of the Constitution of Islamic Republic of Pakistan", the Legislature has blended the same value of supremacy of the Parliament/Provincial Assembly which underlie the adopted Constitutional provision."

Essentially on the basis of the Supreme Court Judgment (supra), learned counsel for the petitioner has argued that the Governor of Punjab while acting as the Chancellor of the University is bound by the advice of the Chief Minister of the Province of Punjab. It was argued that the Chancellor cannot act other than on the advice of the Chief Minister and as such the Impugned Order violates Section 11 (8) of the Act as well as the spirit of Article 105 of the Constitution.

5. Learned counsel for the respondent No.5 took up the preliminary objection that the instant petition is a writ of certiorari, which can only be filed by an aggrieved person. He argued that the petitioner is not an aggrieved person, hence the instant petition is not maintainable. To advance this point, he argued that the petitioner has no vested right against the position of Teacher In charge. That his appointment was a stop gap arrangement. Therefore, he could not challenge the order of the Syndicate dated 27-12-2011. He further argued that the order of the Syndicate dated 27-12-2011, which cancelled the appointment of respondent No.5, was an illegal order as the Syndicate was bound to refer the matter to the Chancellor under the Act. He argued that in the event of a difference between the Selection Board and the Syndicate, the matter has to be referred to the Chancellor, whose decision is to be final. He argued that this is a statutory requirement and the Impugned Order

corrected an illegality, hence the said order cannot be interfered in writ jurisdiction. He stated that when an order corrects an illegality, even if the said order is without jurisdiction, it should not be interfered with. He placed reliance on the cases titled "Messrs Norwich Union Fire Insurance Society Ltd. v. Muhammad Javed Iqbal and another" (1986 SCMR 1071) and "Dhani Khan v. M.Z. Khan (Member Board of Revenue, West Pakistan) and another" (PLD 1963 (W.P) Lahore 583). He also argued that the petitioner did not qualify for the position, as he was not eligible as per the requirements of the University. Therefore, appointing him in the first case was in contravention to the rules of the University. Reliance is placed on an unreported judgment dated 6-4-2011 passed in C.As. Nos. 987 to 988 of 2010.

6. Learned counsel for the respondent No.1 argued that respondent No.1 while exercising powers under section 11-A of the Act was not bound by the advice of the Chief Minister. His powers under section 11-A of the Act are of a judicial nature, which cannot be bound by the advice of the Chief Minister. This fact distinguishes, the instant case from the case cited at 2012 SCMR 6 (supra) as the said judgment is a case regarding the appointment of the Vice Chancellor of the University, where the advice of the Chief Minister was given but not followed. However, the instant case relates to the exercise of the statutory power to review by the respondent No.1, which power is not subject to the advice of the Chief Minister.

7. Learned Law Officer while supporting the arguments of learned counsel for the respondent No.1 further elaborated the distinction from the cited judgment with reference to the exercise of powers by the Chancellor of the University. While exercising executive powers, the Chancellor is bound by the advice of the Chief Minister, however, while exercising judicial powers, as contemplated under section 11-A of the Act, the Chancellor is not bound by the advice of the Chief Minister. He argued that the judicial power is not dependent of any advice. Under section 11-A of the Act, the Chancellor sits as an officer of the University, who has been granted the power of revision just as he has been granted the power of review under section 43 of the Act. Both these sections require the Chancellor to exercise a judicial function, which exercise of power cannot be made dependent on the advice of the Chief Minister. The same would render the entire exercise as redundant, as the spirit of judicial power lies in the exercise of independent authority. As such it would be an exercise in futility if the Chancellor were to seek the advice of the Chief Minister for deciding matters of the judicial side. It goes against the spirit of both the sections.

8. I have heard learned counsel for the parties and reviewed the record available on the file.

9. The main issue raised in this writ petition is with respect to the exercise of power by the Governor of the Province as Chancellor of the University of Punjab. The question is whether the Chancellor is bound by the advice of the Chief Minister of the Province while exercising his power to review under section 11-A of the Act. Although, the petitioner's counsel has placed absolute reliance on the Supreme

Court judgment (supra), the counsel for the respondents have drawn a distinction with respect to executive functions and judicial functions exercised by the Chancellor of the University of the Punjab. They have argued that the judgment is with reference to the executive functions and not the judicial functions of the Chancellor. That when the Chancellor exercises his judicial authority he is not bound by the advice of the Chief Minister. Therefore I find that this point needs consideration from this Court.

10. The counsel for the respondent No.5 raised a preliminary objection with respect to the maintainability of this petition. I find that the objection has no merit. The petitioner is an aggrieved person for the purposes of this petition within the meaning of Article 199 of the Constitution. The petitioner is an employee of the University of Punjab, who was appointed as Teacher Incharge on 27-12-2011. His appointment was set aside by the Impugned Order issued by the respondent No.1. He is directly and adversely affected by the Impugned Order. A direct injury is caused to the petitioner as his appointment as Teacher Incharge was set aside. His interest has been prejudiced. This prejudice and injury give rise to the right to question and challenge the authority exercised by the respondent No.1 whilst setting aside the appointment of the petitioner. Reliance on the case titled "Dhani Khan v. M.Z. Khan (Member Board of Revenue, West Pakistan) and another" (PLD 1963 (W.P) Lahore 583) does not advance the case of the respondent No.5 as in that case the petitioner sought appointment to the position of lambardar. The Court found that he had no vested right to the position of lambardar hence it cannot be challenged in a writ of certiorari. The instant case is not one where an appointment is sought, but one where an appointment was made and thereafter set aside by virtue of the Impugned Order. The petitioner being the affected party can question the exercise of authority when issuing the Impugned Order. Hence, I find this petition is maintainable.

11. On the legal question, with reference to the powers exercised by the respondent No.1, the Supreme Court Judgment (supra) finds that the Chancellor while exercising its functions under the Act is bound by the advice of the Chief Minister. The case pertains to the appointment of the Vice-Chancellor of the University. Learned counsel have drawn an inference to the fact that appointment is an executive function where as the power of revision under 11-A of the Act is a judicial function. Although the issue with respect to the interpretation of section 11(8) of the Act has been decided by the honorable Supreme Court, what needs to be seen is whether section 11(8) of the Act draws any distinction between the executive function and the judicial functions of the Chancellor of the University. The Chancellor is an officer of the University in terms of section 10(i) of the Act. Section 11(1) of the Act provides that the Governor of Punjab, shall be the Chancellor of the University. Section 11(2 through 6) provides for the functions of the Chancellor. Section 11(8) of the Act provides that:--
"In the performance of his functions under the Act the Chancellor shall act and be bound in the same manner as the Governor of a Province acts and is bound under Article 105 of the Constitution of the Islamic Republic of Pakistan."

Section 11-A of the Act provides that:--

"The Chancellor may, of his own motion or otherwise, call for and examine the record of any proceedings in which an order has been passed by any authority for the purpose of satisfying himself as to the correctness, legality or propriety of any finding or order and may pass such orders as he may deem fit."

The argument put forward by the learned counsel for the respondents and the learned Law Officer is that section 11(8) of the Act, will apply to executive functions but will not apply to the Chancellor's judicial functions, such as the power of revision under section 11-A of the Act or the power of review under section 43 of the Act. To my mind, this argument is fundamentally flawed. In the first case section 11(8) applies to all functions of the Chancellor under the Act. It does not distinguish between executive or judicial functions. The functions of the Chancellor are provided for in the Act and section l1(8) shall apply to all functions performed by the Chancellor. furthermore there is also no legal basis upon which this distinction can be read into section 11(8) of the Act as such a reading would negate the objective of the section. A bare reading of section 11-A of the Act, reveals that the Chancellor may of his own motion or otherwise examine or call for the record of any proceeding where an order was passed by any authority, to satisfy himself on the legality of the findings or the order so passed and may pass such an order as he deems fit. The ability to exercise power of his own motion and to pass any order as he deems fit with respect to any matter pending before any authority of the University means that the Chancellor can exercise his discretion with respect to all such matters where he would otherwise be bound by the advice of the Chief Minister. This goes against the requirement of section 11(8) of the Act and negates its meaning and purpose. Section 11(8) of the Act categorically provides that the Chancellor of the University, while performing his functions under the Act is bound in the same manner as the Governor of the Province while performing his function under the Constitution. Article 105 of the Constitution provides that the Governor while performing his function shall act on and in accordance with the advice of the Chief Minister. Article 105 of the Constitution draws no distinction with reference to the functions of the Governor as contemplated by the Constitution. The Constitutional mandate in this regard has already been discussed in the Judgment (supra), and the Court has held that the Chancellor is bound by the advice of the Chief Minister just as the Governor is bound by the advice of the Chief Minister.

12. The Constitution provides the structure of authority with respect to the office of the Governor of the Province. The same structure has been imported into the Act by virtue of section 11(8). The powers and the functions of the Chancellor are subject to the advice of the Chief Minister as provided by the Constitution. The Constitution draws no distinction between the executive or judicial functions of the Governor. Hence no such distinction can be read into section 11(8) of the Act. To read the distinction drawn with reference to the functions of the Chancellor, in section 11(8) of the Act, would go against the mandate of Article 105 of the Constitution. Section 11(8) of the Act must be read to give effect to the same

structural mandate as provided in Article 105 of the Constitution. Another reason for not accepting the distinction drawn by the respondents counsel with respect to the functions of the Chancellor i.e. judicial and executive power, is that by drawing this distinction, the Chancellor could, under the garb of judicial power, exercise discretion where advice is required. The whole concept of acting on the advice of the Chief Minister would disappear.

13. Therefore, the Chancellor is bound by the advice of the Chief Minister while exercising powers under section 11-A of the Act. The petition is allowed as the Impugned order is an illegal order passed without authority, hence set aside. There is no order as to costs.

JJK/T-3/L Petition allowed.

2013 C L C 1457
[Lahore]
Before Mrs. Ayesha A. Malik, J
NAZAR ELAHI----Petitioner
Versus
GOVERNMENT OF PUNJAB and others----Respondents
Writ Petition No.20018 of 2012, decided on 6th May, 2013.

Constitution of Pakistan---

----Arts. 25, 27 & 34---Punjab Women Empowerment Package, 2012---Constitutional petition---Discrimination---Scope---Petitioner assailed relaxation of three years to female candidates in their upper age limit---Validity---Equal protection of law was guaranteed under Art.25 of the Constitution, to every citizen and also required that the State would undertake action for protection of women and children---Constitution had itself recognized and created classification which needed special protection---Any act of government which aimed to protect women and children was affirmative action and did not offend Art.25(1) of the Constitution---Age relaxation for female candidates met standard of permissible affirmative action, hence was protected under Art.25(3) of the Constitution---Age relaxation offered to female candidates did not violate Art.27(1) of the Constitution and it promoted full participation of women in national life as contemplated under Art.34 of the Constitution, which provided that steps would be taken to ensure full participation of women in all parts of National life--- No discrimination was made out against petitioner on account of the fact that petitioner was not offered three year age relaxation which female candidates were given---Petition was dismissed in circumstances.

Miss Rabia Khan and 3 others v. Province of Sindh 2012 YLR 1801 and Syeda Sadia and 2 others v. Baha-ud-Din Zakria University through Vice-Chancellor and 3 others 2011 YLR 2867 ref.
Rana Muhammad Nawaz for Petitioner.
Waqas Qadeer Dar, Asst. A.-G. for Respondent.
Date of hearing: 18th April, 2012.

JUDGMENT

MRS. AYESHA A. MALIK, J.--- Through this petition the petitioner has impugned the proclamation wherein a relaxation of age was offered to female candidates but the same relaxation of age was not offered to male candidates. The petitioner claims that he is being discriminated against which is in contravention to Articles 4 and 25 of the Constitution of Islamic Republic of Pakistan, 1973 (the Constitution).

2. The basic facts are that through a proclamation in the newspaper applications were invited for the posts of Educators. As per clause 3 of the proclamation the

maximum age for a candidate is 35 years, inclusive of five years age relaxation. The Government of Punjab granted a further age relaxation upto three years to female candidates in terms of the Punjab Women Empowerment Package, 2012, meaning thereby that female candidates up to the age of 38 were eligible to apply for the post of Educator. The petitioner moved an application to the respondent No.1 to request for an age relaxation of three years being similar to that which was being offered to female candidates. The petitioner's request was not considered. The petitioner made several requests to the respondent No.1 and ultimately filed the instant petition before this Court.

3. Written reply has been filed by the respondents Nos.2 and 3 as well as by the respondent No. 1 . In terms of the replies filed, it is stated that the petitioner cannot be considered for age relaxation on account of the Recruitment Policy, 2011 wherein it is stated that the maximum age limit is 35 years of age across the board and no further age relaxation will be allowed. It is further explained that the age relaxation offered to female candidates is on account of the Punjab Women Empowerment Package, 2012 (PWEP). Hence in terms of the replies filed the age relaxation is offered only to female candidates under the PWEP.

4. The case of the petitioner, as argued by the learned counsel is that every citizen is equal before the law and is entitled to equal protection of the law. Furthermore, in terms of Article 27 of the Constitution, no citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground of race, religion, caste, sex, residence or place of birth. Learned counsel argued that it is the fundamental right of the petitioner to be given the same treatment as that of the female candidates and that there is no justification for giving only female candidates an age relaxation of three years. He argued that this act of the respondents is discriminatory and offends Article 27(1) read with 25(1) of the Constitution.

5. Learned Law Officer argued that the Punjab Women Empowerment Package, 2012 was introduced in terms of Article 25(3) of the Constitution. It represents a concerted effort on the part of the Provincial Government to acknowledge the mandate of Article 25(3) read with Article 24 of the Constitution. The PWEP is protected under Article 25(3) of the Constitution and represents an affirmative action on the part of the Government to protect the rights of women. He placed reliance on case titled Miss Rabia Khan. and 3 others v. Province of Sindh (2012 YLR 1801) and Syeda Sadia and 2 others v. Baha-ud-Din Zakria University through Vice-Chancellor and 3 others (2011 YLR 2867) in support of his contention that Article 25(3) of the Constitution provided for affirmative action for the protection of women.

6. I have heard the learned counsel and have reviewed the record available on the file.

7. The point that needs consideration in this case is whether the age relaxation of three years provided for in the proclamation, for the benefit of female candidates violates Article 27(1) of the Constitution. Article 27 of the Constitution reads as follows:---

"No citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex residence or place of birth. ."

Article 25 of the Constitution being the equal protection Article reads as follows:---

"(1) All citizens are equal before law and are entitled to equal protection of law.

(2) There shall be no discrimination on the basis of sex.

(3) Nothing in this Article shall prevent the state from making any special provision for the protection of women and children."

8. It is clear from reading both the Articles that there shall be no gender based discrimination. Article 25 ensures equal treatment under the law however Article 25(3) provides that nothing in this article shall prohibit the State from making special provisions for the protection of women and children. This means that the Constitution has given the State a remedial power to protect women and children notwithstanding the fact that everyone is to be treated equally under the law. Article 25 of the Constitution guarantees equal protection to every citizen and also requires that the State undertake affirmative action for the protection of women and children. Therefore the Constitution has itself recognized and created a classification which needs special protection. Hence an act of the Government which aims to protect women and children will be an affirmative action which does not offend Article 25(1) and equal treatment. The next question is whether Article 27 is offended by the age relaxation offered to female candidates. Article 27(1) provides that no citizen shall be discriminated against in respect of any appointment he is otherwise qualified for only on the ground of race, religion, caste, sex or place of birth. Article 27 provides for a safeguard against discrimination in service. The safeguard ensures that the State will not commit gender based discrimination. However this Article does not prohibit affirmative action to protect the female gender. The age relaxation offered to females under PWEP does not discriminate against the petitioner but in fact is part of an affirmative action to protect women by creating opportunities for women professionally so that they can apply for jobs keeping in view the time spent for responsibilities such as marriage and children. Affirmative action for women and children is the remedial power given to the Government to equalize opportunities by creating special dispensation or special standards for them so as to equalize their opportunities. A similar view was considered in 2012 YLR 1801 (supra) where it was held that:---

"Furthermore, the reliance placed on Article 25 of the Constitution is also misplaced. Clause (2) of this Article prohibits gender based discrimination, but clause (3) allows positive discrimination for the "protection" of women. Now fundamental rights serve as a check on State power, i.e., they prohibit the relevant organ of the State from doing what it otherwise could do (whether in the exercise of legislative or executive power). In other words, fundamental rights do not confer

powers on the State; they derogate from its powers and draw a line which cannot be crossed".

9. The question which also needs to be answered is whether the action undertaken by the Government is permissible affirmative action to protect women. In the instant case the PWEP was introduced under Article 25(3) of the Constitution. As part of the PWEP female candidates were given an age relaxation up to three years, for fresh induction, over and above the normal age for the purpose of encouraging employment in the public sector and to enable women to join professional career after marriage and child bearing. In the instant case, as explained by the learned Law Officer and provided for in the PWEP the intention of the PWEP is to give women an equal opportunity to apply for jobs given that a certain amount of their time may have been utilized for marriage and child bearing. The aim therefore is to provide women a level playing field so that they have equal representation and opportunities in the different activities of national life. To my mind the Government has a compelling reason for undertaking affirmative action by allowing age relaxation upto 38 years for female candidates. The decision to offer female candidates a three year age relaxation is taken to remedy an imbalance. And finally, even though it suggests different treatment the object is to promote gender equality.

10. I am of the opinion that the age relaxation for female candidates meets the standard of a permissible affirmative action, hence is protected under Article 25(3) of the Constitution. I am also of the opinion that the age relaxation offered to female candidates does not violate Article 27(1) of the Constitution. In fact it promotes the full participation of women in national life as contemplated under Article 34 of the Constitution, which provides that steps shall be taken to ensure full participation of women in all parts of National Life.

11. Therefore, I find that no discrimination is made out against the petitioner on account of the fact that the petitioner is not offered the three years age relation which female candidates are given. Petition dismissed.

MH/N-25/L Petition dismissed.

2013 C L C 1491
[Lahore]
Before Mrs. Ayesha A. Malik, J
MUHAMMAD AKHTAR SHERANI----Petitioner
Versus
GOVERNMENT OF PUNJAB through Chief Secretary, Lahore and 4 others----Respondents
Writ Petition No.13074 of 2013, heard on 10th July, 2013.

(a) Punjab Textbook Board Ordinance (XLI of 1962)---

----Ss. 11, 3 & Preamble---Punjab Curriculum Authority Act (XLIX of 2012) Ss.6 & 2(a)---National Textbook and Learning Materials Policy and Plan of Action (2007 Policy), Clause 2.2---Constitution of Pakistan, Art.199--- Constitutional petition ---Selection, development and regulation of manuscripts for textbooks---Selection of manuscripts by Punjab Curriculum Authority---Role and functions of Punjab Textbook Board---Scope---Petitioner was an employee of the Punjab Textbook Board and sought direction to the effect that the Punjab Textbook Board be allowed to participate in the bidding process for the selection of textbooks to be carried out by the Punjab Curriculum Authority---Contention of the petitioner was, inter alia, that per S.6 of the Punjab Curriculum Authority Act, 2012, the Punjab Textbook Board, as an "agency"; could participate in open competition for selection of manuscripts--- Validity---- Punjab Textbook Board in terms of the Preamble to the Punjab Textbook Board Ordinance, 1962 was a facilitator that was to make arrangements for the production and publication of textbooks, reading materials etc.---Section 11 of the Punjab Textbook Board Ordinance, 1962 did not provide that the Punjab Textbook Board should participate in publication of textbooks itself---Section 6, Punjab Curriculum Authority Act, 2012 provided that the Punjab Curriculum Authority shall approve standards of education and manuscripts produced by any person or agency before such textbooks were prescribed; however the said section did not explain as to when the Punjab Textbook Board could participate for publication of textbooks for selection by the Punjab Curriculum Authority and the same was explained by the National Textbook and Learning Materials Policy ("Policy")---Clause 2.2 of said Policy clearly provided that the Punjab Textbook Board could only participate in the publication of a manuscript if no letter of interest for the same was submitted by a private publisher that too after re-advertisement---Punjab Textbook Board was, therefore, essentially a regulator and facilitator, that had to make schemes for publication of textbooks for all stages for implementation of educational policy---Section 6(1)(b) of the Punjab Curriculum Authority Act, 2012 provided that the Authority could approve standards of education and manuscript of a textbook produced by any person or agency and such ability to produce a manuscript of a textbook should be in accordance with the clear objective laid down in the National Textbook and Learning Materials Policy, 2007---Punjab Textbook Board which was a regulator, should not therefore, for commercial purposes, participate in the publication process and such act of the Regulator/Punjab Textbook Board was in direct conflict with its

primary function and would reduce the efficiency and objectivity of its regulatory function--- Scheme of law did not visualize the participation of the Punjab Textbook Board in open competition for selection of manuscripts of textbooks--- Ability of employees of the Punjab Textbook Board to put forward their own manuscripts for selection by the Punjab Curriculum Authority also undermined their role as regulators and if the employees of a regulator participate in a commercial venture, then the basic role of the regulator disappears---Petitioner, who was an employee of the Punjab Textbook Board had no right on its own as an employee of the Punjab Textbook Board, which was an agency of the Government of Punjab to participate in an open competition which the Punjab Textbook Board, was to regulate---National Textbook and Learning Materials Policy, 2007 was discussed and approved by Provincial Ministers to ensure the production of standard textbooks through fair competition in their respective Provinces and the role of the Punjab Textbook Board was not to undertake to produce textbooks itself, unless an expression of interest was advertised and no response was received pursuant to the first advertisement and on second advertisement, it was only after the second advertisement that the Textbook Board could produce and publish a textbook---No conflict existed between the National Textbook and Learning Materials Policy, 2007, Punjab Textbook Board Ordinance, 1962 and the Punjab Curriculum Authority Act, 2012---Constitutional petition was dismissed.
Writ Petition No.31842 of 2012 and I.C.A. No.50 of 2013 ref.

(b) Punjab Textbook Board Ordinance (XLI of 1962)---

----S. 3---Constitution of Pakistan, Art.199---Constitutional jurisdiction of High Court---Scope---Aggrieved person---Petitioner was an employee of the Punjab Textbook Board, and General Secretary of the Punjab Textbook Board Employees Welfare Society, and sought direction for, inter alia, allowing the Punjab Textbook Board to participate in the submission and selection of manuscripts by the Punjab Curriculum Authority---Maintainability of Constitutional petition---Foremost question was whether the petitioner could seek relief for the Punjab Textbook Board which was respondent in the Constitutional petition---Issue of whether the petitioner was an "aggrieved person" or not, could not be simply answered by looking at whether the petitioner was directly or indirectly injured, and instead the question that was to be determined was whether the petitioner had a right to plead a case and seek relief for the benefit of a person who himself was capable and competent to approach the court to plead its own case---Punjab Textbook Board, in the present case, was established under the Punjab Textbook Board Ordinance, 1962 and S.3 of the said Ordinance provided that the Board shall be a body corporate with perpetual succession having a common seal and could sue and be sued in its own name---Constitutional petition by the petitioner/ employee of the Punjab Text Book Board was not maintainable.
Nisar Ahmad and 2 others v. Additional Secretary Food and Agriculture, Government of Pakistan and 3 others 1997 SCMR 299; Muhammad Ayub Khan v. Superintendent, Central Jail and others 1997 SCMR 302 and Ardeshir Cowasjee,

Karachi and 4 others v. Messrs Multiline Associates, Karachi and 2 others PLD 1993 Kar. 237 rel.

(c) Punjab Textbook Board Ordinance (XLI of 1962)---

----Ss. 3 & 11---Punjab Curriculum Authority Act (XLIX of 2012), Preamble & S.6---National Textbook and Learning Materials and Plan of Action (2007 Policy)---Punjab Textbook Board Ordinance, 1962, the Punjab Curriculum Authority Act, 2012 and the National Textbook and Learning Materials Policy, 2007; were all in consonance with each other and no conflict existed between them.

Hafiz Tariq Nasim for Petitioner.
Mrs. Samia Khalid, A.A.-G. along with Rana Muhammad Younas Aziz, Law Officer, Education Department.
Farooq Amjad Meer for Respondent No.5.
Agha Abul Hassan Arif for Respondent No.3.
Date of hearing: 10th July, 2013.

JUDGMENT

MRS. AYESHA A. MALIK, J.--- The petitioner has impugned advertisement dated 13-5-2013 for being illegal and unconstitutional. The petitioner prays that advertisement dated 10-4-2013 may be restored and the respondent No.3 may be allowed to participate in the open competition for publication of textbooks in accordance with law.

2. The grievance of the petitioner is that the respondent No.3 has always participated in the bidding process for approval of manuscript of textbooks before the Punjab Curriculum Authority. Initially an advertisement was published on 10-4-2013 by virtue of which the respondent No.3 was allowed to submit its textbook manuscript with reference to the subject provided in the advertisement. Subsequently the advertisement was set aside by an order of the respondent No.5 and a fresh advertisement was issued on 13-5-2013 whereby the respondent No.3 could not participate in the open competition for selection of textbook manuscript by the Punjab Curriculum Authority.

3. On 28-6-2013 an interim order was issued whereby advertisement dated 13-5-2013 was suspended and the petitioner was allowed to participate in the open competition and submit its application to develop textbooks manuscript in various subjects for different grades. On 8-7-2013 C.M. No.4 of 2013 was moved by the respondent No.5 for recalling of order dated 28-6-2013 and for early hearing of the instant Writ Petition. The case was fixed for 10-7-2013, being today.

4. Learned counsel for the petitioner opened his arguments by relying upon the order of this court dated 3-6-2013. He argued that the respondent No.5 was to file its report and parawise comments. However, the same has not been done. Learned

counsel also argued that C.M. No.4 of 2013 does not pray for recalling of order dated 28-6-20l3. It simply prays that the case be fixed at the earliest and be heard. Finally learned counsel raised the objection that respondent No.5 Mr. Najam Aziz Sethi is the Central Chairman, Pakistan Publishers and Booksellers Association. However, the power of attorney submitted by the learned counsel Farooq Amjad Meer does not bear the signature of Mr. Najam Aziz Sethi. It has been signed by a Vice-Chairman and the Honourary Secretary-General for the Pakistan Publishers and Booksellers Association. The learned counsel argued that the Association has not been arrayed as a party. It is the Chairman of the Association Mr. Najam Aziz Sethi who has been arrayed as a party.

5. Learned counsel for the respondent No.5 argued that the case should be heard on its merits and decided as the interim order passed on 28-6-2013 is against the spirit of the relevant law. He further argued that presently Mr. Najam Aziz Sethi is not the Chairman of the Pakistan Publishers and Booksellers Association; that he himself is the Acting Chairman and he is representing the Association as the Acting Chairman. He argued that the petitioner has not arrayed Mr. Najam Aziz Sethi in his personal capacity but has arrayed the Chairman of the Association who at that time happened to be Mr. Najam Aziz Sethi.

6. After hearing both the counsel on these issues it was decided that the case be heard on its merits as the learned counsel for the respondent No.5 argued that he does not need to file any written reply and comments as he has basic preliminary objections with respect to the maintainability of this petition on the basis of which the case can be decided.

7. That facts of this case as narrated by learned counsel for the petitioner are that the West Pakistan Textbook Board Ordinance, 1962 (1962 Ordinance) established the respondent No.3 in 1962. In 1971 the West Pakistan Textbook Board was substituted by the Punjab Textbook Board by Ordinance V of 1971. Since then the respondent No.3 has been participating and getting approved its manuscripts of various books which have been scrutinized by the competent authority. In 2007 a Policy was formulated by the Federal Government being the National Textbook and Learning Materials Policy and Plan of Action (2007 Policy) whereby a role has assigned to the respondent No.3. However that role was contrary to the 1962 Ordinance. The Punjab Curriculum Authority Act, 2012 (Act of 2012) was promulgated which set out the role of the respondent No.3 and defined the respondent No.3 as an Agency of the Government under section 2(a). Learned counsel argued that the respondent No.5 filed a representation before the Chief Minister on 12-6-2012 to oust the respondent No.3 from the open bidding process. This application was not decided by the then Chief Minister. In the meanwhile, the respondent No.5 became caretaker Chief Minister. The Vice-Chairman of the Pakistan Publishers and Booksellers Association, moved another application on 18-4-2013 again seeking ouster of the respondent No.3 from the open competition for selection of textbook manuscripts. This application was decided by the respondent No.5 in his capacity as caretaker Chief Minister. As a consequence an order was

passed on 2-5-2013, whereby the impugned advertisement dated 13-5-2013 was published, which withdrew the earlier advertisement of 10-4-2013 and in its place invited only publishers to participate in the open competition for selection of textbook manuscripts by the Punjab Curriculum Authority. Learned counsel argued that the respondent No.5 has acted with mala fide intention, as a judge of his own cause. Originally he moved an application himself before the Chief Minister which was never decided and when he became caretaker Chief Minister, he had the same application moved before himself and decided upon it.

8. Learned counsel for the petitioner has also argued that the respondent No.3 has all along participated in the open competition for selection of textbook manuscript by the Punjab Curriculum Authority by virtue of section 6(1)(b) read with section 26 of the Act of 2012. Under this Act, he argued that 'agency' "means any department or organization or directorate of the Government and includes a corporation or other autonomous or semi-autonomous body set up by the Government" and Agency can participate in the production of any manuscript of textbook to be approved by the Punjab Curriculum Authority. Learned counsel has placed reliance on Writ Petition No.31842 of 2012 and its order dated 9-1-2013 as well as I.C.A. No.50 of 2013 and its order dated 23-1-2013 to advance this point. Learned counsel for the petitioner has argued with respect to Article 18 of the Constitution of Islamic Republic of Pakistan, 1973 arguing that the respondent No.3 has a right to participate in the open competition for selection of textbook manuscripts by the Punjab Curriculum Authority. Learned counsel for respondent No.3 supports the arguments of learned counsel for the petitioner. Learned counsel for respondent No.3 was asked by this court to explain why its case was presented to this court through the petitioner. The learned counsel explained that the petitioner is an office-bearer of a welfare association for the employees of Punjab Textbook Board; that the petitioner being employees of the Punjab Textbook Board put-forward their own manuscripts in the open competition bidding process for selection of textbook manuscripts. He argued that the respondent No.3 is an autonomous body which does not receive any financial assistance from the Government and meets its expenses from the fixed profit generated by the sale of textbooks and if ousted from the participation in the open competition the respondent No.3 likely to face financial difficulties. Consequently the employees of the respondent No.3 will face difficulties.

9. Learned counsel on behalf of respondent No.5 raised the objection of locus standi with respect to the petitioner. He argued that the petitioner is an office-bearer of the Punjab Textbook Board Employees Welfare Association who was appointed as the General Secretary by the Chairman Punjab Textbook Board through an order dated 27-4-2013. He places reliance on the office order appended with the petition as Annexure-H. He argued that the petitioner is an employee of the respondent No.3 and as such cannot plead the case of the respondent No.3. He referred to the prayer of the petitioner who seeks the participation of the respondent No.3 in the open competition for selection of manuscripts of textbooks. Learned counsel further argued that the mandate of the respondent No.3 in terms of the 2007 Policy is that it

will be a Regulator to help/support the process of approval of textbooks for use in schools in their respective areas of jurisdiction. He further argued that the policy provided that the Textbook Boards will invite provincial/national publishsers to register their interest or intent and specify for which subjects and grades they intend to develop and submit manuscripts. Where no letter of intent is submitted by private publishers, Textbook Boards will re-advertise and if still no letter of intent is forthcoming then the Textbook Board can develop its manuscript for that subject. He argued that the Textbook Board is a Regulator who is to review the different manuscripts submitted and give its opinion on the same. It is not their mandate to participate in the open competition for selection of manuscripts and thus undertook a commercial venture of publishing its own manuscripts. With respect to the preliminary objection, learned counsel has argued that the petitioner has not filed any order of the caretaker Chief Minister whereby he has decided upon the representation dated 18-4-2013. He argued that the petitioner has relied upon order dated 7-5-2013 issued by the Deputy Secretary (Implementation) whereby he states that the Chief Minister has been pleased to desire that recent advertisement published by Punjab Curriculum Authority to invite manuscripts for textbooks and reading material may be re-advertised in accordance with Text Books and Reading Material Policy 2007 for Group-III books only. Learned counsel argued that the earlier representation filed on 12-6-2012 was decided by the then Chief Minister on 24-1-2013 wherein a policy decision was taken that only the private sector should develop manuscript and the respondent No.3 should act as monitoring and regulating agency. Learned counsel also raised an objection with respect to the maintainability of this petition in view of the section 22 of the Act of 2012 which provides the right of appeal to any person aggrieved by a direction or order of the Authority within 30 days.

10. I have heard learned counsel for the parties at length and reviewed the record available on the file.

11. The foremost question which needs to be decided is whether this petition can be filed by the petitioner who admittedly seeks relief for the benefit of the respondent No.3. Essentially the respondent No.3 has not moved the court against the advertisement dated 13-5-2013 with respect to its inability to participate in the open competition for the publication of selection of textbook manuscripts. Yet it has indirectly argued its case as a respondent in the instant petition through the petitioner who is an office-bearer of the Punjab Textbook Board Employees Welfare Association and an employee of the respondent No.3. Learned counsel for the petitioner has relied upon the cases titled "Nisar Ahmad and 2 others v. Additional Secretary Food and Agriculture, Government of Pakistan and 3 others" (1997 SCMR 299), "Muhammad Ayub Khan v. Superintendent, Central Jail and others" (1997 SCMR 302) and "Ardeshir Cowasjee, Karachi and 4 others v. Messrs Multiline Associates, Karachi and 2 others" (PLD 1993 Karachi 237) to argue that the petitioner is an aggrieved person. With respect to the definition of an aggrieved person learned counsel argued that the petitioner is an aggrieved person if he is able to establish that he is directly or indirectly injured by the act of the respondents. I

have reviewed the cases relied upon by learned counsel for the petitioner. To my mind in the instant case the question whether the petitioner is an aggrieved person or not cannot be simply answered by looking at whether the petitioner is directly or indirectly injured. The question here is whether the petitioner has a right to plead a case and seek relief for the benefit of a person who himself is capable and competent to approach the court to plead its own case. The respondent No.3 is established under the 1962 Ordinance. Its section 3 provides that the Board shall be a body corporate with perpetual succession having a common seal and can sue and be sued in its own name. The reply filed by the respondent No.3 has also been reviewed by me and I find that throughout the reply the respondent No.3 has justified and explained that it should be allowed to participate in the open competition for selection of manuscripts of textbooks. Para-6 of the reply provides that the respondent No.3 has every right to prepare textbooks and compete with the private publishers and that it has started the process of preparation of textbooks on its own in anticipation of registration to avoid delay for the preparation of textbooks for the next academic year. The reply does not explain or justify the locus standi of the petitioner. The petitioner is an employee of the respondent No.3. Admittedly the employees themselves prepare manuscripts and participate in the open competition, meaning thereby that the participation by the respondent No.3 in the open competition is essentially by its employees, for the benefit of its employees, who prepare their own manuscripts for approval by the Punjab Curriculum Authority. This means that essentially between the petitioner and the respondent No.3 there is an effort to promote the interests of the employees of the respondent No.3. The employees of the respondent No.3 along with the respondent No.3, which is an autonomous body of its own participate in this commercial venture to make money. Conceptually this goes against the mandate of the respondent No.3. The respondent No.3 in terms of the preamble of its own Ordinance is a facilitator who is to make arrangements for the production and publication of textbooks, supplementary reading material and guide books for teachers. Under section 11 the powers and duties of the Board have been enumerated. It provides that the Board may take such measures and exercise such powers as it considers necessary or expedient for carrying out the purpose of this Ordinance. Subsection (3) provides that the Board may prepare claims pertaining to all or any of the following matters. The scheme involved implementation of educational policies of Government with respect to the production and publication of textbooks, supplementary reading material and teaching aids. It also provides arrangement for the publication of textbooks. Section 11 does not provide for the Punjab Textbook Board should participate in the publication of textbooks itself. The Act of 2012 provides under section 6 that the Authority shall approve standards of education and manuscript of a textbook produced by any person or agency before the textbook is prescribed for any class of an institution. Essentially case of the petitioner is based on this section. However, this section does not explain when the respondent No.3 can participate in the publication of textbooks for selection by the Authority. The same is done in the 2007 Policy which clearly provides in clause 2.2 that the Textbook Board can only participate in the publication of a manuscript if no letter of intent is submitted by the private publisher that too after re-advertisement meaning that after a first and

second advertisement whereafter still no letter of intent is forthcoming. The 1962 Ordinance, Act of 2012 and the 2007 Policy are all in consonance with each other. The respondent No.3 essentially is a regulator and a facilitator who has to make schemes for publication of textbooks for all stages for implementation of educational policy. Section 6 (1)(b) provides that the Authority i.e. Punjab Curriculum Authority, can approve standards of education and manuscript of a textbook produced by any person or agency. This ability to produce a manuscript of textbook should be in accordance with the clear objective laid down in 2007 Policy. It does not mean that the regulator should, for commercial purposes, also participate in the publication process. This act of the regulator is in direct conflict with its primary function and will reduce the efficiency and objectivity of its regulatory function. To my mind the scheme of law does not visualize the participation of the respondent No.3 in the open competition. Furthermore the petitioner has no right on the basis of which it can pray that the respondent No.3 be allowed to participate in the open competition. To my mind this ability of the employees of the respondent No.3 to put forward their own manuscripts for selection by the Punjab Curriculum Authority also undermines the role of a regulator. If the employees of the regulator are to participate in the commercial venture then the basic role of the regulator disappears. The petitioner has no right on its own as employees of the respondent No.3 which is an agency of the Government of Punjab to participate in an open competition which the respondent No.3 is to regulate.

12. Learned counsel for the petitioner has argued and stressed a great deal on the question that no one can be a judge of its own cause, essentially on the ground that the respondent No.5 moved a representation before the then Chief Minister in 2012 which application was never decided and when he himself became caretaker Chief Minister, he made a decision on the same application. I have considered this argument and find that the argument is presumptive. There is nothing on the record to substantiate the claim that the representation of 12-6-2012 has not been decided. To the contrary the record shows that a decision was taken in January, 2013 by the Chief Minister which has not been placed on the file of this court. Similarly there is no order of the caretaker Chief Minister with respect to the representation filed on 18-4-2013. The report and parawise comments filed by the respondents Nos.1, 2 and 4 show that an Inter-Provincial Education Ministers Conference was held on 22-1-2013 in Islamabad. The 2007 Policy was discussed and approved by the Provincial Ministers to ensure the production of standard textbooks through a fair competition in their respective provinces. The role of the respondent No.3 as per the report and parawise comments filed by the respondents Nos.1, 2 and 4 is that the respondent No.3 will not undertake to produce textbooks themselves unless an expression of interest is advertised, no response is received pursuant to the first advertisement and on second advertisement, it is only after the second advertisement that the Textbook Board can produce and publish a textbook. Therefore, this argument has no merit as the record shows that the 2007 Policy endorsed by the Provinces is being followed. Furthermore the application was filed by the respondent No.5 as Central Chairman, Pakistan Publishers and Booksellers Association. It was not his personal cause, but the cause of the Publishers and

Booksellers Association. As caretaker Chief Minister, he endorsed the decision taken in January, 2013 by the then Chief Minister and called for an advertisement as per the 2007 Policy. As I have already stated there is no conflict between the 2007 Policy, 1962 Ordinance and the Act of 2012. Hence no case of interference is made out.

13. In view of the aforesaid, this petition is dismissed.

KMZ/M-205/L Petition dismissed.

2013 P L C (C.S.) 1062
[Lahore High Court]
Before Mrs. Ayesha A. Malik, J
Dr. MASOOD SALEEM
Versus
FEDERATION OF PAKISTAN through Secretary, Establishment Division and another
Writ Petitions Nos.22405 and 22406 of 2012, decided on 16th November, 2012.

(a) Civil service---

----Rotation Policy notified on 22-7-2000 by Government of Pakistan for transfer and posting of Officers (BS-19) of Police Service of Pakistan---Criteria to be followed explained.

Mushtaq Ahmad v. Ch. Saeed Ahmad and another 1996 SCMR 1649; Khalid Mahmood Wattoo v. Government of Punjab and others 1998 SCMR 2280 and Tariq Aziz ud Din and others: in re: 2010 SCMR 1301 ref.
Aman Ullah Khan and others v. The Federal Government of Pakistan through Secretary, Ministry of Finance, Islamabad and others PLD 1990 SC 1092 and Application of Rai Manzoor Nasir's case C.P. No.23 of 2012 and C.P. No.11 of 2012, Crl. Original Petitions Nos.23, 24 and 27 of 2012 in C.P. No.11 of 2012 and H.R.C. No.14427-P of 2012 rel.

(b) Administration of justice---

----Deviation from a particular procedure laid down for doing an act could be labelled as being arbitrary---Principles.
Where a particular mode is laid down for doing an act and there is no impediment in adopting the procedure laid down, a deviation from that procedure amounts to being unreasonable and can be labelled as being arbitrary.

(c) Policy decision---

----Once decision was taken and guidelines in form of policy were formulated, then any deviation or departure therefrom would have to be explained with reasons.

Salman Akram Raja for Petitioner.
Naveed Ahmad Malik, Dy. A.-G. and Syed Nayyar Abbas Rizvi, Addl. A.-G. for Respondents.
Date of hearing: 5th November, 2012.

JUDGMENT

MRS. AYESHA A. MALIK. J.--- This common judgment will dispose of Writ Petitions Nos.22405 and 22406 of 2012. In Writ Petition No.22405 of 2012, the

petitioner has challenged letter dated 7-9-2012 issued by the respondent No.1, notification of transfer dated 29-5-2012, memo. bearing No.3(3)/2012-E.3 dated 11-7-2012 and memo. bearing No.3(3)/2012-E-3 (Police) (Pt-II) dated 4-9-2012. In Writ Petition No.22406 of 2010, the petitioner has challenged letter dated 7-9-2012, notification of transfer dated 29-5-2009 and memo. bearing No.3(3)/2012-E-3 (Police)(Pt-II) dated 4-9-2012.

2. The case of the petitioner is that the petitioner in Writ Petition No.22405 of 2012 is a PSP Officer in BS-19 having the domicile of Punjab and having served 7 years 5 months and 20 days outside the Province of Punjab. The petitioner in 22406/2012 is a PSP Officer in BS-19 having the domicile of Punjab, who has served 6 years 23 days outside the Province of Punjab. The grievance of both the petitioners is that by virtue of the impugned letter, notification and memo, the respondent No.1 has acted in an arbitrary manner, without adhering to the policy which governs the transfer and posting of, amongst others, BS-19 officers to the Province of Balochistan. It is the case of the petitioners that the petitioners having served outside their province for more than five years, are not eligible for transfer to Balochistan in terms of the Rotation Policy of 22-7-2000 and the Amended Rotation Policy of 28-8-2012. Learned counsel argued that the respondent No.1 has set clear categories which forms the criteria for transfer of PSP officers to Balochistan vide the Amended Rotation Policy, dated 28-8-2012 and that for no plausible reason they have ignored the policy and have issued orders for the transfer of the petitioners to Balochistan.

3. The brief facts are that the respondent No.1 issued a Rotation Policy on 22-7-2000 (Rotation Policy). In terms of the Rotation Policy, PSP officers were liable to serve in at least two Provinces during their career, however in exigencies of the service, an officer may be posted to a third Province. The main feature of the Rotation Policy was that officers were to be transferred on the principle of "least rotated first transferred". Thereafter, on 28-8-2012, the Rotation Policy was amended with respect to postings to the province of the Balochistan vide Notification No.F.10/2/2006/E-5 (the Amended Policy). At this point, five categories were created which provided the criteria on the basis of which posting and transfer to the province of Balochistan was to be effectuated. In terms of the categories provided the petitioners fell in category No.4 being officers who have served outside their province of domicile and have not served in Balochistan. In terms of the Amended Policy, the first category is of officers who have the domicile of Balochistan and are serving outside Balochistan. The second category is of officers serving in the province of their domicile who have never been posted outside of their Province. The third category of the officers are those who remained posted in a province other than the province of their domicile. The case of the petitioners is that the five categories have been created to ensure transparency in selection and should be followed in the sequential order, giving priority to serials 1, 2 and 3 before enforcing serial No.4. They have also provided a list of PSP Officers BS-19 who are available in terms of the Amended Policy. They argue that the respondents are required to exhaust the first three categories before enforcing category 4. Furthermore the petitioners also argued that in terms of the list they fall

at serial Nos.46 and 37 respectively. Therefore, by way of priority the respondents should transfer the other officers who are eligible for transfer and whose names are placed ahead of the petitioners. It is the case of the petitioners that respondent No.1 without any reason or explanation has totally disregarded its own Rotation Policy and Amended Policy. The Amended Policy cannot be disregarded as it structures the discretion exercised by the respondents when transferring officers to Balochistan. Learned counsel also argued that the Amended Policy was the result of the order in C.P.No.77/10 by the Hon'ble Supreme Court. By ignoring its own criteria and categories the respondent No.1 has acted in an arbitrary and capricious manner.

4. Learned Deputy Attorney General on behalf of respondent No.1 has raised an objection with respect to the maintainability of the petitions. He argued that the petitioners are civil servants and the matter of transfer is a part of the terms and conditions of their service, meaning thereby that they cannot raise this issue in constitutional jurisdiction as there is a clear bar under Article 212 of the Constitution. He further argued that the petitioners are relying on a policy which cannot be enforced in constitutional jurisdiction. He argued that it is the prerogative of the respondent No.1 to decide where to transfer the petitioners and the petitioners are bound by the terms of their contract to accept all postings. Furthermore the respondent No.1 can transfer the petitioners for administrative reasons. Even otherwise the respondent No.1 is not bound by the Amended Policy nor bound by the sequential order of categories provided in the Amended Policy. In support of his arguments he has placed reliance on the law laid down in cases titled "Mushtaq Ahmad v. Ch. Saeed Ahmad and another" (1996 SCMR 1649) and "Khalid Mahmood Wattoo v. Government of Punjab and others" (1998 SCMR 2280).

5. In response to the arguments raised on maintainability learned counsel for the petitioners argued that notwithstanding the fact that the petitioners are civil servants the issues raised in the instant petitions can only be decided in constitutional jurisdiction. In the first case, he argued that there is no transfer order meaning that there is no impugned or appealable order. The first order for transfer was issued by the respondent No.1 on 29-5-2012. Thereafter, upon the release of the petitioners by the Government of Punjab another order was issued on 7-9-2012. The petitioners filed a representation before the Chief Secretary who issued his order on 12-6-2012 wherein the transfer notification with respect to the petitioners was cancelled being contrary to the Rotation Policy. Then on 3rd August, 2012 by virtue of a notification issued in favour of the petitioners, the orders requiring the petitioners to report to the Government of Balochistan was withdrawn by the respondent No.2. Hence there is no appealable order for the petitioners to challenge. He argued that the petitioners have challenged the arbitrary manner in which a decision has been made, despite the fact that clear cut guidelines are available to respondent No. 1. On the question of enforcing and relying upon a policy, counsel for the petitioners sites case-law titled "Aman Ullah Khan and others v. The Federal Government of Pakistan through Secretary, Ministry of Finance, Islamabad and others" (PLD 1990 SC 1092) wherein it was held that discretion must be exercised fairly and rationally.

He has placed reliance on a case titled "Tariq Aziz ud Din and others: in re:" (2010 SCMR 1301) which provides that discretion must be exercised in accordance with guidelines and not in an arbitrary and capricious manner. More importantly it should be exercised reasonably and subject to the guidelines laid down.

6. I have given due consideration to the arguments raised by respondent No.1 and the counsel for the petitioners with respect to maintainability of the instant writ petition. Although the contentions of the learned Deputy Attorney General are correct with respect to the bar of Article 212 under the Constitution, I find that the case of the petitioners falls outside the purview of the bar. Even though the petitioners are civil servants and have a remedy and a forum available to them where they can challenge a transfer order, the nature of the dispute in the instant petitions is not of a transfer simpliciter. In this case the Federation respondent No.1 made a comprehensive policy to ensure that the process of transfer is transparent and that no officer should resist the posting and transfer to Balochistan. The Amended Policy was made pursuant to and in compliance with the orders of the Hon'ble Supreme Court in C.P.No.77 of 2010 being the Missing Persons Case. The respondent No.2 is resisting the transfer and posting of the petitioners, reasoning that the two officers cannot be transferred under the Amended Policy, as their transfer is in violation of the categories set out under the Amended Policy. Furthermore, the respondent No.2 has written to the respondent No.1 that other officers can be identified and transferred in terms of the Amended Policy. Accordingly on 3-8-2012 the respondent No.2 withdrew its orders to transfer the petitioners to Balochistan. On 7-9-2012 the respondent No.1 required the respondent No.2 to relieve the petitioners for transfer to Balochistan. Hence, respondent No.1 and respondent No.2 are in disagreement over the posting of the petitioners. As a consequence of the disagreement between respondent No.1 and respondent No.2, and in the absence of a valid transfer order, the petitioners are not hit by the bar of Article 212 of the Constitution. Under the circumstances, I find these petitions to be maintainable.

7. Now to proceed with the merits of the case. The respondent No.1 has argued that the respondents are obligated in terms of the orders of the Hon'ble Supreme Court dated 23-5-2012 in C.P.No.77 of 2010 to ensure that PSP officers are duly posted to Balochistan to meet up with the requirements in the said Province. One of the concerns raised by respondent No.1, as recorded in the said orders is that officers resist being posted to Balochistan. Hence to comply with the orders of the Hon'ble Supreme Court the Rotation Policy was amended in August, 2012. Learned D.A.-G also argued that the respondent No.1 has been transferring officers regularly and as such it is not exercising a pick and choose policy. He states that in BS-19 four officers were notified for transfer to Balochistan in category I of the Amended Policy and stated that more than 15 officers have been posted to Balochistan subsequent to the orders of the Hon'ble Supreme Court in terms of the Amended Policy. He also argued that transfer is a part of the terms and conditions of the service of the petitioners and they should comply with the orders of the respondent No. 1.

8. I have heard the arguments raised by both the learned counsel and reviewed the record.

9. The policy for transfer and posting of PSP officers was notified on 22-7-2000 known as the Rotation Policy for DMG/PSP officers. The basic concept of the Rotation Policy was that officers least rotated should be transferred first. In August, 2012, the Policy was amended such that it set out five categories laying down the criteria for all current and future postings of PSP Officers to the Province of Balochistan, in terms of priority. The categories essentially were created to ensure that the respondent No.1 could effectively transfer PSP Officers to Balochistan in a transparent manner which would prevent resistance from the PSP Officers. Furthermore, admittedly it was set out in compliance with the order of the Hon'ble Supreme Court in the Missing Persons Case. The Amended Policy is explicit and defines clear categories which should be followed for the purposes of transfer to Balochistan. The Amended Policy structures and controls the discretion of the respondent No. 1. It sets out the criteria to be followed in order to reduce the resistance and to encourage compliance with the transfer orders. In this regard I am of the opinion that where a particular mode is laid down for doing an act and there is no impediment in adopting the procedure laid down, a deviation from that procedure amounts to being unreasonable and can be labelled as being arbitrary. Therefore when the respondent No.1 sets out clear guidelines for transfer and posting of PSP officers to Balochistan, then they must follow the same. If they want to deviate from the Amended Policy then they must provide cogent and justifiable reasons. In the case cited at PLD 1990 SC 1092 ibid, the Honorable Supreme Court specified the seven principles of transparency or good governance:----
"Wherever wide worded powers conferring discretion exist, there remains always the need to structure the discretion. The structuring of discretion only means regularizing it, organizing it, producing order in it so that decision will achieve the high quality of justice. The seven instruments that are most useful in the structuring of discretionary power are open plans, open policy statements, open rules, open findings, open reasons, open precedents and fair informal procedure. Somehow, the wide worded conferment of discretionary powers or reservation of discretion, without framing rules to regulate its exercise, has been taken to be an enhancement of power and it gives that impression in the first instance but where the authorities fail to rationalize it and regulate it by Rules, or policy statements or precedents, the Courts have to intervene more often than is necessary, apart from the exercise of such power appearing arbitrary and capricious at times."

10. During the course of the proceedings the respondent No.1 was asked several times to provide the list of names of PSP Officers (BS-19) who have been transferred to Balochistan in terms of the categories of the Amended Policy. However the respondent No.1 could only name officers belonging to category 1 of the Amended Policy. Admittedly no exercise was done to formulate a list in terms of category 2, 3 and 4 provided for in the Amended Policy. Also the respondent No.1 had no plausible response to the list provided by the petitioners, of the officers who are available in terms of the Amended Policy. They did not deny the list yet

they could not explain why officers who are available in terms of the Amended Policy have not been transferred. Finally the respondent No.1 was also asked to justify the transfer of the petitioners in terms of any special requirements that the respondent No.1 may have with reference to their skill set or training or work experience. However again the respondent No.1 had no explanation whatsoever. To my mind, the Rotation Policy was amended to comply with the order of the Hon'ble Supreme Court. Once a decision was taken and the guidelines in the form of the Amended Policy were set out, any deviation or departure from the same would have to be explained and reasoned. In this case there is no explanation or justification for non-compliance with the Amended Policy. In this regard the respondent No.1 should be mindful of the Amended Policy it has formulated and should advance its aims and objectives. It should act in accordance with the Amended Policy as acting or deciding otherwise will be unfair and unreasonable. In a recent judgment in C.P. No.23 of 2012 and C.P. No.11 of 2012, Crl. Original Petitions Nos.23, 24 and 27 of 2012 in C.P. No.11 of 2012 and H.R.C. No.14427-P of 2012 (Application of Rai Manzoor Nasir) the Hon'ble Supreme Court held that:---

"We are fully conscious that the aforesaid matters relate to decision making and administration of the machinery of the State. As such the responsibility of deciding as to suitability of an appointment, posting or transfer falls primarily on the exclusive branch of the State which comprises of both the political executive and civil servants. Courts ordinarily will not interfere in the functioning of the executive as long as it adheres to the law and established norms and acts in furtherance of its fiduciary responsibility. However, while hearing this petition we have recognized the need for ensuring that decision making in relation to tenure, appointments, promotions and transfers remains rule based and is not susceptible to arbitrariness or absolute and unfettered discretion"

11. In view of the aforesaid, the petitions are allowed and the letters dated 7-9-2012, notifications of transfer dated 29-5-2009, memo. No.3(3)/2012-63 dated 11-7-2012 and dated 4-9-2012 with respect to the transfer and posting of the petitioners are set aside. There is no order as to cost.

SAK/M-27/L Petitions accepted.

2013 C L C 1547
[Lahore]
Before Mrs. Ayesha A. Malik, J
CREATIIVE ELECTRONICS AND AUTOMATION----Petitioner
Versus
COMMISSIONER, LAHORE and others----Respondents
Writ Petition No.25955 of 2012, decided on 12th April, 2013.

Partnership Act (IX of 1932)---

----Ss. 69, 18 & 19 --Constitution of Pakistan, Art.199---Constitutional petition---Maintainability--- Non-registered firm--- Words "other proceedings" in S.69, Partnership Act, 1932---Scope---Objection was raised to maintainability of Constitutional petition in view of bar contained in S.69 of Partnership Act, 1932---Validity---Words "other proceedings" did not include Constitutional jurisdiction as such jurisdiction created by the Constitution, could not be equated with suits or claims of set off---Bar contained in S.69 of Partnership Act, 1932, was not applicable to Constitutional petition---One partner had implied authority to act and carry on business in usual way and could bind his firm, therefore, he could file Constitutional petition on behalf of other partners without written authorization from other partners---Subsequent filing of deed of Association and ex-post facto rectifications by partners was accepted and the same cured technical defects in filing petition---Constitutional petition was maintainable in circumstances.

Muhammad Ayub and Brothers through Partner v. Province of Sindh through Secretary Irrigaiton and Power Department, Karachi and others 2009 CLD 194; Messrs Nishat Chunnian Ltd. v. Province of Punjab through Secretary, Local Government and 2 others 2012 CLD 1288; Muslim Commercial Bank Limited Karachi v. Haji Shaikh Yaqinuddin and 2 others PLD 1992 Kar. 314; Rala Singh and others v. Babu Bhagwan Singh & Sons AIR 1925 Rangoon 30; Muhammad Azam Muhammad Fazil & Co., Karachi v. Messers N.A. Industries, Karachi PLD 1977 Kar. 21; Brig. Muhammad Bashir v. Abdul Karim PLD 2004 SC 271; Sajawal Khan v. Wali Muhammad 2002 SCMR 134 and Messrs Al-Raham Travels and Tours Pvt. Ltd. v. Ministry of Religious Affairs, Hajj, Zakat and Ushr through Secretary and others 2011 SCMR 1621 ref.
Mansoor Usman Awan for Petitioner.
Waqas Qadeer Dar, A.A.-G. for Respondents.

ORDER

MRS. AYESHA A. MALIK, J.--- Through this petition the petitioner seeks a decision on an application pending before the DCO requesting him to pay the outstanding amount for supply of diesel generators by the petitioner. Learned counsel pressed for notice to be issued and a report be called for as to why the respondent has not made the payment due to the petitioner.

2. At the very outset, learned Law Officer raised an objection with respect to the maintainability of the instant petition. The learned Law Officer's objection was that the petitioner has not been duly authorized to file this petition; that the petitioner has not annexed any document to show that it is a partnership concern; that no registered partnership deed has been filed and the petition suffers from non-joinder of necessary parties.

3. The petitioner has placed documents before this Court through C.M.No.3 of 12 consisting of an authority letter from two other partners and a Deed of Association of Persons. It was explained that the petitioner is a partnership firm engaged in the business of supply of power electronics and information technology. Again learned Law Officer raised an objection that the petitioner could not file any document to show that he is duly authorized as it was a fundamental preliminarily issue and could not be rectified through a subsequent application. The Law Officer argued that if no authorization was appended with the petition it was fatal to the Petition. Reliance is placed upon the cases titled "Muhammad Ayub and Brothers through Partner v. Province of Sindh through Secretary Irrigaiton and Power Department, Karachi and others" (2009 CLD 194) "Messrs Nishat Chunnian Ltd. v. Province of Punjab through Secretary, Local Government and 2 others" (2012 CLD 1288).

4. The question before this Court is whether the petitioner stating to be a partnership firm can file a constitutional petition without a registered Deed of Association and a resolution or authority letter permitting the partner to this effect. The second question is whether the partners can rectify the filing of a constitutional petition subsequently by ratifying the act of the parties.

5. On the question that the petitioner has not filed the registered Deed of Association, section 69 of the Partnership Act, 1932 is relevant which is reproduced as under:---
Section 69 "Effect of non-registration.--- (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.
(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the person suing are or have been shown in the Register of Firms as partners in the firm.
(3) The provisions of subsections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect---
(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realize the property of a dissolved firm, or
(b) the powers of an official assignee, receiver of Court under the Insolvency (Karachi Division x x x x) Act, 1909 or the Provincial Insolvency Act, 1920 to realize the property of an insolvent partner.
(4) This section shall not apply---

(a) to firms or to partners in firms which have no place of business in Pakistan, or whose places of business in Pakistan are situated in areas to which, by notification under (section 56) this Chapter does not apply,
(b) to any suit or claim of set-off not exceeding one hundred rupees in value which is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887, or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim."
In terms of section 69, no suit can be instituted in any Court on behalf of a partner unless the firm is registered and the persons suing is shown as a partner in the Register of Firms. Similarly, no suit to enforce a contractual right can be instituted by an unregistered firm. A review of section 69 shows that there is nothing in the stated section which is applicable to constitutional petitions. It has been held in a case titled "Muslim Commercial Bank Limited Karachi v. Haji Shaikh Yaqinuddin and 2 others" (PLD 1992 Karachi 314) that the bar under section 69(3) of the Partnership Act 1932 does not extend to constitutional jurisdiction or even to rent cases because section 69 is applicable specifically to suits, claim of set-off or other proceedings to enforce a right under a contract. A bare reading of section 69 (1) and (2) reveals that for filing a suit or for the enforcement of a right under the Partnership Act, 1932, the firm must be registered. Subsection (3) provides that it shall apply to a claim of set-off or other proceedings to enforce a right arising from a contract. The use of the words "other proceedings" when interpreted, applying the rule of ejusdem generis would mean that other proceedings will not include constitutional jurisdiction as this jurisdiction, created by the Constitution of Islamic Republic of Pakistan, 1973 cannot be equated with suits or claim of set-off. Therefore, I am of the opinion that section 69 of the Partnership Act, 1932 will not apply to the instant petition.

6. Having said that, with respect to the instant petition the name of the petitioner as given in the file of the petitioner does not disclose that it is a partnership firm nor is there any document appended with the petition to show that it is a partnership firm and Mr. Sajjad Muhammad Khan is a partner, duly authorized by the firm to file the instant petition. Learned Law Officer argued that in the case of a company or registered society, the Memorandum and Articles of Association are filed along with the petition and due authorization has to be filed. In the same way with respect to a partnership firm if a partner does not append the Deed of Association and his authorization the petition would not be maintainable.

7. Conversely, learned counsel for the petitioner argued that under the Partnership Act, 1932, the partners of a firm do not require to file an authorization in the same way as a registered society or limited liability company. He argued that a firm is distinct from a society and a company as the rights and liabilities of a partner are enforceable against him individually. In the case of a society or a company the person filing the petition must show that he has been duly authorized by the members or the Board of Directors as they are not enforcing a personal right. They are acting on behalf of the society or the company which is a legal entity and from whom they have to be authorized. In such cases it is necessary that the management

who is acting on behalf of the members or share-holders to duly authorize a person to file a constitutional petition. In the case of a firm since it is an individual right that a partner is seeking to enforce he does not require authorization to file the constitutional petition. Learned counsel relied upon sections 19 and 22 of the Partnership Act, 1932 to argue that the same permit the individual partner to file a petition on behalf of a firm. He argued that the partners have implied authority under section 19(2) of the Partnership Act, 1932, therefore, a partner can invoke constitutional jurisdiction on behalf of the firm without placing any authorization on the file and without appending the Deed of Association. In this case, he argued that Sajjad Muhammad Khan was the Managing Partner of the firm who has been given authority for filing the instant petition. He relied upon the documents subsequently filed.

8. After hearing both the counsel and reviewing the law, it is clear that there is a distinction between a company which files a constitutional petition through its Director and a partner who files a petition on behalf of the firm. Under section 196 of the Companies Ordinance, 1984, the share-holders of the company act through the Board of Directors. The Board members are not the owners of the company and therefore, they cannot initiate proceedings on behalf of the company in their individual capacity unless they are expressly authorized by a Board Resolution. The same principle would apply to a society registered under the Co-operative Societies Act, 1925. Under section 23 of the said Act a registered society is a body corporate with perpetual succession with the power to file or defend itself in a suit. A member of the society is not an agent of the society nor does he own the society, hence, he would have to be authorized by the society in accordance with its Memorandum of Association before instituting any proceedings in any Court. A firm on the other hand is different. The partners are the owners of the firm and the rights and liability of the firm are the rights and liability of the partners. Each partner is an agent of the firm under section 18 of the Partnership Act, 1932. Under section 19 of the said Act, each partner has the implied authority to carry on business in the usual way and bind the firm. Section 19(2) provides for the exclusions to the implied authority. Under these sections implied authority does not empower a partner to submit a dispute relating to the business of the firm for arbitration, or relinquish any claim by the firm, admit any liability in a suit by or against the firm or withdraw the suit proceedings filed on behalf of the firm. These subject-matters have been specifically excluded from the implied authority of a partner. Filing of a constitutional petition has not been mentioned in the exclusion clauses. These clauses relate specifically to contractual disputes of the firm. In the instant petition, the petitioner seeks to enforce a right against the respondent to make certain payments which are due to it. In this regard, the petitioner seeks a direction to the respondents to decide upon its application pending before the respondents. Therefore, since a partner has the implied authority to act and carry on business in the usual way and can bind his firm, Mr. Sajjad Ahmad Khan can file this constitutional petition on behalf of the other partners without written authorization from the other partners.

9. The next question that arises is whether his act can be subsequently ratified by the other partners. It has been held in the cases titled "Rala Singh and others v. Babu Bhagwan Singh & Sons" (AIR 1925 Rangoon 30) and "Muhammad Azam Muhammad Fazil & Co., Karachi v. Messers N.A. Industries, Karachi" (PLD 1977 Karachi 21) that submission to arbitration by one partner can be ratified by a co-partner so as to be binding on the firm. It was held that such authorization need not be formal or in writing. By reading sections 18 and 19 of the Partnership Act, 1932 together I find that the Partnership Act declares every partner to be an agent of the firm for the purpose of business of the firm and every act of the partner which is done to carry on business, in the usual way, binds the firm. The partnership business belongs to each and every partner jointly and severally. Hence, there is no distinction between the partner and the firm. In such a situation there is no requirement under the law that one partner be duly authorized by the other partner in writing to file a constitutional petition. This is because one partner can seek to enforce a right on behalf of all the partners, through a constitutional petition. In such cases, authority can be implied or inferred from the conduct of the partners. In the instant case the petitioner has placed on file the Deed of Association of Persons as well as a copy of an earlier petition filed by the partnership to show that the same partners previously had also instituted a writ petition through same partner. Therefore, the said partner was authorized by the other partners to institute the instant petition.

10. The final objection raised was with respect to the subsequent filing of documents by the partner by the firm and non-joinder of parties. The subsequent filing of documents arose on account of the fact that the title of the petitioner does not disclose that it is a partnership firm hence, this Court at the very outset asked the petitioner to explain its legal status as the same was not clear from the contents of the petition. Learned Law Officer objected on the ground that in terms of the given title of the petitioner it appears that the petitioner is a proprietor. Furthermore, no document has been appended to show that the petitioner is a partnership. Learned Law Officer then objected that consequence of subsequent filing would create serious disability to raise objections, if they are allowed to be rectified by placing documents before the Court.

11. To my mind, in the instant case, this amounts to a technical objection. No doubt the petitioner is not described as a partnership firm in the petition and it is only upon being questioned that it became apparent that this petition has been filed by a partner of a partnership firm. However, since the main objection with respect to the authorization of the partner filing the petition and the documentation required for the purpose of filing the petition has been decided in favour of the petitioner, therefore, subsequent filing of the documents will not have a critical effect on the maintainability of the writ petition. In any event the Hon'ble Supreme Court of Pakistan has held time and again that if technicalities can be avoided. Reliance is placed to cases of Brig. Muhammad Bashir v. Abdul Karim (PLD 2004 SC 271), Sajawal Khan v. Wali Muhammad (2002 SCMR 134) and Messrs Al-Raham

Travels and Tours Pvt. Ltd. v. Ministry of Religious Affairs, Hajj, Zakat and Ushr through Secretary and others (2011 SCMR 1621).

12. The subsequent filing of Deed of Association and ex-post facto rectifications by the partner is accepted. As such it has cured the technical defects in filing of the instant petition.

13. Now to come up for arguments on 16-5-2013.

MH/C-9/L Order accordingly.

P L D 2013 Lahore 487
Before Mrs. Ayesha A. Malik and Abid Aziz Sheikh, JJ
BANK OF PUNJAB---Petitioner
Versus
INTERNATIONAL CERAMICS LTD. and 4 others---Respondents
Writ Petition No.5864 of 2013, decided on 29th April, 2013.

Constitution of Pakistan---

----Art. 199---Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001), Ss. 10, 22 & 13--- Constitutional petition---Suit for recovery---Leave to defend, application for---Constitutional petition against order of Banking Court rejecting or allowing application for leave to defend in a suit for recovery---Scope---Financial Institutions (Recovery of Finances) Ordinance 2001 contemplated expeditious decisions on matters relating to Financial Institutions---Such intent could be seen in S.13 of the Ordinance which provided that in a suit where leave to defend was granted, the case should be disposed of within a period of ninety days---Section 22 of the Ordinance, therefore, prevented appeal, review or revision of an order granting leave so that cases could be decided as soon as possible once the stage of application for leave to defend was over---In such a situation, filing a constitutional petition against order granting or rejecting leave to defend would defeat the object of the Financial Institutions (Recovery of Finances) Ordinance, 2001---High Court held that the general rule was that constitutional petition would not lie against an order granting or rejecting leave to defend and observed that constitutional petition would be maintainable in exceptional circumstances where the petitioner could show a blatant illegality in the impugned order, such as that the Banking Court had not followed the express mandate of law or that the Banking Court had exercised its powers outside the jurisdiction conferred upon it---In order to meet the ends of justice, constitutional petition would be maintainable in such circumstances.

Sheikh Abdul Sattar Lasi and another v. Judge Banking Court 2007 CLD 69; Messrs United Bank Ltd. through Authorised Attorneys v. Banking Court No.II and 2 others 2012 CLD 1556; United Bank Ltd. v. Presiding Officer, Banking Court No.2, Karachi and 6 others 2011 CLD 931 and Agricultural Development Bank of Pakistan and others v. Yar Muhammad and others 2004 CLD 1084 distinguished.
Messrs Sajid Brothers and Co. through Proprietor and 2 others v. Manager, Allied Bank Limited and 8 others 2012 CLD 1858 rel.
Muhammad Ahmad Pansota for Petitioner.

ORDER

Through this petition the petitioner has impugned order dated 14-2-2013, passed by the learned Single Judge in Chamber. The impugned order has been passed under section 10 of the Financial Institutions (Recovery of Finances) Ordinance. 2001 (FIO) and is a leave granting order.

2. The facts of the case are that the petitioner filed a suit under section 9 of the FIO for the recovery of Rs.71457523/- from the respondents. The respondents Nos. 1 to 4 filed an application for grant of leave to appear under section 10 of the FIO. The petitioner then filed its replication. Learned Single Judge in Chamber while exercising jurisdiction under the FIO granted unconditional leave to the respondents Nos.1 to 4 through his order dated 14-2-2013.

3. Learned counsel for the petitioner argued that the Impugned Order has been passed by the learned Judge in Chamber in complete disregard of an unreported order issued on 6-2-2013 by a Division Bench of this Court. He also argued that there was no lawful justification to grant leave to the respondents on account of non availability of the statement of the C.D. account. Learned counsel for the petitioner was asked at the very outset how this petition was maintainable given that section 22 of the FIO specifically bars the filing of an appeal, review or revision against an order which grants leave or rejects leave. Learned counsel argued that section 22(6) of the FIO expressly bars filing of an appeal, review or revision against the order accepting or rejecting an application for leave to defend. In such a situation a writ petition would be maintainable if the order is illegal or without jurisdiction as no other remedy was available to the petitioner. Learned counsel has placed reliance on Sheikh Abdul Sattar Lasi and another v. Judge Banking Court (2007 CLD 69), Messrs United Bank Ltd through Authorised Attorneys v. Banking Court No.II and 2 others (2012 CLD 1556), United Bank Ltd v. Presiding Officer, Banking Court No.2, Karachi and 6 others 2011 CLD 931 and Agricultural Development Bank of Pakistan and other v. Yar Muhammad and others 2004 CLD 1084.

4. Arguments heard. Record perused.

5. The order impugned before us is an order which grants unconditional leave to the respondents. Section 22(i) of the FIO provides as follows:-
"22. Appeal----(1) Subject to subssection (2), any person aggrieved by any judgment, decree, sentence, or final order, passed by a Banking Court may, within thirty days of such judgment, decree, sentence or final order prefer an appeal to the High Court".
Section 22(6) provides as follows:--
"(6) No appeal, review or revision shall lie against an order accepting or rejecting an application for leave to defend, or any interlocutory order of the Banking Court which does not dispose of the entire case before the Banking Court other than an order passed under subsection (11) of section 15 or subsection (7) of section 19".
A bare reading of section 22(1) and (6) shows that no appeal, review of revision lies against an order which accepts or rejects an application for leave to defend. Therefore, the FIO has explicitly barred the remedy of appeal, review or revision against such an order. The question that arises is whether in such a situation a constitutional petition is maintainable by a person aggrieved by an order granting or rejecting leave. Section 10 of the FIO provides for the right to file an application for leave to defend. In terms of section 10(3) an application for leave to defend is in the form of a written statement and contain a summary of the substantial questions of

law and fact for which evidence needs to be recorded. In the event that leave is granted under section 10(10) of the FIO the Court shall fix a date for recording of evidence. In the event that leave is not granted section 10(11) of the FIO provides that a decree should be passed in favour of the plaintiff against the defendant. Therefore, the FIO contemplates expeditious decisions on matters relating to Financial Institution. The intent can be seen in section 13 of the FIO which provides that in a suit where leave is granted the case should be disposed of within 90 days. Hence, section 22 prevents appeal review or revision of an order granting or rejecting leave, so that cases can be decided as soon as possible once the stage of considering the PLA is over. In such a situation filing of a constitutional petition against the order granting or rejecting leave would defeat the objective of the FIO, especially section 22. It has been held in case titled Messrs Sajid Brothers and Co. through Proprietor and 2 others v. Manager, Allied Bank Limited and 8 others (2012 CLD 1858) that:--

"In the present case, the Banking Court has decided the application for leave to defend the suit of respondents Nos.5 and 6 in doing so has struck off the names of these respondents from the list of defendants. Against such order the appeal is expressly barred by law and thus there is no warrant for entertaining a Constitutional Petition as it will not only amount to circumvention the law but will also frustrate the same. Yet again, the impugned order is passed by a Judge of this Court which is not a person in terms of Article 199(5) of the Constitution, for this reason also Constitutional Petition will not be maintained. The petition, being not maintainable, is therefore, dismissed".

Therefore, we hold that the general rule is that no constitutional petition would lie against an order granting or rejecting leave.

6. The learned counsel for the Petitioner has placed reliance on 2012 CLD 1556 (supra). In the said case a constitutional petition was filed against the order in which the leave was denied. The Hon'ble court held that after dismissal of the application for grant of leave to defend the law envisages that the suit should be decreed, forthwith ,therefore, at the stage when only a decree can be passed in a suit an order for consolidation of the suit with any other suit in which evidence is to be recorded defeats the object of section 10(11) of the FIO. The order of consolidation shall also have the effect of nullifying the order whereby the application for leave to defend the suit was dismissed. Since the impugned order passed by the Banking Court has violated section 10(11) of the FIO, the impugned order was found not sustainable in law and liable to be set aside. The Hon'ble Court held that a constitutional petition is maintainable on the ground that the Banking Court failed to exercise the jurisdiction which was vested to it under section 10(11) of the FIO. Learned counsel has also relied upon 2011 CLD 1571 (supra). In the said case leave was also not granted. The Hon'ble Court held that constitutional jurisdiction could be invoked against such an order to correct a wrong in a case where no other remedy was available. In 2007 CLD 69 (supra) it was held that in cases of grave violation in following the substantive provision of law an order rejecting or granting leave could be challenged in a constitutional petition.

7. We have reviewed the cases cited by the learned counsel for the petitioner and find that the common ground in all the cited cases is one of illegality or lack of jurisdiction. To our minds these cases represent the exception to the general rule being that no constitutional petition would lie against an order granting or rejecting leave. We are of the opinion that a constitutional petition would be maintainable in exceptional circumstances, where the petitioner could show a blatant illegality in the order, such that the Banking Court has not followed the expressed mandate of law or that the Banking Court has exercised its powers outside the jurisdiction conferred. In such a situation in order to meet the ends of justice and to prevent a gross miscarriage of justice a constitutional petition would be maintainable.

8. In the instant case the learned Judge in Chamber found that the debt entries to the defendant's account did not disclose the cheque numbers and did not disclose the account which was credited. Further more that the statement of the current account from where the withdrawal was said to have taken was not available on the record. During the course of the proceedings the plaintiff sought permission to place on record the statement of account of the defendant No.1 through an application under Order VI, Rule 17, C.P.C.. The learned Judge in Chamber held that since the relevant documents were not available on the record and since the plaintiff wanted to file its statement of account a case of unconditional leave to defend was made out. We have heard the learned counsel for the petitioner at length and we are of the opinion that he was unable to point out any illegality with the impugned order. We note that the petitioner had moved an application under Order VI, Rule 17, C.P.C. for filing an amended plaint. Through the said application the petitioner wanted to place further documents with his plaint. We find that the filing of the application under Order VI, Rule 17, C.P.C. to amend the plaint and further document the plaint itself suggests that leave should be granted as the petitioner has failed to satisfy its burden under section 9 of the FIO.

9. The other argument stressed by the learned counsel was that the impugned order is in absolute disregard of an order of the Division Bench on the issue of CD account statement. We note that leave has been granted for several reasons in the impugned order. In any event each case has to be seen on its own merits and the grant of leave under section 10(8) is based upon the substantial questions raised by the defendants vis-a-vis the case and documents filed by the plaintiff with the plaint. Section 9 of the FIO places heavy burden on the Financial Institution to file along with its plaint a statement of account and all other relevant documents relating to the grant of finance. Thereafter section 10 provides that the defendant shall file an application for leave to defend which shall be in the form of a written statement and which shall contain a summary of the substantial question of law as well fact in respect of which evidence needs to be recorded. The application for leave to defend shall be accompanied by all documents which in the opinion of the defendant supports the substantial question of law and fact. The plaintiff is given an opportunity to file a reply to the application for leave to defend. Therefore, in terms of sections 9 and 10 of the FIO the plaintiff has to put across its best case and the defendant has to place his entire case before the Court. The Court then has to satisfy

itself, in the first instance, as to whether any substantial question of law and fact is in issue between the parties. This first look principle gives the court an opportunity to form an opinion based on the documents filed before it, whether evidence needs to be recorded in order to settle the dispute between the parties. Therefore, an order granting leave merely gives the defendant an opportunity to lead evidence to defend its case. As such no right of the plaintiff is prejudiced. It simply means that plaintiff does not have an open and shut case on the basis of which a decree can be passed, and that the plaintiff will have to prove its claim through evidence.

10. In the case of the petitioner the impugned order finds that the entries relied upon did not provide sufficient data to show that the disbursement and utilization of the finance had been made by the respondent. There is no illegality with this order and it does not fall within the ambit of the exceptions.

11. For the foregoing reasons, this petition is dismissed in limine.

KMZ/B-11/L Petition dismissed.

Lahore High Court
Judge(s)
Ayesha A. Malik,
Union Local Loop (Pvt) Ltd.
VS
Federal Board Of Revenue, Etc.
W.P. No. 20783 of 2012
30/05/2013
Reported As [108 TAX 340]
Result: Petition dismissed

Practice Area: Constitutional Law, Income Tax, Tax Laws
Tagged Statutes: Constitution of Pakistan, 1973 [], Income Tax Ordinance, 2001 updated upto 30.06.2017 []
ORDER
[Ayesha A. Malik, J.] - The Petitioner is a private limited company, which has impugned the amended assessment order under Section 122(1) and (5) read with Section 124 of the Income Tax Ordinance, 2001 (Ordinance, 2001) dated 29-06-2012.

2. At the very outset, learned counsel for the Respondent has raised an objection with respect to the maintainability of this petition. He argued that adequate remedy is available to the Petitioner against the assessment order and that the statutory remedy must be availed under Section 127 of the Income Tax Ordinance, 2001. As such the Petitioner cannot place his grievance before this Court in constitutional jurisdiction.

3. When confronted with this point, learned counsel for the Petitioner argued that since this is a case of illegal selection of audit, hence the Petitioner has moved this Court in constitutional jurisdiction. He has placed relied on a case titled "Shahnawaz (Pvt.) Ltd. Through Director Finance v. Pakistan through the secretary Ministry Of Finance Government Of Pakistan, Islamabad" (2011) 104 Tax 164 (H.C. Kar.)=(2011 PTD 1558).

4. I have heard learned counsel for the parties and find that the statutory remedy is available to the Petitioner. The impugned order has been issued under Section 122(1) and (5) read with Section 124 of the Ordinance, 2001 against which a right of appeal lies under Section 127 of the Ordinance, 2001. It is also noted that the Petitioner participated in the audit proceedings, which led to the amendment in the assessment. At that point, the Petitioner did not raise any objection with respect to the selection for audit. Hence no case of illegality is made out against the impugned order.

2013 Y L R 1796
[Lahore]
Before Ijaz ul Ahsan and Ayesha A. Malik, JJ
Ms. AYESHA SIDDIQA---Petitioner
Versus
GOVERNMENT OF PUNJAB and others---Respondents
Writ Petition No.3094 of 2013, heard on 4th April, 2013.

Prospectus for Admission in Punjab Medical and Dental Colleges, 2012-2013-------Condition "e" of Eligibility and Rules---Constitution of Pakistan, Art. 199---Constitutional petition---Admission in Medical College---Failure to mention the name of college in the preference form---Effect---Candidate was aware at the time of filling the admission form that she had to mention every college that she wanted to be considered for admission---Prospectus and the admission form were clear at stating and highlighting the importance of the preference form---No basis upon which the High Court could direct the respondents-Authorities to consider the petitioner for admission to a college which was not stated in the list of preference---Petitioner took a conscious decision at the time of filling of the form, hence she was bound by such decision---Constitutional petition was dismissed.

Muhammad Ahsan Bhoon for Petitioner.
Risal Hassan Syed and Imran Muhammad Sarwar for Respondents.
Date of hearing: 4th April, 2013.

JUDGMENT

AYESHA A. MALIK, J.---Through this petition, the petitioner seeks a direction to the respondents for the grant of admission in the M.B.B.S. programme in D.G. Khan., Medical College.

2. The brief facts of the case are that the petitioner applied for admission to a medical college in Punjab. As per the requirement, she filled up the form listing her preferences for admission in the medical colleges. She mentioned the names of 15 colleges and failed to mention the name of the 16th college being D.G. Khan Medical College. At the time, when the merit list was announced, the petitioner was not eligible for admission in the 15 colleges but in terms of her merit, she became eligible for admission in D.G. Khan Medical College.

3. The grievance of the petitioner is that she had the required merit for admission in D.G Khan Medical College. However, she was refused admission on the ground that she did not mention the said college as one of her preference in the form submitted for this purpose.

4. Learned counsel for the petitioner argued that the petitioner has a right to education and that she meets the merit requirements of D.G. Khan Medical College. Therefore, the college has wrongly denied her admission. He argued that the

petitioner mentioned 15 colleges out of a total 16 colleges on the preference form and that D.G. Khan Medical College was the only one college that had not been mentioned in the preference form by the petitioner. He argued that it was an inadvertent mistake by the petitioner and given that it is the 16th medical college, it should be deemed as being her sixteenth choice. Hence, the learned counsel for the petitioner argued that this Court may direct the respondents to grant admission to the petitioner.

5. Learned counsel for the respondent-University argued that the prospectus and the admission form clearly provide that each candidate must provide a list of Medical and Dental Colleges that he or she wishes to get admission. He argued that the choice is binding on the candidate and that it cannot be subsequently changed. The list of preference requires the candidates to state their preference and they are considered for admission only in terms of the list of preference provided by them. Since the petitioner did not opt for D.G. Khan Medical College, she was not considered by the stated college and for the purposes of admission it is irrelevant that she has the merit for the said college. He relied upon the provision of prospectus session 2012-2013 given at serial (e), which provides as follows:--
"An applicant, under no circum-stances, shall be considered for a college, he/she has not named in his/her order of preferences. The admitting Authority shall not assign a college by itself if the alternate choices are not indicated."
He has also produced copy of the admission form in Court and argued that the preference requirement is provided in red colour in the admission form to highlight its importance and to ensure that it is not overlooked by any candidate. He explained that if the petitioner is granted admission to a college, which she has not stated as a preference, it will have an adverse effect on the entire admission process as the admission is granted on the basis of the preferences stated by the candidates. Furthermore, he explained that the petitioner can apply again for the next session and may be considered for admission in the next session of the M.B.B.S classes. He has also placed reliance on an unreported order dated 16-2-2010 passed in Writ Petition No.1527 of 2010 and judgment dated 21-1-2013 passed in Writ Petition No.406 of 2013 wherein a similar issue was raised and the writ petitions were dismissed.

6. Heard learned counsel for the parties and reviewed the record available on the file.

7. The issue before us is whether the petitioner can be considered for admission in D.G. Khan Medical College, even though she had not listed it as her preference in the list of preferences. The prospectus provides for college choice, which specifically stipulates that candidates are to provide the list of names of the colleges that they would like to consider for admission. This list of preference cannot be subsequently changed. The prospectus provides that the candidates will be considered for admission in accordance with list of preferences and the candidates will be assessed and ranked according to the merit for each college. The relevant portion of the prospectus in this regard provides that under no circumstances, shall a

applicant be considered for admission to a College that he/she has not named in his/her order of preferences. We have also reviewed the admission form produced in Court by the learned counsel for the respondents. On the titled form List of Preferences was typed in red colour that the candidates will only be considered for admission in the colleges stated as its preference and that no candidate shall be considered for admission to a college, which they have not shown as their preferences. To our mind, the matter has been provided for in the prospectus as well as in the admission form. The petitioner was aware at the time of filling the form that she had to mention every college that she wanted to be considered for admission. The argument that even though she has not mentioned the name of D.G. Khan Medical College, it should be deemed as being the 16th preference because there were only sixteen choices in which admission could have been granted to the petitioner does not find favour with us given that the prospectus and the admission form are clear at stating and highlighting the importance of the preference form. There is no basis upon which this Court can direct the respondents to consider the petitioner for admission to a College which is not stated in her of preference. We are of the opinion that the petitioner took a conscious decision at the time of filling of the form, hence she is now bound by it and that no right is prejudiced as she can always apply in the next academic session of admissions.

8. In view of the above, this petition is dismissed.

AG/A-51/L Petition dismissed.

2014 C L C 130
[Lahore]
Before Ayesha A. Malik, J
MUHAMMAD IDREES----Petitioner
Versus
PROVINCE OF PUNJAB through Collector District Sialkot and others----Respondents
Writ Petition No.12691 of 2012, heard on 7th January, 2013.

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

----S. 55---Punjab Land Acquisition Rules, 1983, R.14(2)---Constitution of Pakistan, Art.199---Constitutional petition---Maintainability---"Aggrieved person"---Scope---Restoration of the acquired land to original owners or their heirs on completion of purpose of acquisition---Petitioner relied upon a letter by Railway Authorities that the land that was acquired by the Railways may be relinquished in favour of the original owners as purpose of acquisition no longer existed---Implementation of said letter was sought by the petitioner through constitutional petition so that the land could be restored to the petitioner at original price---Validity---Letter by the Railway Authorities did not create a right in favour of the petitioner---High Court in an earlier constitutional petition filed by the petitioner on the same subject-matter had directed the petitioner to file an application before the Deputy Commissioner for redressal of his grievance---No such application was available on record to show that the same was filed or was pending---Nothing was available on record to show that the authorities did not require the land---In order to avail the benefit of constitutional jurisdiction, the petitioner must show that he is aggrieved---Person aggrieved must be a man, who has suffered a legal grievance, against whom a decision has been pronounced, which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something---Aggrieved person is one who has suffered any legal wrong---Petitioner should have moved an application before the Deputy Commissioner for decision of the matter in accordance with law and should have pursued the claim in a diligent manner---Without having done the same, the petitioner cannot now claim that he is aggrieved---Length of the delay involved in the case and the conduct of the petitioner both support the fact that the petitioner is not an aggrieved person---Petitioner has no right on the basis of the letter by the Railway Authorities nor he is an "aggrieved person" under Art. 199 of the Constitution---Constitutional petition was dismissed in circumstances.

(b) Constitution of Pakistan---

----Art. 199---Constitutional petition---"Aggrieved person"---In order to avail the benefit of constitutional jurisdiction, the petitioner must show that he is aggrieved---Person aggrieved must be a man, who has suffered a legal grievance, against whom a decision has been pronounced, which has wrongfully deprived him of something

or wrongfully refused him something or wrongfully affected his title to something---Aggrieved person is one who has suffered any legal wrong.

(c) Constitution of Pakistan ---

----Art. 199---Aggrieved person---Scope---Person aggrieved must be a man, who has suffered a legal grievance, against whom a decision has been pronounced, which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something.
(188) 1 Ch. D. 458 ref.

Majid Ali Wajid for Petitioner.
Syed Nayyar Abbas Rizvi, Addl. A.-G. with Rasheed-ud-Din Dar, Tehsildar and Waheed Ahmad Chaudhry for Respondents.
Date of hearing: 7th January, 2013
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JUDGMENT
AYESHA A. MALIK, J.--- Through this petition, the petitioner prays that letter No.476-W/872 dated 23-4-1970 issued by the respondent No.2 returning the ownership of land in question to the petitioner be implemented.

2. The case of the petitioner is that his predecessor Sodagar Ali (now deceased) along with the pro forma respondents are owners of land measuring 1068 Kanals and 8 Marlas situated in Village Kul, Tehsil and District Sialkot. The land was acquired by the Government of Punjab vide Notification No.911 G.S dated 24-8-1916 for the benefit of the Railway Department. Compensation was received by the predecessor of the petitioner and the pro forma respondents at that time. The land was left vacant and the Railway Department did not utilize it. Hence the purpose of the acquisition was finished. The predecessor of the petitioner along with other owners remained in possession of the land and cultivated it. They received letter dated 23-4-1970 wherein it was stated that since the land was no longer required by the Railway Department, it should be relinquished in favour of the original owner at the original cost of the land. On the basis of the said letter, Writ Petition No.789 of 1990 was filed seeking a direction that the land be returned to the petitioner. The said writ petition was disposed of on 4-7-2000 with the observation that the petitioner can approach Deputy Commissioner, Sialkot and file an application before him or if any such application had already been filed, then it should be decided in accordance with law within a period of three months. After this order, application was moved by the petitioner on 27-2-2012 seeking return of the land at the original price in terms of the aforementioned letter of 1970. Learned counsel for the petitioner argued that the original representation dated 7-9-2000 pursuant to the order dated 4-7-2000 has still not been decided. A fresh application was moved on 27-2-2012 and that respondent No.1 should decide the same pertaining to the proprietary rights of the petitioner.

3. Learned Law Officer argued that pursuant to the order of this Court dated 4-7-2000 passed in Writ Petition No.789 of 1990, no representation was filed by the petitioner before the respondent No.1 and no representation was pending before him at the time. He argued that the land was acquired by respondent No.1 and the landowners were duly compensated which included the predecessor of the petitioner. Despite the same, the predecessor of the petitioner and now the petitioner are illegally in occupation of the land. As such, they enjoy no right or title on the said land yet they are in illegal possession of the same. He further agued that an application was moved by some people in relation to this land before the Member Board of Revenue. The Member Board of Revenue requested respondent No.1 for issuance of NOC with respect to the land and whether respondent No.1 wanted to surrender the same in favour of the applicants. Respondent No.1 vide his Letter No.469/W/150/84 dated 1-2-1987 declined and stated that it did not want to surrender the land. He argued that the petitioner was not entitled to the return of the land. He argued that his reliance on the letter dated 23-4-1970 is grossly hit by laches and in any event, the petitioner has exhausted his remedy before the Administrative Civil Judge, Sialkot by filing a suit on the same issue which was dismissed on 28-2-1974.

4. In rebuttal, learned counsel for the petitioner placed reliance primarily on the letter of 23-4-1970 as well as on the representation filed pursuant to the order of this Court dated 4-7-2000. He argued that since the purpose for the acquisition no longer existed, then in terms of Rule 14(2) of the Punjab Land Acquisition Rules, 1983, the petitioner was entitled to the return of the land at the original price.

5. Heard learned counsel for the parties and reviewed the record available on the file.

6. The main issue in this petition is whether the petitioner has a right with respect to the return of the land in dispute on the basis of the letter dated 23-4-1970. The said letter was issued by Vice-Chairman, Engineering of Pakistan Western Railway in favour of the Deputy Commissioner, Sialkot. It provides that the Railway land measuring 133.541 acres in Village Kul Tehsil and District Sialkot may be relinquished in favour of the original owners. Admittedly since the issuance of the letter to date, the predecessor of the petitioner and now the petitioner continue to enjoy possession of the land in dispute despite having received the compensation for the acquisition. After forty-two years from the issuance of the letter of 1970, the petitioner seeks implementation of the said letter. Learned Law Officer on behalf of respondents Nos.1 and 2 submitted that respondent No.2 does not want to surrender the land. A review of the Writ Petition No.789 of 1990 filed by the petitioner and others reveals that at the time, the petitioner prayed for return of the land on the basis of the same letter. In the reply filed by the Deputy Commissioner Sialkot, it was provided that Pakistan Railway did not want to surrender the land which was communicated to the Collector, Sialkot vide letter dated 1-2-1987. Similarly, in the reply filed by the Railway Department, in the said writ petition, it was stated that the petitioner at the time having encroached upon the government land was ejected

from the land on 25-11-1989 and no letter for relinquishment was issued to the petitioner. The letter was sent to one Mehr Din and not to the petitioner. The reply also provides that a suit was filed by the petitioner at the time, which was dismissed on 28-2-1974. Based on the admitted facts and the documents relied upon by the petitioner, the petitioner has no right to the property. The letter of 23-4-1970 does not create a right in favour of the petitioner as the petitioner has already agitated against the said letter through Writ Petition No.789 of 1990. The order of 4-7-2000 required the petitioner to file a representation before the Deputy Commissioner, Sialkot. There is no such application available on the record to show that the same was filed or was pending. Learned counsel for the petitioner argued that a representation was filed and he has referred to Annexure-C at Page 23. However, this application does not have any diary number on it or receiving to show that it was received by the Deputy Commissioner, Sialkot. Furthermore, it was filed by one Barkat Ali and not by the petitioner.

7. Counsel for the petitioner has also relied upon Rule 14 of the Punjab Land Acquisition Rules, 1983. Rule 14(2) of the said Rules provides for the return of acquired land to the owners at the discretion of the government where the project has been abandoned. The respondent No.1 stated in Writ Petition No.789 of 1990 and again in the instant petition that it does not want to surrender the land. There is nothing on the record to show that the respondent No.1 does not require the land. The petitioner relies upon the letter of 23-4-1970 to assert his claim.

8. In order to avail the benefit of constitutional jurisdiction, the petitioner must show that he is aggrieved. "A person aggrieved must be a man, who has suffered a legal grievance, against whom a decision has been pronounced, which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something"[1]. Therefore, an aggrieved person is one who has suffered a legal wrong. As such the petitioner has not suffered any legal wrong, nor has he been denied something he is legally entitled to. Through Writ Petition No.789 of 1990, the petitioner agitated the same matter in issue. After the order of 4-7-2000, the petitioner should have moved an application before the Deputy Commissioner, Sialkot. He should have pursued his claim in a diligent manner. Without having done any of the aforementioned, the petitioner cannot now claim that he is aggrieved. There is nothing to support the fact that he vigilantly pursued his claim in terms of order dated 4-7-2000. The length of the delay involved in his case and the conduct of the petitioner both support the fact that the petitioner is not an aggrieved person. Therefore, the petitioner has no right on the basis of letter dated 23-4-1970 nor is he an aggrieved person under Article 199 of the Constitution of the Islamic Republic of Pakistan.

9. In view of the aforesaid, this petition is dismissed with no order as to cost.

MAK/M-282/L Petition dismissed.

2014 C L C 230
[Lahore]
Before Ayesha A. Malik, J
MUJADDAD ASHRAF and 5 others----Petitioners
Versus
COMMISSIONER LAHORE DIVISION, LAHORE and 3 others----Respondents
Writ Petition No.22606 of 2012, heard on 7th November, 2012.

Land Acquisition Act (I of 1894)---

----Ss. 17(4), 5, & 5-A---Constitution of Pakistan, Art. 199---Constitutional petition---Acquisition of land in cases of urgency---Acquisition of land for the purpose of development of a mass transit metro-bus project---"Public purpose"---Scope---Petitioners impugned proceedings initiated for acquisition of the petitioner's land for a mass transit metro bus project, inter alia on the ground that proper procedure had not been followed and no notice under Ss.5 & 5-A of the Land Acquisition Act, 1894 was served on the petitioners and no opportunity was provided to them for filing objections---Validity---Provincial Government had issued notifications declaring urgency, under Ss.4 & 17(4) of the Act, and the same were affixed at conspicuous places of the locality---Project was for "pubic purpose" and under the Land Acquisition Act, 1894 the Provincial Government had power to acquire land for "public purpose"---Upon issuance of notice under S.17(4) of the Land Acquisition Act, 1894 provisions of Ss.5 & 5-A of the Act were done away with upon a direction of the Commissioner---Metro Bus project was aimed at the planned development of the city and therefore land was required urgently hence provisions of said S.17(4) were invoked---Section 17(4) of the Land Acquisition Act, 1894 was based on subjective satisfaction of the competent authority to determine whether to apply the provisions or not according to prevailing circumstances, and the same was not available for scrutiny by the court---When provisions of S.17(4) were invoked and urgency was declared, no prior notice or intimation to owners of land was required---Petitioners were, therefore, bound by law to surrender their land for public purpose and a remedy was available to them to raise objections on the compensation or enhancement thereof under S.18 of the Land Acquisition Act, 1894---Constitutional petition was dismissed, in circumstances.
Muhammad Ashiq and another v. Water and Manpower Development Authority, Lahore through Chairman, WAPDA House and another PLD 2008 SC 335 and PLD 2009 SC 217 rel.
Petitioner No.1 in person.
Syed Nayyar Abbas Rizvi, Addl. A.-G.
Waqar A. Sheikh, Legal Adviser, L.D.A.
Ashfaq Ahmad Rana, Litigation Officer, TEPA, L.D.A.
Rab Nawaz Kathia, Assistant Director, TEPA, L.D.A.
Waseem Alam, LAC, L.D.A.
Date of hearing: 7th November, 2012.

JUDGMENT

AYESHA A. MALIK, J.--- Through this Writ Petition, the petitioners have impugned the acquisition proceedings initiated for acquisition of petitioners' land measuring 3 kanals, 16 marlas under the Land Acquisition Act, 1894 (the Act) for the project of Metro Bus Rapid Transit System (MBRTS).

2. The case of the petitioners is that their land measuring 3 kanals 16 marlas bearing Khasra No.3723/3 should not be made part of the acquisition proceedings as it is not mentioned in the Notification under section 17(4) of the Act or the proclamation of newspapers dated 9-9-2012. It is contended in the Writ Petition that process of law as required under sections 4, 6 and 17 of the Act has not been followed. As such, the acquisition under challenge is violative of Article 24 of the Constitution of the Islamic Republic of Pakistan, 1973. It has further been agitated that no notice under sections 5 and 5-A of the Act have been issued to the petitioners while initiating proceedings under section 17(4) of the Act. No opportunity was provided to the landowners to file objections upon the acquisition. The petitioners have also agitated that their land is not required for primary or the secondary purposes as the same is located at about 300/400 meters away from the route of the Project and 5 Kms away from the terminal. The petitioners next argued that they are being treated discriminately as other land is available for the said purpose. He lastly argued that the consent of the petitioner was not sought, no price for the land has been determined nor any compensation for the land paid to the petitioners so far.

3. Conversely, learned Additional Advocate-General assisted by learned Legal Adviser for LDA vehemently opposed this writ petition mainly on the grounds that the land of the petitioners and others has been acquired for public purpose after invoking provision of section 17(4) of the Act. Therefore, no notice was required to be issued to the petitioners before taking possession of the land in question. They aver that no illegality has been committed by the respondents. So far as the compensation for the land acquired is concerned, the petitioners have a remedy available to them that is to object to the amount of compensation offered and further they may file application/reference for enhancement of the price of the land, if the given price not acceptable to them. They aver that the petitioners have challenged the whole acquisition proceedings even though they have remedies available upon pronouncement of award under section 11 of the Act for raising objections with regard to the price of the land. It was also argued that the petitioners are not entitled to their prayer nor can the acquisition process be stopped. Hence the instant petition is not maintainable and merits dismissal.

4. I have heard the petitioner No.1 in person, learned Law Officer and learned counsel for LDA and also perused the record made available before me.

5. The Government of the Punjab has acquired the land in question for MBRTS. Notification under section 4 of the Act for acquiring the land was issued on 17-7-2012 which was duly published in the official Gazette on 20-7-2012. A notification

dated 8-8-2012 under section 17(4) of the Act while declaring urgency was published in the official Gazette on 9-8-2012 and, as per parawise comments of the respondents, also affixed at conspicuous places of the locality for intimation of the interested persons about the acquisition proceedings. A notice under section 9 of the Act was also served upon the interested persons on 10-8-2012 and was published in the print media on 18-8-2012 whereas notice under section 10 of the Act was also served for determination of the interested persons. Furthermore, under sections 23 and 24 of the Act, the prices of the land acquired for the Project in question have already been determined by the District Price Assessment Committee, Lahore in its meeting held on 27-7-2012 which were duly approved by the competent authority and two cheques amounting to Rs.41,00,00,000/- and Rs.4,55,22,524/- stand deposited in the government treasury for payment to the effectees of the MBRTS Project.

6. Undisputedly, the above said notifications have been issued by the Government of the Punjab aimed to acquire the land of the petitioners and others for the MBRTS Project. There is no denial that the said Project is for public purpose. Under the Act, the Government has the power to acquire the land for public purpose. Upon issuance of notice under section 17(4) of the Act, the provisions of sections 5 and 5-A of the Act are done away with, upon a direction of the Commissioner. The MBRTS is a project aimed at planned development of the city. The land was required urgently, hence, provisions of section 17(4) were involved, meaning that the requirements of sections 5 and 5-A were dispensed with. In this regard it has been held in case of Muhammad Ashiq and another v. Water and Manpower Development Authority, Lahore through Chairman, WAPDA House and another (PLD 2008 SC 335) that section 17(4) of the Act was based on the subjective satisfaction of the Competent Authority to apply the provisions or not according to the given circumstances which was not available for scrutiny by the Court. Therefore, the petitioners' grievance that notices should have been served after the notification under section 17(4) is without basis. As to the procedure followed by the respondent for acquisition it is in accordance with the Act. In this regard it has been held in Suo Motu case No.13 of 2007 reported as PLD 2009 SC 217 as under:-
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"The Act provides a systematic scheme for taking measurements of the property, assessment of its value and payment of compensation to the person interested, besides remedy for adjudication of rights of aggrieved persons in accordance with well-known norms of administration of justice. In the case involving any dispute of measurement of property or determination of its market value, the Act provides a remedy through a reference by the Collector to the Civil Court for settlement of these disputes where parties have the opportunity to adduce evidence in support of their stance."

7. So far as the contention of the petitioners that the consent of the petitioners should have been sought before acquiring the land, suffice it to say that when the provisions of section 17(4) of the Act are invoked and the urgency is declared, no prior notice or intimation to the owners of the land is required.

8 The petitioners have prayed in the writ petition that the entire acquisition proceedings being illegal be set aside, this prayer be granted because the land has been acquired, admittedly, for public purpose while declaring urgency under section 17(4) of the Act and the petitioners have no right to ask for setting aside of the entire acquisition proceedings initiated in public interest. As such, this prayer cannot be allowed. Instead they are bound by law to surrender their lands for a purpose declared as a public requirement. The only remedy available to them is to raise objections on the compensation being awarded with them. They can also move an application/reference for enhancement of the compensation if they are not satisfied with the same as provided under section 18 of the Act.

9. The contention of the petitioners that they are being treated discriminately does not hold water as nothing has been brought on record to show discrimination. Mere allegation of discrimination without any solid proof in support thereof is nothing and does not merit any consideration.

10. The other contention of the petitioners is that their land bearing Khasra No.3723/3 should not be mentioned in any of the notifications issued for acquisition of land. This contention has been addressed by the petitioner No.1 himself saying that Khasra Numbers of the land, as per revenue authorities, have been changed whereby khasra number of his land 3723/3 stands changed as 3733/3 which is duly mentioned in the notifications.

11. The summary of the whole discussion is that the land of the petitioners has been acquired by the Government admittedly for public purpose following due procedure prescribed by law. No illegality whatsoever has been committed by the respondents. Furthermore, when the land is acquired for public purpose, the owner is expected to surrender his land in public interest though he may object to the amount of compensation being awarded to him under the award and may also file reference for enhancement of the compensation. Resultantly, this writ petition is devoid of any force, hence dismissed.

KMZ/M-170/L Petition dismissed.

2014 P L C (C.S.) 268
[Lahore High Court]
Before Umar Ata Bandial, C.J. and Mrs. Ayesha A. Malik, J
Agha NADEEM
Versus
ADDITIONAL SECRETARY WELFARE and 3 others
Intra-Court Appeal No.557 of 2012 in Writ Petition No.1703 of 2012, heard on 7th November, 2012.

Punjab Services and General Administration Department (S&GAD) (Allotment Policy), 1997---

----Rr. 33(g) & 15---Law Reforms Ordinance (XII of 1972), S.3---Civil service---Intra-court appeal---Government accommodation---Right to retain accommodation after transfer of allottee---Scope---Appellant impugned order of Single Judge whereby his constitutional petition seeking direction that he be allowed to retain official accommodation for a period of five years after his transfer to the Federal Government, was dismissed---Contention of the appellant was that as per the Allotment policy, a vested right had been created in his favour which could not be taken away by a subsequent amendment to said policy which reduced entitlement to retain accommodation after transfer from five years to two years---Validity---Allotment Policy provided that an officer of the rank of the appellant was entitled to retain official accommodation for a period of five years or till the provision of accommodation at his new place of posting, whichever was earlier---Meaning to be attributed to the phrase "whichever is earlier" was that an officer upon being transferred could retain a designated house for up to five years provided he applied for residential accommodation at his new place of posting---Contention of the appellant that on account of R.33(g) of the Punjab Services and General Administration Department (S&GAD) (Allotment Policy), 1997; the appellant could retain official accommodation for up to five years and only then apply for residential accommodation from Federal Government, could not be agreed with---Allotment was an entitlement while in service and not a vested right of the appellant---Rule 15 of the said Allotment Policy provided that government servant had no vested right or claim to the allotment of a government owned residential accommodation---Upon posting to the Federal Government, appellant lost the right to retain official accommodation owned by the Provincial Government---No illegality therefore existed in the findings of the Single Judge---Intra-court appeal was dismissed, in circumstances.

Senior Member BOR and others v. Sardar Bakhsh Bhutta and another 2012 SCMR 864 and Adnan Afzal v. Capt. Sher Afzal PLD 1969 SC 187 ref.
Shahram Sarwar Chaudhry for Appellant.
Dr. Abdul Basit for Respondent No.4.
M. Arif Raja, A.A.-G. along with M. Masood Mukhtar, Additional Secretary (W) and M. Akmal, Law Officer, Estate Office.
Date of hearing: 7th November, 2012.

JUDGMENT

MRS. AYESHA A. MALIK, J.--- Through this I.C.A the appellant impugns order dated 13-8-2012 passed by this court in Writ Petition No.1703 of 2012.

2. The facts of the case that the appellant is a D.M.G Officer BPS-21 serving as Additional Secretary Industries with the Federal Government. Previously, he was serving as Secretary Transport for the Government of Punjab. At the time the respondent No.3 allotted him residential accommodation being House No.12.A Aikman Road, G.O.R-I, Lahore. The appellant was relieved from service by the respondent No.3 in June, 2008 whereafter he reported for duty to the Federal Government and has been working in the Federal Capital since then. The respondent No.3 issued an order dated 31-12-2011 wherein it cancelled the allotment in favour of the appellant and allotted it to respondent No.4. The appellant filed a writ petition against the said order of 31-12-2011 which was dismissed by the learned Judge in Chamber vide the impugned order. The matter in issue before us is with respect to the appellants' right to retain the residential accommodation since June, 2008, notwithstanding the fact that he is no longer an employee of the respondent No.3 and now is in the service of the Federal Government.

3. The case of the appellant is that the allotment policy was first introduced on August 15, 1997 regarding the allotment of Government owned residential accommodation. This policy was amended from time to time and by virtue of an amendment vide S&GAD 1997 dated 19-1-2009 (the Allotment Policy) rule 33(g) entitled the appellant to retain Government accommodation in the Province of Punjab for a period of five years or until he obtains official residence in the Federal Capital. Rule 33(g) reads a follows:---
"Any Officer of the rank/status of Secretary, Additional Secretary and Deputy Secretary to Provincial Government, whose cadre posts exist in S&GAD, Government of the Punjab on his/her transfer out of Punjab, shall be entitled to retain allotted official accommodation, other than a designated house for a period of five years (inclusive grace period) or till the provision of accommodation at his/her place of posting whichever is earlier, providing his/her family lives in the official residence during the period."

4. It is argued by the learned counsel for the appellant that R.33(g) of the Allotment Policy confers a vested right on the appellant as the Allotment Policy had been acted upon by the respondents. He argued that the right of five years cannot be taken away from the appellant pursuant to a subsequent amendment in the Allotment Policy. Reliance has been placed on the cases titled "Senior Member BOR and others v. Sardar Bakhsh Bhutta and another" (2012 SCMR 864) and "Adnan Afzal v. Capt. Sher Afzal" (PLD 1969 SC 187) wherein it was held that a substantive right stands accrued to a party, which avails the same prior to the amendment of such a right. In the present case, the Allotment Policy was amended on 6-6-2011 wherein the right to retain official accommodation was reduced from five years to two years. Learned counsel for the appellant argues that the two year

requirement cannot be imposed upon the appellant and that he is entitled to retain the accommodation at Lahore for five years in terms of the Allotment Policy.

5. Learned A.A.-G. opposes the arguments raised by the learned counsel for the appellant. He argued that no vested right is created in favour of the appellant. He is no longer in the service of the respondent No.3 and cannot retain the official accommodation. Furthermore he argued that the appellant has retained official accommodation, since 2008 and even if the amended period of two years was not made applicable to the appellant, the respondent No.3 was still well within its rights to eject the appellant from the official residence. He argued that rule 33(g) of the Allotment Policy relied upon by the appellant required the appellant to exercise his option to request for official residence by the Federal Government. He argued that it was incumbent upon the appellant to secure official accommodation from the Federal Government in a timely manner. In this regard, he stated that the appellant applied for official accommodation from the Federal Government on 5th January, 2012 being three years after his transfer in 2008 and after three years of being in occupation of the official residence. The appellant, in terms of rule 33(g) cannot remain in possession of the official residence owned by the respondent No.3 and yet at the same time delay applying for residence from the Federal Government.

6. We have heard learned counsel for the parties and reviewed the record available on the file.

7. The entire controversy revolves around policy dated 19-1-2009 rule 33(g) The said paragraph provides that an officer of the rank of Additional Secretary shall be entitled to retain allotted official accommodation for a period of five years or till the provision of accommodation at his place of posting, whichever is earlier. The meaning we attribute to whichever is earlier is that the officer upon being transferred can retain a designated house upto a period of five years provided that he applies for residential accommodation at the new place of posting. There is a requirement built into rule 33(g) wherein the officer must apply for official accommodation at the new place of his posting such that he cannot retain his previous accommodation for more than five years. Therefore, he should apply at the earliest and should get accommodation within the five year period. We do not agree with the understanding advance by the learned counsel for the appellant that on account of 33(g) the appellant can retain official accommodation up to five years and then apply for residential accommodation from the Federal Government. Admittedly, the accommodation belongs to the respondent No.3. Admittedly it was allotted when the appellant was in the service of respondent No.3. The said allotment amounts to an entitlement while in service and not a vested right of the appellant. Upon his posting to the Federal Government, he lost the entitlement to retain official accommodation owned by the respondent No.3 and by virtue of the Allotment Policy and rule 33(g) a concession is given to him to retain the accommodation until he obtains new accommodation, for a period no more than five years. We have reviewed the Allotment Policy and note that rule 15 of the Allotment Policy also clearly provides that no government servant has any vested

right or claim to the allotment of government owned residential accommodation. The appellant was put to notice at the time that any entitlement in his favour to retain official residence will not create a vested right in his favour. In this regard, we find that there is no illegality with the findings of learned Single Judge in Chamber on this issue.

8. For the reasons discussed above this ICA is dismissed with no orders as to cost.

KMZ/N-7/L Appeal dismissed.

2014 P T D 501
[Lahore High Court]
Before Mrs. Ayesha A. Malik, J
LAHORE ELECTRIC SUPPLY COMPANY LTD. through Director Legal---Petitioner
Versus
FEDERAL BOARD OF REVENUE through Chairman and 2 others---Respondents
Writ Petitions Nos.29138, 30678 and 30782 of 2013, decided on 16th January, 2014.

Sales Tax Act (VII of 1990)---

----Ss. 11-A & 48-----Constitution of Pakistan, Art. 199---Constitutional petition---Short-paid amounts of Sales Tax recoverable without notice---Expression "as indicated in its return"---Exercise of power under S.11-A of the Sales Tax Act, 1990---Scope----Petitioners were Electricity Supply Companies and impugned notices issued to them under S. 11-A of the Sales Tax Act, 1990 with regard to short paid amount of sales tax---Contention of the petitioners' was inter alia, that the Federal Board of Revenue ("FBR") relied on externous documents (electricity bills placed on the petitioners' websites) and on such information had claimed that the petitioners' had short paid tax---Validity---Petitioners had provided with their returns, the details of units consumed by each supplier and the FBR had verified the number of units consumed by each supplier from the information found on petitioners' websites---Information had already been annexed by the petitioners with their return, and the respondent FBR had merely verified the information with regard to units consumed by electricity consumers and determined that the petitioners had short-paid sales tax---Section 11-A of the Sales Tax Act,1990 did not prohibit verification process undertaken by the FBR---Contention that the system for filing returns was electronic, and would only accept returns if liability was fully discharged, was misconceived, as e-filing of return along with required information did not take away the ability or requirement to verify the information to determine whether less tax had been paid---For purposes of S. 11-A of the Sales Tax Act, 1990, electricity bills relied upon did form part of the returns filed, and the action initiated under S. 11-A of the Act, therefore, was based on information provided by the petitioners in their returns---Constitutional Petitions were dismissed, in circumstances.

Micro Corporation through Managing Partner v. Deputy Collector, Customs, Sialkot 2006 PTD 378; Messrs G.M.H. Traders and Manufacturers through Proprietor/Chief Executive v. Deputy Director/Investigating Officer, Directorate of Intelligence/Investigation, Lahore 2009 PTD 1894; Province of the Punjab through Secretary Health Department v. Dr. S. Muhammad Zafar Bukhari PLD 1997 SC 351; Atta Muhammad and 16 others v. Modern Textile Mills (Pvt.) Ltd., and 2 others 2004 PLC 137 and 'Tufail Muhammad and others v. Raja Muhammad Zia

Ullah Khan, Claims Commissioner, Lahore and Director of Enforcement, Evacuee Property and Claims, South Zone, Lahore PLD 1965 SC 269 ref.
Shahbaz Butt for Petitioner.
Ch. Muhammad Zafar Iqbal, Muhammad Yahya Johar, Shafqat Mehmood Chief Commissioner RTO, Asim Majeed, Commissioner Zone-IV, RTO, Lahore, Nadeem Rizvi, Commissioner, Zone-I, RTO, Lahore and Raza Ashfaq Sheikh, Deputy Commissioner, Zone-I, RTO, Lahore for Respondents.
Date of hearing: 5th December, 2013.

JUDGMENT

Mrs. AYESHA A. MALIK, J.---This single judgment, decides upon the issues raised in Writ Petitions Nos.29138, 30678 and 30782 of 2013 as common question of law and facts are involved in these petitions.

2. The petitioners have impugned notices issued under section 11-A of the Sales Tax Act, 1990 (Act of 1990) and the process adopted thereunder.

3. The petitioner in Writ Petition No.29138 of 2013 is the Lahore Electric Supply Company Limited (LESCO). The case of the petitioner is that the petitioner has been filing its monthly sales tax returns as required under section 26 of the Act of 1990. The returns are being filed electronically through the E-portal of respondent No.1. The respondent No.3 issued three separate notices dated 28-10-2013 in which it has alleged that the petitioner has short paid the sales tax with respect to steel melters and re-rollers and hence the short paid amount has been made recoverable under section 11-A of the Act of 1990.

4. The petitioner in Writ Petition No.30678 of 2013 is Gujranwala Electric Power Company Limited (GEPCO), which has impugned notices issued under section 11-A of the Act of 1990 wherein it has alleged that the petitioner has short paid the sales tax with respect to the steel melters and re-rollers and the short paid amount has been made recoverable under section 11-A of the Act of 1990.

5. The petitioner in Writ Petition No.30782 of 2013 is also GEPCO, which has impugned letter dated 28-11-2013 wherein pursuant to the notice under section 11-A of the Act of 1990 (impugned in Writ Petition No.30678 of 2013) a notice under section 48(1)(b) has been issued under the Act of 1990 for recovery of the short paid amount directly from the bank accounts of GEPCO. Learned counsel for the petitioner submits that the basic issue in this writ petition also relates to the exercise of power under section 11-A of the Act of 1990, which has been impugned in the connected Writ Petition No.30678 of 2013, hence the matter in issue is the same as the aforementioned petition.

6. The common grievance of the petitioners is that the respondents have initiated action under section 11-A of the Act of 1990, which section is not applicable and cannot be invoked for the purposes of recovery of the alleged short paid amount.

Learned counsel for the petitioners argued that the respondents have relied upon extraneous documents and information on the basis of which it has claimed that the petitioners have short paid their sales tax in terms of the amount indicated in their returns. Learned counsel argued that the sales tax returns for their respective period have been placed on the E-portal of the respondent. He argued that it is an automated, electronic process wherein the amount of sales tax due has to be paid and if not paid by the petitioners, the returns will not be accepted by the system. Hence the system calculates the tax due and unless the liability is discharged the returns are not accepted. He argued that there is no question of any short payment as the returns were duly accepted by the E-portal of the respondents. Learned counsel argued that the figures taken by the respondents represent the billed amount and not the collected amount or the paid amount by the steel melters and re-rollers. Hence the amount claimed as short paid is disputed by the petitioners. Learned counsel argued that the petitioners have not short paid the sales tax and in fact have paid the due tax. Furthermore, in the event that the respondents dispute the amount of tax due from the Petitioners then the respondents are required to follow due process, determine the liability and thereafter, raise a claim for the amount found to be due against the petitioners. Learned counsel argued that the respondents are using section 11-A of the Act of 1990 as a short cut to recover amounts, which are disputed by the petitioners and are not due to the respondents. Learned counsel further argued that the respondents for the purposes of section 11-A of the Act of 1990 cannot rely upon outside information or documents. They are required to determine short paid amount from the returns filed by the petitioners. Learned counsel argued that in terms of the impugned notices issued to the petitioners, the respondents have collected information from the electricity bills of the steel melters and re-rollers, on the basis of which they have determined that the petitioners have short paid the sales tax due to the respondents. In this regard, learned counsel has relied upon the case titled 'Micro Corporation through Managing Partner v. Deputy Collector, Customs, Sialkot' (2006 PTD 378) to urge the point that first a determination of the liability had to be made and only then any penal provision or recovery can be made. He has also placed reliance upon the case titled 'Messrs G.M.H. Traders and Manufacturers through Proprietor/Chief Executive v. Deputy Director/Investigating Officer, Directorate of Intelligence/Investigation, Lahore' (2009 PTD 1894) to urge the point that a demand cannot be raised without finalizing adjudication proceedings. Learned counsel argued that if the respondents dispute the amount of tax paid by the petitioners then proceedings under section 11 of the Act of 1990 may be initiated wherein an order for assessment of tax actually payable by the petitioners has to be made before any amount can be recovered from the petitioners. With respect to Writ Petition No.30782 of 2013 learned counsel argued that invoking section 48 of the Act of 1990 is also misconceived as the tax liability has yet to be determined and the respondents have relied upon extraneous documents to demand recovery under section 11-A of the Act of 1990, hence the impugned notice issued under section 48(1)(b) of the Act of 1990 is also liable to be set aside.

7. Report and para wise comments have been filed by the respondents. Learned counsel for the respondents argued that the petitioners have approached this Court with unclean hands as they are avoiding payment of the required tax. Learned counsel argued that the exercise of discretion under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 should not be in aid of injustice and he who seeks equity must come to the Court with clean hands. In this regard, learned counsel have relied upon the cases titled 'Province of the Punjab through Secretary, Health Department v. Dr. S. Muhammad Zafar Bukhari' (PLD 1997 SC 351), 'Atta Muhammad and 16 others v. Modern Textile Mills (Pvt.) Ltd., and 2 others' (2004 PLC 137) (Karachi High Court) and 'Tufail Muhammad and others v. Raja Muhammad Zia Ullah Khan, Claims Commissioner, Lahore and Director of Enforcement, Evacuee Property and Claims, South Zone, Lahore' (PLD 1965 SC 269). Learned counsel further argued that the petitioners in Writ Petitions Nos.29138 and 30678 of 2013 are collection agents for the respondents and are required to collect sales tax at the rate of Rs.4 per unit of electricity consumed from every steel melter and re-roller and thereafter, deposit the same in the government treasury. Learned counsel argued that the petitioners filed their monthly sales tax returns along with all required appenditures as provided for in section 26 of the Act of 1990. The respondents while relying upon the information provided in the returns, which includes the appended documents discovered that the petitioners were not declaring the correct amount of sales tax collected from the steel melters or re-rollers. The information provided in the returns of the petitioners were verified and checked by the respondents from the bills issued by the petitioners to the stated consumers. In the same way, the petitioner in Writ Petition No.30782 of 2013 is a collection agent for the purposes of extra tax and further tax which is also collected from the electricity bill. The petitioner in this case has not disclosed the amounts actually collected as extra tax and further tax for the months of July, August and September, 2013. Essentially they have charged the tax at its given rate but have deposited less in the government treasury. Again this information was ascertained from the return filed and the electricity bills issued by the petitioner. Learned counsel explained that the information provided for in the bills is tabulated and given to the respondents in the form of "Annexures A and C" of the returns. Learned counsel argued that no extraneous document was referred to. The information provided in "Annexure-C" was verified from the bills that were issued to the consumer of the petitioners. It was then discovered that the petitioners had short paid sales tax, as well as the extra tax and further tax, hence recovery proceedings under section 11-A of the Act of 1990 were initiated against the petitioners. Learned counsel explained that there is no dispute or assessment required as the petitioners are merely collecting agents of the respondents, meaning that they recover the sales tax, extra tax and further tax through the electricity bills and deposit the same in the government treasury. Whatever they recover they are to deposit it in the government treasury. Learned counsel further argued that this question has already been decided in Sales Tax References Nos.105 (Messrs LESCO v. The Commissioner Inland Revenue, and others) and 106 of 2011 vide judgment dated 6-10-2011.

8. Heard the learned counsel for the parties and reviewed the record available on the file.

9. The common question which requires determination before this Court is whether the documents relied upon by the respondents for the purposes of determining short paid tax, falls within the scope of as indicated in his return under section 11-A of the Act of 1990. The second question that arises is whether assessment of tax was necessary for which due process is mandated under the Act of 1990.

10. The petitioners filed their monthly sales tax returns indicating the amount of sales tax due and paid by the petitioners. The respondents initiated action against the petitioners under section 11-A of the Act of 1990 on the ground that they had paid less tax than the tax that is due. As per the notices issued by the respondents under section 11-A of the Act of 1990 this information was obtained from the electricity bills issued by the petitioners and placed on their websites. Since the information relied upon are the electricity bills found on the websites of LESCO and GEPCO the petitioners grievance is that the bills and the data contained therein are extraneous documents, which do not form part of their return, hence cannot be relied upon for the purposes of recovering short paid amount under section 11-A of the Act of 1990. Section 11-A of the Act of 1990 is re-produced hereunder:-
"Short paid amounts recoverable without notice.---Notwithstanding any of the provisions of this Act, where a registered person pays the amount of tax less than the tax due as indicated in his returns, the short paid amount of tax along with default surcharge shall be recovered from such person by stopping removal of any goods from his business premises and through attachment of his business bank accounts, without giving him a show-cause notice and without prejudice to any other action prescribed under section 48 of this Act or the rules made thereunder."
Section 11-A provides that short paid amount is the amount of tax less than the tax due as indicated in his return. A dispute has arisen as the electricity bills referred to by the respondents do not form part of the returns filed by the petitioners. The requirements of a return is provided under section 26 of the Act of 1990 wherein every registered person shall furnish a true and correct return in the prescribed form indicating the purchases and the supplies made during the tax period, the tax due and paid and such other information as may be prescribed. Section 26(2) of the Act of 1990 provides that any person or class of person can be required to furnish summary or details or particulars pertaining to the imports, purchase and supplies for any tax period or period in the specified formats. The petitioners along with their returns provide information in the form of domestic purchase invoice "Annexure-A" and domestic sales invoice "Annexure-C". Annexure-A provides information pertaining to WAPDA. Annexure-C provides for the NTN number and the name of the supplier. In this case, the names of the suppliers are the names of the steel melters and re-rollers. It provides for the rate at which sales tax has been collected and the units consumed by each supplier. Thereafter total sales tax is calculated. The returns and Annexures are not disputed by either party. The respondents have reviewed the Annexures and have verified the information stating the number of units consumed by the supplier and the billed amount. It is their case that the

number of units consumed as reflected in its column in "Annexure-C" is not as per the electricity bills of the supplier. The respondents have verified the number of units consumed against the bills of the supplier, which were found on the websites of the petitioners. During the course of this verification process, the respondents discovered that the petitioners have not correctly inserted the units consumed by the suppliers. Consequently, the total amount of sales tax collected from the supplier has not been correctly entered. In the same way in Writ Petition No.30782 of 2013 the electricity bills show the recovery of extra tax and further tax in the billed amounts, but the amount deposited for the said taxes is less than that billed by the petitioners.

11. The information in "Annexure-C" has been given by the petitioners to the respondents in terms of the bills that they have issued to their suppliers. The respondents have merely verified the information of units consumed by the electric consumers from the bills. To my mind, section 11-A of the Act of 1990 does not prohibit the verification process undertaken by the respondents. The contention of the learned counsel that the system is automated and electronic and will not accept the returns, if the liability is not fully discharged is misconceived. E-filing of the returns along with required information does not take away the ability or the requirement of the respondents to verify the information provided in the returns. It is only after verifying the information that the respondents can determine whether less tax has been paid than that disclosed in the returns. In fact, if the argument of the petitioner is accepted then section 11-A of the Act of 1990 would become redundant as the respondents would have to accept tax paid by a person as being the tax due from such person and no question of less paid tax could arise. In this case the entire dispute is with reference to the disclosure of units of electricity consumed by the suppliers of the petitioners in the returns filed by the petitioners. The respondents have produced copies of the bills of the suppliers of the petitioners to show that the units consumed as reflected in "Annexure-C" is not the same as the units consumed mentioned in the bills of the suppliers. The respondents have calculated short paid amount on the basis of the bills issued by the petitioners to their suppliers. The fact that "Annexure-C" contains the required data from the bills issued by the petitioners to their suppliers means that the respondents can rely upon the actual bills issued by the petitioners. It is on the basis of the units consumed that the sales tax is collected by the petitioners under the Special Procedure for Payment of Sales Tax, Chapter XI of the Sales Tax Special Procedure Rules, 2007 (Special Procedure Rules, 2007) from the steel melters, re-rollers and ship breakers. In Writ Petition No.30782 of 2013 the petitioner has not deposited the full amount of extra tax and further tax collected from the suppliers. This information was also ascertained from the electricity bills. To my mind, the electricity bills are deemed to be a part of the returns filed by the petitioners as all the relevant information from the bills has been provided to the respondents in "Annexure-C", which is a part of the returns filed by the petitioners. Hence reliance on the same is as per the information provided by the petitioners in their returns.

12. Section 11-A of the Act of 1990 enables the respondents to collect short paid amounts without giving any show-cause notice and without prejudice to any action prescribed under section 48 of the Act of 1990. The purpose of this section is to enable the respondents to recover the amount of less paid tax from the tax due as indicated in the returns without recourse to the person. The tax due is determined from the returns filed by a person and the information contained in the returns. The default become apparent from the return filed and no further information/document is needed. The return filed by the tax payer is the evidence which proves the default and renders the person liable for short paid amount under section 11-A of the Act of 1990. In the instant petitions, notices were issued to the petitioners to pay the short paid amount along with default surcharge and penalty within seven days. Since the petitioners did not make the payment, in Writ Petition No.30678 of 2013 notice under section 48(1)(b) of the Act of 1990 was issued by the respondents for direct recovery from the accounts of the petitioner. Hence the petitioners were given notice of the intended action of the respondents. It is also noted that the petitioners have only challenged the information relied upon for the purposes of determining short paid tax. Furthermore the argument of the petitioners that there is a dispute with respect to the sales tax payable by the petitioners and such dispute is subject to due process under section 11 of the Act of 1990 is without merit. I find that there is no dispute with respect to the assessment of tax. The dispute pertains to collection of sales tax by the petitioners under the Special Procedure Rules, 2007 prescribed for steel melters and re-rollers and the collection of extra tax and further tax on the billed amount. In these cases the petitioners are merely collection agents wherein they recover the extra tax, further tax on the billed amount and sales tax at the rate of Rs.4 per unit consumed through the electricity bills and deposit the same in the government treasury. Incorrect disclosure of units consumed or tax collected does not give rise to an assessment dispute. In fact it suggests that the petitioners have deliberately evaded their obligation of depositing the necessary tax, sales tax, extra tax or further tax. Learned counsel for the petitioners was unable to explain why there was a discrepancy in the units of electricity consumed in "Annexure-C". His emphasis was on the fact that due process under section 11 of the Act of 1990 must be followed to assess the tax due from the petitioners, if any. In the same way there is no explanation for the incorrect disclosure of the tax collected (extra tax and further tax). The petitioners have also argued in their petitions that the tax collected is their output tax. It is the grievance of the petitioner that this fact should have been considered before acting under section 11-A of the Act of 1990. Again this argument is misconceived as this point has already been agitated and decided by this Court in STR Nos.105 and 106 of 2011. The learned counsel for the petitioners stated that the matter is now pending before the Hon'ble Supreme Court of Pakistan.

13. Therefore, in view of the aforesaid for the purposes of section 11-A of the Act of 1990 the electricity bills relied upon form part of the returns filed and the action initiated under section 11-A of the Act of 1990 is based on the information provided in the returns of the petitioners.

KMZ/L-1/L Petition dismissed.

PLJ 2014 Lahore 209
Present: Mrs. Ayesha A. Malik, J.
AL-JADEED ENGINEERING SERVICES, etc.--Petitioners
versus
OIL AND GAS REGULATORY AUTHORITY, etc.--Respondents
W.P. No. 1524 of 2013, decided on 27.9.2013.

CNG Rules, 1992--

----Rr. 5, 16 & 18--CNG Rules, 2010, Rr. 155 & 159--OGRA Ordinance, 2002--Scope--Explosive Act, 1884, Ss. 4, 5 & 7--Constitution of Pakistan, 1973, Art. 199--Constitutional petitions--Annual safety inspection of CNG Stations--Jurisdiction of OGRA to appoint third party inspector for purposes of inspections, certifications and verification of CNG Stations--Responsibility of OGRA to maintain standard and code of practice--Issuance of licences, testing--Chief Inspector Explosives is the licensing authority who has to ensure that every vessel, cylinder or container which is filled with or used for storage or transport of compressed gas is manufactured and maintained as per the rules--Chief Inspector Explosives is required to carry out periodic inspections, which includes an annual safety inspection of the pressure vessels, cylinder, valves, electrical installation and allied fittings used in the CNG Stations to ensure compliance of the 2010 Rules--Chief Inspector Explosives will issue its approval that all the cylinders, vessels, valves and electrical installations are as per the prescribed standards--Chief Inspector Explosives conducts annual safety inspection of vessel, cylinders, valves and electrical installation of the CNG station and allied fittings to ensure compliance of the design and manufacturing standards and OGRA conducts the annual safety inspection to ensure that the licensee is complying with the Standard Code of Practice in the operation of its CNG station--Primary objective for both inspections is to ensure strict compliance with the terms of the license and the safety codes--OGRA and Chief Inspector Explosives are responsible to ensure compliance of the rules and to maintain public safety and prevent accidents--OGRA is the licensing authority for compressed natural gas and is required to conduct third party inspections of the licensed premises to ensure strict compliance of OGRA Ordinance 2002 and the CNG Rules 1992, the terms of the license and to ensure compliance with the Standard Code of Practice as prescribed in the CNG Rules 1992--Notices issued by OGRA for conducting annual safety inspections and for retesting cylinders are in accordance with the law and should be complied with by the Petitioners. [Pp. 216 & 217] A, B, C & D

Mr. Mobeen-ud-Din Qazi, Ch. Muhammad Rafique Warriach, Mr. Amir Umer Khan, Mian Javed Iqbal Araien, Mr. Saleem Akram Chaudhry, Mr. Muhammad Iqbal Ghaznavi, Syed Amjad Iqbal Hussain, Rana Shakeel Ahmed Khan, Advocates for Petitioners.

Mr. Sameer Khosa, Advocate for OGRA (in W.P. Nos. 22706/12, 29306/12, 31841/12, 1524/13 & 940/13).

Mr. Shaukat Umar Pirzada, Advocate for OGRA (in W.P. Nos. 25984/11, 17237/12 and 21101/12).

Mr. Muhammad Naseem Kashmiri, DAG alongwith Mr. M. Nazir Malik, Senior Law Officer, Mehfooz-ur-Rehman, Technical Officer and Muhammad Aftab Qazi, Inspector of Explosives for Respondents.
Date of hearing: 31.07.2013

JUDGMENT

This consolidated judgment shall decide upon the common issues raised in Writ Petition Nos. 25984/2011, 21101/2012, 11269/2012, 17237/2012, 22706/2012, 29306/2012, 31841/2012, 940/2013, 1524/2013 and 8262/2013.

2. The basic issue that arises in these petitions is with respect to the annual safety inspection of CNG stations. The case of the petitioners is that the annual safety inspection is to be carried out by third party inspectors as appointed by the Chief Inspector Explosives, under the control of the Ministry of explosives. It is their case that the Oil and Gas Regulatory Authority (OGRA) has no jurisdiction or authority to appoint third party inspectors for the purposes of inspections, certifications and verification of CNG stations. This authority lies exclusively with the Chief Inspector Explosives.

3. The grievance of the petitioners is that OGRA has issued notices to conduct annual safety inspections of CNG stations through third party inspectors, appointed by them, failing which the gas supply to the CNG stations will be disconnected. The petitioners counsels argued that the annual safety inspection was carried out by third party inspectors appointed by the Chief Inspector Explosives, therefore, the petitioners should not be burdened with the fee demanded by OGRA for carrying out an inspection already completed by the Chief Inspector Explosives. The petitioners contend that the dispute between the Ministry of Explosives and OGRA over who has to conduct the annual safety inspection of the CNG stations should not transgress upon the rights of the petitioners to conduct their business.

4. The petitioners in W.P. Nos. 25984/2011, 21101/2012, 11269/2012, 17237/2012, 22706/2012, 29306/2012, 940/2013, 1524/2013 and 8262/2013 were all issued notices by OGRA for the purposes of conducting annual safety inspection by third party inspectors appointed by OGRA. W.P. No. 31841/2012 has been filed against a notice issued for re-testing of CNG cylinders. W.P. No. 1524/2013 has been filed by the association of third party inspectors who seek a declaration from this Court that they enjoy exclusive jurisdiction to conduct all safety related inspections. The case of the petitioners is that in terms of Sections 5 and 6 of the Explosive Act, 1884, (Act of 1884) Sections 4 and 5 of the Petroleum Act, 1934 (Act of 1934) read with Explosives Rules, 2010 and the Mineral and Industrial Gas Safety Rules, 2010 (2010 Rules), the Department of Explosives is exclusively empowered to grant approval of designs, specifications, standards, manufacturing and all other issues with respect to a CNG station. Furthermore, the Department of Explosives is also given the exclusive mandate under the law to ensure implementation of all safety rules wherever any industrial gases, hazardous, substances and explosives are used.

Section 7 of the Act of 1934 specifically empowers the Chief Inspector Explosives to appoint third party inspectors for inspection, certification and verification of CNG stations. It is the petitioners case that OGRA has no role to play when it comes to public safety and installation of a CNG station. In order to resolve this issue between the Department of Explosives and OGRA, the Department of Explosives wrote a letter to the Chairman, OGRA on 10.08.2011 explaining the role of the Department of Explosives as follows:--

"(I) As per Sections 5 and 6 of Explosives Act, 1884 and Sections 4 & 5 of Petroleum Act, 1934 and rules framed underthere, the Department of Explosives is empowered to grant approval of design, specification, standards, import & manufacturing and manners of installation of all sort of compressed/liquefied Gas containers (Cylinders, Vessels) Petroleum Storage Tanks, compressors, Dispensers, piping, fitting, allied equipments and all kind of safety devices.

(II) As per Section 7 of Explosives Act, 1884 and Section 26 of Petroleum Act, 1934, Department of Explosives is an entity empowered to appoint third party inspectors to enter for inspection/certification/verification of CNG stations, LPG plants, LPG automotive station, Petrol pumps, Bulk Petroleum Oil & other Petrochemicals depots, all sort of CNG/LPG/LNG/Industrial Gases carriers and containers (cylinders, vessels) etc.

(III) As compared to above, the domain of OGRA under Ordinance No. XVII of 2002, dated 28.03.2002 is that OGRA was formulated to foster competition, increase private investment and ownership in the midstream and downstream. Petroleum industry to protect the public interest while respecting individual rights. Obviously OGRA is mainly concerned with the pricing, marketing, tariff, duties, tax exemptions, supply of CNG, LPG, LNG to provide effective and efficient regulation for above mentioned purposes."

However, OGRA totally ignored the said letter and continued to issue letters to CNG stations with respect to third party inspections. In this regard, a letter was issued by the Ministry of Industries Department to the Respondents No. 4 and 5 on 11.9.2012 explaining that the relevant authority to regulate safety aspects of CNG stations is the Chief Inspector Explosives. Based on these letters, it has been argued that OGRA cannot appoint third party inspectors. The learned DAG supported the case of the Respondents No. 6 and 7 by contending that the authority for appointment of third party inspectors for annual safety inspections lies with the Chief Inspector Explosives.

5. The Respondent No. 3, Hydrocarbon Development Institute of Pakistan argued that all testing of CNG cylinders fell within their jurisdiction under the Hydrocarbon Development Institute of Pakistan Act, 2006 (2006 Act) and the CNG Rules, 1992. That OGRA is responsible to maintain the Standard Code of Practice and the CNG Safety Rules and that the competent authority for maintaining safety and conducting inspections was OGRA.

6. In the instant petitions, report and parawise comments have been filed by the Respondent No. 1 OGRA, the Respondent No. 2 Ministry of Petroleum & Natural Resources, the Respondent No. 3 Hydrocarbon Development Institute of Pakistan,

the Respondents No. 6 & 7 Ministry of Industries and Department of Explosives and the Respondent No. 8 Federation of Pakistan through Secretary Cabinet Division, Islamabad.

7. In order to appreciate the controversy at hand, the learned counsels appearing before this Court set out to explain the law governing the dispute at hand. OGRA was established under the Oil and Gas Regulatory Authority Ordinance, 2002 (OGRA Ordinance 2002) to regulate the oil and gas sector especially with regard to petroleum, oil, natural gas, LPG, LNG and CNG. Section 2(1)(xxxii) of the OGRA Ordinance, defines `regulated activity' as an activity that requires a license. License has been defined under Section 2(1)(xi) as one granted under the OGRA Ordinance, 2002. Section 22 of the OGRA Ordinance, 2002 provides that OGRA shall have exclusive powers to grant licenses in respect of any regulated activity. Section 23(2) provides that no person shall construct or operate any CNG testing facility, CNG storage facility and undertake transportation, filling, marketing or distributing CNG unless a general or specific license has been issued by OGRA. OGRA has also adopted the Standard Code appended to the CNG (Production & Marketing) Rules, 1992 (CNG Rules, 1992) and is the Authority under the CNG Rules, 1992. Rule 3 of the CNG Rules 1992 provides that a license must be obtained from OGRA before the operation, or construction of works connected with compression of natural gas for the purpose of filling, storing and distributing CNG. Rule 10 of the CNG Rules, 1992 provides that the licensee, after the commencement of the license, shall execute to the satisfaction of the Authority his works in accordance with the code of practice, appended to these rules, within a period of two years or; such further period as the Authority may allow under special circumstances proved by the licensee to be behind his control. Rule 10 further provides that the Authority shall appoint third party inspectors for verification of works of the licensee in pursuance of Rule 10(1).

8. Learned counsel for OGRA argued that the license issued by the Authority is for filling, storing, distribution, transportation and marketing CNG stations. In order to establish a CNG station, a provisional marketing license is issued by the Authority OGRA. Thereafter the proprietor of the CNG station provides the Authority with all the required documentation which includes No Objection Certificates from various Departments. Under the CNG Rules, 1992 when the works commence at the CNG station, OGRA is to conduct an inspection and on the completion of the works it issues a license. Prior to the issuance of the license, OGRA obtains verification of the works through third party inspection. Subsequently after the commissioning of the station, OGRA obtains a report through third party inspectors to ensure that the terms and conditions of the license have been satisfied. He argued that the Explosive Rules, 2010 are made under the Explosive Act, 1884. Under the Petroleum Act, 1934, the Petroleum Rules, 1937, Gas Safety Rules, 1960 and the Gas Safety Rules, 2010 were framed. Under the Regulation of Mines and Oil Fields Act, 1948, the CNG Rules, 1992 were framed prior to the establishment of OGRA. Third party inspection was carried out under the CNG Rules, 1992 by the department of Explosives. However after 2002 with the establishment of OGRA, all

matters related to CNG stations, such as issuance of license, testing, certifications, storage all fall under the exclusive control of OGRA.

9. Learned counsel for the petitioners argued that letter dated 28.07.2011 issued by the Ministry of Industries clarifies the matter and the legal position. Pursuant to this decision, the Chief Inspector Explosives requested OGRA to refrain from appointing third party inspectors to inspect CNG stations. However, notwithstanding the clarification from the Ministry of Industries, OGRA continued to interfere in the third party inspections carried out by the Department of Explosives. Again on 23.01.2012 the Department of Explosives addressed a letter to all the Chief Secretaries of all the Provinces stating that third party inspectors could only be appointed by the Department of Explosives. However, with reference to the petitioners' cases OGRA has issued letters calling for appointment of third party inspectors failing which the gas supply of the petitioners with the CNG stations will be disconnected.

10. I have heard learned counsel for the parties and reviewed the record available on the files.

11. The Explosives Act, 1884 promulgated under the Ministry of Industries provides in Section 4(1) definition of explosives. The definition of explosives is conferred to substances whether solid, liquid or gaseous used or manufactured with a view to produce an explosion or fireworks. Section 5 gives the power to make rules as to license and manufacturing, use, sale, transport and import of explosives. Section 7 provides for conferring the rule making power for inspection, search, seizure, detention and removal. Under this Act the Explosives Rules, 2010 were framed. However, there is no provision in the said rules relevant to the controversy at hand.

12. The Petroleum Act, 1934 regulates the import, transport, storage and production, refining and blending of petroleum substances. Petroleum is defined to mean any liquid hydrocarbon or mixture of hydrocarbons. Section 4 relates to the import, transport and storage of petroleum, providing that the Federal Government may make rules in relation to import, transport and storage of petroleum. Section 5 relates to production, refining and blending of petroleum and provides that the Federation may make rules for this purpose. Section 13 provides for inspection of places where petroleum is imported, stored and produced, refined and blended. The Federal Government may authorize any officer to cause such inspection. Section 26 provides for entry and search to any place to seize, detain or remove the petroleum. Again the Federal Government is to authorize an officer for this purpose. Under the Act of 1934 the Mineral and Industrial Gases Safety Rules, 2010 were promulgated. The 2010 Rules regulate filling and manufacture of compressed gas in any vessel including the transport of vessel filled with compressed gas. Vessel is defined as a pressure vessel under Rule 2(ixxxvii) and pressure vessel is defined in Rule 2(ixviii) as a closed metal container of whatever shape for storage and transport of compressed gas. Rule 3 provides that filling and manufacture in any vessel shall be

as per the specified standard or code and with the approval of the Chief Inspector Explosives. The procedure for seeking the approval of the Chief Inspector Explosives is provided under the said Rule. The 2010 Rules provide that third party inspectors carry out certifying pressure vessels and their fittings so as to ensure that the pressure vessels are designed and constructed as per the prescribed standard Rule 2(xcii). The Chief Inspector Explosives also carries out inspection and testing of cylinders filled with compressed gas under Rule 28. The filling, possession, import and transport of cylinders with compressed gas have to be approved by the Chief Inspector Explosives under Rule 129. Similarly the valves used on the gas cylinders must also comply with the required specification (Rule 130) and so must the electrical installation used at the CNG station (Rule 148). Rule 155 of the 2010 Rules provides that no person shall fill any cylinder, vessel and container with compressed gas and no cylinder, vessel and container filled with compressed gas shall be possessed by anyone except under and in accordance with the conditions of a licence granted under these rules and Rule 159 of 2010 Rules provides the plans of the premises proposed to be licensed are to be submitted to the Chief Inspector Explosives who will ensure that the compressed gas will be filled and stored in the premises as per the proposed license. Therefore the 2010 Rules regulate the design and manufacturing of pressure vessels, the cylinders, valves and the electrical installation used in CNG stations. The inspection carried out by the third party inspectors under the 2010 Rules is to ensure that the vessel, cylinder valves and electrical installation are manufactured as per the standards prescribed. The Chief Inspector Explosives is the licensing authority who has to ensure that every vessel, cylinder or container which is filled with or used for storage or transport of compressed gas is manufactured and maintained as per the rules. In this regard the Chief Inspector Explosives is required to carry out periodic inspections, which includes an annual safety inspection of the pressure vessels, cylinder, valves, electrical installation and allied fittings used in the CNG stations to ensure compliance of the 2010 Rules. The Chief Inspector Explosives will issue its approval that all the cylinders, vessels, valves and electrical installations are as per the prescribed standards. In this regard the Chief Inspector Explosives will also review the plans for the installations of the cylinders, vessels and electrical installations to ensure compliance with the prescribed standards. OGRA on the other hand is the licensing authority for the operation of the CNG stations. The regulation of OGRA starts from the inception, such that no person shall without first obtaining a license from OGRA, enter into an agreement for the operation and construction of works for storage, filling and distributing CNG. Under Rule 5 of the CNG Rules, 1992 when considering an application for issuance of license OGRA is required to give regard to public interest. OGRA regulates the total area within which the CNG is stored, filled or distributed. It regulates the price of the CNG, the location of the station and the use of the site for the CNG station and all related safety issues. It regulates the works after commencement of the license till its completion. OGRA can conduct inspections under Rules 16 and 18 of the CNG Rules, 1992 to ensure compliance of the terms and conditions of the license as well as to ensure public safety which read as follows:--

"16. Entry, inspection and enforcement of the rules.--The Authority or any person duly authorized by the Authority in this behalf may enter, inspect and examine any place in which he has reason to believe that there is any work(s) for compressing natural gas for the purpose of storing, measuring or distribution of CNG and take other necessary steps for the due observance of the provisions of these rules by licensees, consumers or any other person connected with the storage, filling, distribution and use of CNG."
"18. Protection to public.--(1) A licensee shall locate, construct and operate his pipeline and all works connected with CNG Refueling station, and installation of CNG equipment in automobiles in accordance with the licence granted by the Chief Inspector of Explosives under the Mineral Gas Safety Rules, 1960, and strictly comply with the provisions of the Petroleum Rules, 1937 and the Gas Cylinder Rules, 1940, so as to avoid any danger to the public health or safety ....."
Therefore as per the 2010 Rules and the CNG Rules, 1992, I find that the Chief Inspector Explosives conducts annual safety inspection of the vessel, cylinders, valves and electrical installation of the CNG station and allied fittings to ensure compliance of the design and manufacturing standards and OGRA conducts the annual safety inspection to ensure that the licensee is complying with the Standard Code of Practice in the operation of its CNG station. Both inspections can be carried out through third party inspectors. The primary objective for both inspections is to ensure strict compliance with the terms of the license and the safety codes. I may add here that the law and the rules referred to contemplate "public safety" not only from the perspective of the location and operation of the CNG station but also to ensure the checking of every vessel, cylinder, valve or electrical fitting used in the CNG station. Therefore both OGRA and Chief Inspector Explosives are responsible to ensure compliance of the rules and to maintain public safety and prevent accidents.

13. Each regulator is to work within its given jurisdiction. The explanation given by Respondent No. 2 does not resolve the matter at hand and has misconstrued the role of both OGRA and Chief Inspector Explosives. OGRA is the licensing authority for compressed natural gas and is required to conduct third party inspections of the licensed premises to ensure strict compliance of OGRA Ordinance, 2002 and the CNG Rules, 1992, the terms of the license and to ensure compliance with the Standard Code of Practice as prescribed in the CNG Rules, 1992. The Chief Inspector Explosives is the licensing authority for the vessel and cylinder used for filling, storing and distributing compressed gas. He has to ensure that every vessel, cylinder, valve and electrical installation used at the CNG station is as per the specifications prescribed. The role of both regulators is of paramount importance when it comes to public safety. Therefore the notices issued by OGRA for conducting annual safety inspections and for retesting cylinders are in accordance with the law and should be complied with by the petitioners.

14. In view of the aforesaid all these petitions are dismissed.

(R.A.) Petitions dismissed

2014 C L C 590
[Lahore]
Before Mrs. Ayesha A. Malik, J
Messrs LAHORE ELECTRIC SUPPLY CO. LTD.----Petitioner
Versus
PROVINCE OF PUNJAB----Respondent
Writ Petitions Nos.18373 and 13836 of 2012, decided on 29th March, 2013.

(a) West Pakistan Urban Immovable Property Tax Act (V of 1958)---

----Ss. 3 & 4---Constitution of Pakistan, Arts.154, 165, 165(1), 183 & 199---Constitutional petition---Lahore Electric Supply Company---Grid Stations of such company sealed by Punjab Government due to non-payment of property tax in compliance of demand notice issued by Government---Validity---Federal Government had incorporated such company for distributing electricity within its licensed area---Distribution of electricity being a public utility was being provided by such company under control and supervision of Federal Government---Federal Government owned 100% shares of such company and its property vested in Federal Government---Such company was being controlled by Board of Directors elected by its shareholders i.e. Federal Government---Use of word "Federal Government" in Art.165 of the Constitution would include an instrumentality of Federal Government---Federal Government was doing its business through a corporate body, which was an instrumentality of Federal Government and exempt from levy of provincial property tax---High Court accepted constitutional petition in circumstances.
Province of N.-W.F.P. through Secretary, Local Government and Rural Development Peshawar v. Pakistan Telecommunication Corporation through Chairman and others PLD 2005 SC 670; WAPDA v. Government of Sindh and others PLD 1998 Kar. 209; Water and Power Development Authority through General Manager and Project Director and another v. Administrator, District Council, Swabi and 5 others 2005 SCMR 487; Pakistan Television Corporation Limited v. Capital Development Authority and others 2011 SCMR 1117 and Zila Council Jhang District Jhang v. Daewoo Corporation Kot Ranjeet, Sheikhupura 2001 SCMR 1012 ref.

(b) Taxation---

----Immunity of instrumentalities, doctrine of---Applicability of the doctrine to a statutory corporation owned and controlled by Federal Government---Test.
To apply doctrine of Immunity of Instrumentalities, the court has to examine the relationship between the Government and the statutory corporation to determine whether corporation was a Government instrumentality, and will apply the following test:---
(1) Whether body has any discretion of its own; if it has, then what is the degree of control by the Executive over the exercise of that discretion?

(2) Whether the property vested in the corporation is held by it for and on behalf of the Government;
(3) Whether the corporation has any financial autonomy;
(4) Whether the functions of the corporation are Government functions.
McCulloch v. Maryland, 17 U.S. 316 4 Wheat (1819) rel.
Munawar-us-Salam for Petitioner.
Muhammad Bilal Khan for Respondent No.6.
Iftikhar Ahmad Mian for City District Government with Firdous Akhtar (DDEEE).
Syed Nayyar Abbas Rizvi, Addl. A.-G.
Date of hearing: 29th March, 2013.

JUDGMENT

MRS. AYESHA A. MALIK J: Through this single judgment, I intend to dispose of Writ Petitions Nos.18373 and 13836 of 2012 filed by LESCO against Province of Punjab and others as common questions of law and fact arise in both the petitions. The petitioner in Writ Petition No.18373 of 2012 challenges the demand notice for levy of property tax against all the properties of the petitioner including its grid stations. The petitioner in Writ Petition No.13836 of 2012 impugns the levy of property tax with respect to three grid stations located at Boghiwal Grid Station, Riwaz Garden and ICI (Public) Grid Station. Consequent to the issuance of the notices the respondents sealed the grid stations for non-payment of the tax. In both cases, the petitioner is LESCO.

2. The petitioner has impugned the levy of property tax by the respondents Nos.1 to 3 under the Urban Immovable Property Tax Act, 1958 (Property Tax Act). The case of the petitioner is that the petitioner is not liable to pay property tax under the Property Tax Act on account of the following reasons: (i) Article 165 of the Constitution of Islamic Republic of Pakistan, 1973 provides that the Federal Government shall not, in respect of its property or income, be liable to taxation under any Act of the Provincial Assembly. Since the petitioner is owned and controlled by the Federal Government hence it is not liable to pay property tax; (ii) section 4 of the Urban Immovable Property Tax Act, 1958 exempts the Federal Government from payment of tax in relation to its property. Again since the petitioner is owned and controlled by the Federal Government hence it is not liable to pay the property tax; iii) A clarification was issued by the respondent No.4 on 27 April, 2012 wherein it is clarified that the Federal Government owns 100% shares of the petitioner, hence ownership of the assets of this public sector company vests in the Federal Government. On the basis of this clarification, the petitioner's case is that respondent No.4 having clarified the issue with respect to the ownership of the petitioner, the respondents cannot levy tax with respect to the property of the Federal Government. Reliance was placed on the cases titled"Province of N.-W.F.P. through Secretary, Local Government and Rural Development Peshawar v. Pakistan Telecommunication Corporation through Chairman and others" (PLD 2005 SC 670) and "WAPDA v. Government of Sindh and others (PLD 1998 Karachi 209).

3. Learned counsel for the respondents Nos.1 to 4 and learned Law Officer argued that the petitioner is a limited liability company, which is independent from the Federal Government. Hence, it is liable to pay property tax. They relied upon Articles 165 and 165-A of the Constitution of Islamic Republic of Pakistan, 1973 (the Constitution) to argue that the petitioner is not the Federal Government, it is a separate juristic person hence it is liable to pay tax. Learned Law Officer also raised the objection that the petitioner has not availed the remedy provided to it under the statute. Hence, these petitions are not maintainable. Learned counsel for the respondents placed reliance on PLD 2005 SC 670 (supra) to argue the point that a limited liability company is an independent juristic person which is different from the Federal Government. Therefore, the property and income of a limited liability company cannot be construed to be the property and income of the Federal Government. Hence they argued that the petitioner is liable to pay the property tax to the respondents.

4. Heard learned counsel for the parties and reviewed the record available on the file.

5. At the very onset I find that the objection with respect to alternate remedy is not relevant here as the respondents had sealed some of the grid stations of the petitioner rendering it impossible for the petitioner to provide electricity to the public. In such a situation the alternate remedy suggested by the learned Law Officer is not efficacious for the purposes of these petitions. The issue before this Court is whether the respondents can impose property tax on the property of the petitioner. Section 3 of the Property Tax Act provides that the Government may levy tax in an urban area and that the tax shall be due from the owners of the building and the land. The entire case of the petitioner is that since the owner of the land and building is the Federal Government, it is exempt from paying the property tax. Section 4 (a) of the Urban Immovable Property Tax Act, 1958 provides that:---
"4. Exemptions. The tax shall not be leviable in respect of the following properties, namely:
(a) buildings and lands other than those leased in perpetuity vesting in the Federal Government."
Article 165 of the Constitution of Islamic Republic of Pakistan, 1973 provides that:---
"165. Exemption of certain public property from taxation.--- (1) The Federal Government shall not, in respect of its property or income, be liable to taxation under any Act of Provincial Assembly and, subject to clause (2), a Provincial Government shall not, in respect of its property or income, be liable to taxation under Act of (Majlis-e-Shoora (Parliament) or under the Act of the Provincial Assembly of any other Province.
(2) If a trade or business of any kind is carried on by or on behalf of the Government of a Province outside that Province, that Government may, in respect of any property used in connection with that trade or business or any income arising from that trade or business, be taxed under Act of (Majlis-e-Shoora (Parliament) or

under Act of the Provincial Assembly of the Province in which that trade or business is carried on.
(3) Nothing in this Article shall prevent the imposition of fees for services rendered."

Article 165-A of the Constitution provides that:---

"Power of (Majlis-e-Shoora (Parliament) to impose tax on the income of certain corporation, etc.--- (1) For the removal of doubt, it is hereby declared that (Majlis-e-Shoora (Parliament) has, and shall be deemed always to have had, the power to make a law to prove for the levy and recovery of a tax on the income of a corporation, company or other body or institution established by or under a Federal law or a Provincial law or an existing law or a corporation, company or other body or institution owned or controlled, either directly or indirectly, by the Federal Government or a Provincial Government, regardless of the ultimate destination of such income."

The basis of the arguments of the learned counsel for the petitioner is that petitioner is owned and controlled by the Federal Government, hence the property owned by the petitioner vests in the Federal Government. The respondents have taken the stance that since the petitioner is a limited liability company, it is an independent legal entity, which is not the Federal Government, hence it is liable to pay property tax. The petitioner is incorporated under the Companies Ordinance, 1984. It is a limited liability company, which is owned hundred per cent by the Federal Government. Form-A dated 29-10-2010 evidences this fact and the respondents have admitted to this fact. The shares of the petitioner are issued in the name of President of Islamic Republic of Pakistan. The question that arises is whether the petitioner being owned and controlled one hundred per cent by the Federal Government can take the benefit of Article 165 of the Constitution and section 4 of the Property Tax Act. In order to determine whether they can take this benefit, it is important to review the leading judgments of the Hon'ble Supreme Court of Pakistan on this issue. Both the learned counsel have placed reliance on PLD 2005 SC 670 (supra). In this case, the issue was with respect to levy of octroi tax by the Provincial Government on the Pakistan Telecommunication Corporation. The argument raised was that the corporation was performing the function of the State, its assets were acquired by the Federal Government, its employees were public servants and it was totally in the control and in the administration of the Federal Government. Hence Pakistan Telecommunication Corporation was entitled to the exemption under Article 165 of the Constitution and not liable to pay the octroi tax. The Hon'ble Supreme Court of Pakistan after considering the arguments held that since the company was a juristic person, it was no longer immune and exempt from paying the property tax. The basis of the decision of the Hon'ble apex Court was that the Federal Government was not the sole owner of the Pakistan Telecommunication Corporation, therefore, the assets and liabilities of the company were held to be owned by the company and not by the Federal Government. The

principle laid down in this case is that a company being a juristic person was a separate legal entity from the Federal Government.

6. Another case to consider is titled "Water and Power Development Authority through General Manager and Project Director and another v. Administrator, District Council, Swabi and 5 others" (2005 SCMR 487). In this case, WAPDA was executing a project for electricity generation by the name of Ghazi Barotha Hydropower Project on behalf of the Federal Government. The contractor made payments under intimation of WAPDA and WAPDA then reimbursed the payments under a written contract. The Hon'ble Supreme Court of Pakistan held that since WAPDA had undertaken qua the reimbursement of Ghazi Barotha Contractors with respect to export tax and educational tax, it was a contractual liability which could not be avoided on the pretext of the exemption under Article 165 of the Constitution. It was also found that the tax was imposed on the contractor and not on WAPDA hence the contractual obligation did not get the benefit of Article 165 of the Constitution.
In the case entitled "Pakistan Television Corporation Limited v. Capital Development Authority and others "(2011 SCMR 1117) the basic facts were that by virtue of S.R.O. 24(1)/2001 dated 11-1-2001 buildings and lands owned by the Federal Government or a Provincial Government but excluding public and private corporation, were exempt from payment of property tax. After reviewing the provisions of the S.R.O. the Hon'ble Supreme Court of Pakistan found that the use of the word excluding public and private corporation meant that building and lands vesting in the Federal Government through public and private corporation were not exempt. The benefit of the S.R.O. would thus be given to building and lands directly owned by the Federal or Provincial Government. Therefore, by an express provision in the S.R.O. a tax was imposed on public and private companies owned by the government.
In the case titled "Zila Council Jhang District Jhang v Daewoo Corporation Kot Ranjeet, Sheikhupura (2001 SCMR 1012) the Hon'ble apex Court after lifting the veil of incorporation found that Daewoo Corporation was not a corporation owned and controlled by the Federal Government. The reasons amongst several, were that the Government had not contributed any capital to the corporation, the directors were not appointed by the Government, the Government had no power to remove the directors, the Government was not a shareholder, the Government has no power to audit its accounts. Therefore, the Court reviewed the effective control of the Federal Government over the company. Having found that the Federal Government did not have effective control, it was liable to pay the tax.

7. The cases reviewed have considered the nature of the ownership and control of the Federal Government as well as the basis or reasons for which Article 165 of the Constitution is being invoked. Based on the principles laid down by the Hon'ble Supreme Court of Pakistan in the aforementioned cases it is important, as a first step, to lift the veil of incorporation to determine to what extent the petitioner is owned and controlled by the Federal Government and the degree of control exercised by the Federal Government. The petitioner is a public limited company

incorporated under the Companies Ordinance, 1984. The petitioner was incorporated by the Federal Government to discharge the function of distribution of electricity within its licensed territory. Admittedly, the Federal Government owns one hundred per cent of the petitioner with only one shareholder, being the President of Islamic Republic of Pakistan. This means that the petitioner is totally owned by the Federal Government. A company is controlled by its board of directors who are elected by the shareholders. In this case, the share-holder is the Federal Government, hence the Board of Directors are representatives of the Federal Government. The Federal Government nominates the Board of Directors of the petitioner and they hold office at the pleasure of the Federal Government under the Companies Ordinance, 1984. The petitioner provides a public utility being the distribution of electricity. Article 154 of the Constitution provides that a Council of Common Interest can regulate policy in relation to matters of Part-II of the Federal Legislative List and shall exercise supervision and control over related industries. Electricity is at Serial No.4 Part-II of the Federal Legislative List. Therefore, the petitioner provides a public utility, which is under the control and supervision of the Federal Government. The Federal Government makes its policy on electricity and implements it through the petitioner. Consequently not only does the Federal Government own and control the petitioner but it also controls the public utility provided by the petitioner. This also means that the facts of the instant petition are distinguishable from the PLD 2005 SC 670 (supra) as admittedly Pakistan Telecommunication Corporation was not owned one hundred per cent by the Federal Government. There were other private shareholders in the company, on account of which the Hon'ble apex Court found that it cannot be said that the Federal Government owned this company or the assets of this company. Furthermore, if the reasons reviewed by the Hon'ble Supreme Court of Pakistan in 2001 SCMR 1012 (supra) for determining whether a company is effectively controlled by the Federal Government are applied on the petitioner then it can be said that the petitioner is a juristic person which is owned and effectively controlled by the Federal Government. In the case of the petitioner, the shares are owned one hundred per cent by the President of Pakistan. The directors of the petitioner are appointed by the Federal Government. They can be removed at the pleasure of the Federal Government under section 183 of the Companies Ordinance, 1984. Furthermore the Federal Government controls the public utility provided by the petitioner. So notwithstanding the fact that the petitioner is an independent juristic person, it is essentially the Federal Government doing its business through a corporate structure. In such cases the distinction between the Federal Government and the petitioner become obscure.

8. Where the Federal Government enjoys effective control and carries out a constitutional function through a juristic person the question which arises is whether the company being an independent juristic person is an instrumentality of the Federal Government which is immune from the provincial property tax.

9. The Doctrine of Immunity of Instrumentalities is applied in taxation cases. The Doctrine provides that the instrumentalities of the central government have

immunity from paying tax imposed by the provincial government unless expressly stated otherwise. The meaning of federal instrumentalities was given in a case entitled "McCulloch v. Maryland, 17 U.S. 316 4 Wheat. (1819)" a judgment of the US Supreme Court where it was found that federal instrumentalities were immune from State taxation. The reasons given was that the State government cannot tax any of the means employed by the federal government to execute its constitutional powers. The argument used in this case was that the power of State legislature to tax the instruments used in carrying out the functions of the Federal Government would mean that the State could impede or control any of the constitutional functions of the Federal Government. Hence the Doctrine of Immunity of Instrumentalities was made applicable to a company owned and controlled by the Federal Government for preserving the Federal Government's ability to carry out its powers and duties under the Constitution. To apply this Doctrine the Courts have examined the relationship between the government and the statutory corporation to determine whether the corporation was a government instrumentality. The following test was applied:
(1) Whether the body has any discretion of its own; if it has, what is the degree of control by the Executive over the exercise of that discretion;

(2) Whether the property vested in the corporation is held by it for and on behalf of the Government;

(3) Whether the corporation has any financial autonomy;

(4) Whether the functions of the corporation are Governmental functions."
With the help of this test the distinction between the Federal Government and the juristic person becomes clear. Therefore I shall apply the test to determine whether there is a real distinction between the Federal Government and the petitioner or is it simply a case where the Federal Government has used a corporate structure to execute its function and duty. At this point I also find that the arguments with reference to Article 165 A of the Constitution were not relevant as it deals with income tax and the instant case is with reference to property tax.

10. The status of the petitioner as an instrumentality of the Federal Government is evident from the fact that the petitioner is owned and effectively controlled by the Federal Government. Once it is determined that the Federal Government has effective control the third requirement of financial autonomy is also satisfied. The petitioner was incorporated to carry out a function of the Federal Government. In order to give the benefit of section 4 of the Property Tax Act read with Article 165 of the Constitution to the petitioner, this Court has lifted the veil of incorporation to determine firstly, whether the Federal Government owns and controls the petitioner. In this regard, I find that the petitioner is totally owned and controlled by the Federal Government as the President of Pakistan is the only shareholder of the petitioner. The second test was to determine the degree of control exercised by the Federal Government over the petitioner. In this regard, 1 find that the Federal Government exercises total control over the corporate structure of the petitioner, as it is the only shareholder and the Board of Directors are nominated and removed at

the pleasure of the Federal Government. Furthermore the petitioner was incorporated to undertake a function of the Federal Government that is to provide electricity. All policies related to electricity, its distribution and transmission is under the control of the Federal Government. The third test was to determine, whether the function of the petitioner is that of the Federal Government. Here I find that the petitioner provides a public utility which is totally controlled by the Federal Government. The Federal Government uses the corporate structure to carry out a function specifically provided for it in the Federal Legislative List of the Constitution. The company is left with no authority of its own. Furthermore the providing of electricity is an essential public utility which is a basic necessity. In such a situation the petitioner can be described as an instrumentality of the Federal Government. This means that the Federal Government is executing its function through the petitioner. Hence the use of the word Federal Government in Article 165 of the Constitution would include an instrumentality of the Federal Government. In this case, the petitioner is an instrumentality of the Federal Government hence it is entitled to the exemption section 4 of the Property Tax Act.

SAK/L-5/L Petition accepted.

P L D 2014 Lahore 320
Before Mrs. Ayesha A. Malik, J
COLONY SUGAR MILLS LTD.---Petitioner
Versus
GOVERNMENT OF PAKISTAN and others---Respondents
Writ Petition No.10702 of 2013, decided on 29th May, 2013.

Civil Procedure Code (V of 1908)---

----O. I, R.10(2)---Constitution of Pakistan, Art. 199---Import Policy Order, 2009, R. 20---Constitutional petition---Public interest litigation---Necessary and proper party---Scope---Impleadment of a party to such litigation---Principles---Petitioner filed a constitutional petition impugning the import of Carbon Dioxide (CO2) from India through Wahga Border under R.20 of Import Policy Order, 2009 and contended that there were concerns with respect to storage facilities, testing laboratory and transportation facilities at Wahga Border; that Carbon Dioxide being imported from India was of substandard quality and would affect the public health and lives of citizens---Applicants contended that they should be impleaded as respondents to the constitutional petition on account of being necessary and proper party since all of them were users of Carbon Dioxide either as direct importers or purchasers or as consumers; that since their right with respect to permits given for import would be adjudicated upon in the constitutional petition, and that their rights could be seriously prejudiced---Validity---Constitutional petition in question was on a matter of public importance---For cases involving issues of public interest litigation, more liberal stance was needed to be taken by the courts for impleadment of parties to such litigation, to enable it to hear all the parties concerned, who were likely to be affected by any judgment in such proceedings---When matters were of public importance then it was not only proper but necessary to make a person a party, whose interest was at stake in the constitutional petition and who could render proper assistance to the court about technical aspects of the issue involved---Application was accepted and applicants were allowed to join proceeding in the constitutional petition.
2014 SCMR 531 rel.

Shahid Ikram Siddiqui for Petitioner.
Usman Akram Sahi vice Munawar us Salarn for Applicant (in C.M. No.3 of 2013).
Waseem Abbas for Applicant (in C.M. No.5 of 2013).
Syed Moazzam Ali Shah for Applicant (in C.M.No.1182 of 2013).
Salman Akram Raja for Applicant (in C.M.Nos.1225 and 1231 of 2013).
Ms. Ayesha Hamid for Applicant (in C.M.No.1241 of 2013).
Ch. Muhammad Zafar Iqbal for Respondent Department.

ORDER
C.M. Nos.3, 5, 1182, 1225, 1231 and 1241 of 2013.
MRS. AYESHA A. MALIK, J.---Through this single order I intend to dispose of aforementioned six applications filed in the instant writ petition under Order I, Rule

10, C.P.C. wherein the applicants pray for their impleadment as respondents to the instant petition on account of being necessary and proper party to the proceedings.

2. The case of the applicants is that the petitioner has filed the instant petition wherein it has impugned the import of Carbon Dioxide (CO2) from India through Wahga Border under Rule 20 of the Import Policy Order, 2009. The applicants have argued their case to be made party on the following grounds:--
(i) The petitioner has prayed that the respondent No.1 be restrained from allowing import of CO2 from India through Wahga Border.
The applicants argued that they are all users of CO2 either in as direct importers or purchasers or as consumers. Therefore, it is necessary for them to be made party as their right with respect to the permits giver for import could be adjudicated upon in this petition.
(ii) The petitioner has prayed that quality of CO2 imported from India through Wagha Border, which is of substandard quality and affect the public health, should be destroyed in the larger interest of justice of the citizens of Pakistan."
The applicants argued that they have imported CO2, from India through Wahga Border. Hence if this Court was to pass any order with respect to this prayer, the rights of the applicants would be seriously prejudiced and they should be heard in order to ensure that the relevant information is placed before this Court:--
(iii) The petitioner has arrayed respondent No 6. as a party. The respondent No.6 is a user and importer of CO2 in the same manner as the applicants and that there is no justification for arraying it as a party and leaving out the applicants.
Therefore, they pray that they may be made as party to the instant petition. Reliance has been placed on a judgment dated 25-8-2009 passed by the Hon'ble Supreme Court of Pakistan in C.P.L.A No.857 of 2007 (2014 SCMR 531) in which it has been held that in the cases of public interest litigation, the Court should take more liberal stance with respect to the impleadment of the parties and which should hear all such parties, who are likely to be affected by any judgment in such proceedings.

3. Learned counsel argued that the petitioners have relevant and necessary information to place before this Court to explain the circumstances in which Rule 20 of the Import Policy Order, 2009 has been invoked and to explain the circumstances in which they have been given permission. They argued that the petitioner has not placed all the relevant information before this Court and therefore, in the very least, they are proper and necessary parties to this petition. Hence they should be arrayed as respondents in this petition.

4. Learned counsel for the petitioner has argued that the applicants are not necessary party to this petition. He argued that the provisions of Order I, Rule 10, C.P.C. do not suggest that any person, who in any manner is connected with the judgment, should join the proceedings. A remote issue with the parties would not make them necessary or proper party in this petition in terms of Order I Rule 10 C.P.C. He has raised specific objection with respect to the applications filed and the documents appended with them. He argued that it is not possible to implead every one, who has been conferred an advantage in a general way, which benefit may be lost, if that

provision of law is struck down or its usage is restricted in any way. He argued that the Court would not be able to control the amount of persons, who would be affected and want to be arrayed in a petition. He has placed reliance on the cases titled "Jiand Rai v. Abid Esbhani" (2010 YLR 1666), "Syed Khurram Shah v. Mian Muhammad Shahbaz Sharif and 4 others" (PLD 2009 Lahore 140), "Syed Ahmed Saeed Kirmani v. Punjab Province and others" (1982 CLC 590) and "Dr. Saleem Javed and others v. Mst. Fauzia Nasim and others" (2003 SCMR 965). He argued that the dispute can be decided in the absence of the applicants as they are not the necessary party.

5. Heard learned counsel for the parties and reviewed the case-law relied upon by the learned counsel for the parties.

6. The basic issue in this petition is the import of CO2 from India through Wahga Border. The petitioner has raised certain concern with respect to storage facilities, testing laboratory and transportation facilities at the Wahga Border. He has also raised an objection with respect to the quality of CO2 that is being imported, voicing concern with respect to the health and lives of citizens of Pakistan. This is a matter of public importance and in the judgment dated 25-8-2009 passed by the Hon'ble Supreme Court of Pakistan in C.P.L.A No.857 of 2007 (2014 SCMR 531) it has been held that in the cases involving issues of public interest litigation more liberal stance is needed to be taken by the Courts for impleadment of parties to such litigation, to enable it to hear all the parties concerned, who are likely to be affected by any judgment in such proceedings. The Hon'ble apex Court has also held that when matters are of pubic importance then it is not only proper but necessary to make a person party whose interest is at stake in the petition and who can render proper assistance to the Court about the technical aspects of the issue involved.

7. In view of the above, these applications are accepted and applicants are allowed to join the proceedings in the titled writ petition as respondents Nos.7 to 12.

8. Let amended memo of the parties be filed and the newly arrayed respondents are directed to file their report and parawise comments on or before the next date of hearing.

9. Re-fix on 12-6-2013.MWA/C-1/L Applications allowed.

2014 P T D 1051
[Lahore High Court]
Before Mrs. Ayesha A. Malik, J
HASHIM ASLAM BUTT
Versus
FEDERATION OF PAKISTAN through Ministry of Finance and 4 others
Writ Petition No.16001 of 2013, decided on 16th January, 2014.

Sales Tax Act (VII of 1990)---

----S.37---Qanun-e-Shahadat (10 of 1984), Art.9---Constitution of Pakistan, Art.199---Constitutional petition---Privileged communication---Address of client---Petitioner was advocate who represented his client before Commissioner Inland Revenue---Investigating authorities summoned petitioner under S. 37 of Sales Tax Act, 1990, to obtain information from him with regard to his client---Plea raised by petitioner was that communication between counsel and client were privileged and protected under Art. 9(2) of Qanun-e-Shahadat, 1984---Validity---Petitioner was called upon to disclose identity of his client because petitioner was engaged by his client in a case and investigating authorities wanted to use that information which petitioner had about his client in furtherance of his investigation---Client did not reveal its identity to investigating authorities in its ongoing investigation, in such a situation identity of client had become privileged communication under Art. 9 of Qanun-e-Shahadat, 1984---Investigating authorities could not use machinery available to them for the purposes of investigation to compel an advocate engaged by a client to disclose whereabouts of his client when the whereabouts and identity of client were under investigation---Investigating authorities could not compel petitioner to disclose identity of his client on the grounds that he was representing his client before some other forum or in some other case---Identity of client was privileged communication under Art.9 of Qanun-e-Shahadat, 1984---High Court declared the summons issued in the name of petitioner as illegal---Petition was allowed in circumstances.
Muhammad Maqsood Sabir Ansari v. District Returning Officer, Kasur and others PLD 2009 SC 28 and Syed Ali Nawaz Gardezi v. Lt. Co. Muhammad Yusuf PLD 1963 SC 51 ref.
Khurram Saeed for Petitioner.
Salman Faisal for Respondents.
Date of hearing: 4th December, 2013.

JUDGMENT

MRS. AYESHA A. MALIK, J.---The petitioner has impugned summons issued to him under section 37 of the Sales Tax Act, 1990 on 21-6-2013 by the respondent No.4, Assistant Director/Investigation Officer, Directorate of Intelligence and Investigation Inland Revenue, Lahore.

2. The case of the petitioner is that he is an advocate who was engaged by Pearl Enterprises, Lahore, Shop No.14, Shah Alam Paint Center, Shahalam, Lahore (the Client). The Client required the petitioner to reply and to defend the Client in show-cause notice dated 6-5-2013 issued by the Commissioner Inland Revenue, Lahore. The petitioner accepted the case and filed a reply to the said show cause notice on behalf of the Client. Essentially the petitioner was defending the Client before the Commissioner Inland Revenue, Lahore. On 1-6-2013 the respondent No.4 issued a letter to the petitioner stating therein that the petitioner was representing the Client before the Commissioner Inland Revenue Zone-5 Regional Tax Office. The Directorate of Intelligence and Investigation, Lahore was also investigating the Client in the matter of tax fraud. Therefore, in order to proceed with the matter the petitioner was requested to provide a power of attorney to represent the Client before the respondent No.4. The petitioner issued a reply to this letter on 4-6-2013 stating therein that he was engaged to represent the Client before the Commissioner Inland Revenue and that he has not been engaged to represent the Client before the respondent No.4, hence the petitioner was unable to furnish the required power of attorney. The respondent No.4 replied to this letter through letter dated 7-6-2013 stating therein that while investigating matters related to the Client the Directorate of Intelligence and Investigation tried to locate the Client however they were unable to locate the Client and that they required the petitioner to share information with regard to the particulars of the person who had contacted or engaged the petitioner so that they could proceed with their investigation. The petitioner did not respond to this letter and on 21-6-2013 summons were issued to the petitioner under section 37 of the Sales Tax Act, 1990 (Act of 1990) requiring him to appear before the respondent No.4 so as to provide particulars of the Client. The petitioner has impugned the said summon on the grounds that it is in violation of Article 9 of the Qanun-e-Shahadat Order, 1984 (Order of 1984) which renders all professional information communicated between the petitioner and the Client as privileged communication. Learned counsel for the petitioner has relied upon the case titled 'Muhammad Maqsood Sabir Ansari v. District Returning Officer, Kasur and others' (PLD 2009 SC 28) wherein it has been held that the provisions of Article 9, Qanun-e-Shahadat, 1984 not only secures the secrecy of professional communication but prohibits in express terms an advocate from disclosing any information, communication, instruction and advice made to him, or received, obtained, and tendered by him during the course of his professional engagement and said prohibition is not limited to the knowledge of events or things acquired by him but also extends to facts observed by him in the course and for the purpose of his professional employment. Learned counsel argued that the respondents Nos.3 to 5 cannot summon the petitioner to obtain information from the petitioner with regard to the Client. Learned counsel argued that the respondents are proceeding with an investigation against the Client and the petitioner cannot be compelled to disclose information with reference to his Client because he is an Advocate representing the Client in a case and all information between the Client and the petitioner is privileged, which will include the identity of the Client. Learned counsel argued that the petitioner cannot be forced to disclose any communication made to him as the Advocate of the Client as this will destroy the trust and confidence between a

client and his advocate and will destroy the essence of their relationship. Learned counsel argued that this privilege is to protect the Client of the petitioner such that he may freely consult with the advice of his advocate. Even otherwise he argued that the respondents cannot summon the petitioner under section 37 of the Act of 1990 in furtherance of an inquiry that they are conducting against the Client.

3. Report and parawise comments have been filed by the respondents. In terms of the reply filed, learned counsel for the respondents argued that the respondents required the assistance of the petitioner with the investigation in a case of tax fraud allegedly committed by the Client, causing heavy loss to the public exchequer. Learned counsel argued that the petitioner is obligated to disclose the identity of the Client under Article 9(2) of the Order of 1984. He argued that since the petitioner resisted assistance to the respondents, hence he was summoned under section 37 of the Act of 1990. He further argued that the petitioner is obligated in his capacity as a citizen of Pakistan to provide the required information to the respondents in order to assist them in their on-going investigation. Learned counsel argued that the respondents are unable to locate the Client of the petitioner as all addresses given, telephone numbers provided are found to be fictitious. The respondents in order to proceed with their investigation need to know who runs the business of the Client and have simply asked for the name of the proprietor of the Client of the petitioner. Learned counsel argued that it is also the moral duty of the petitioner to assist the respondents catch persons who are involved in tax fraud. Learned counsel argued that the respondents can summon any person whose attendance it considers necessary to tender evidence or produce documents in any inquiry which is being made under the Act of 1990.

4. I have heard the learned counsel for the parties and reviewed the record available on the file.

5. The issue before this Court in the instant petition is whether the identity of the Client is privileged communication under Article 9 of the Order of 1984. The petitioner has been called upon by the respondent No.4 to provide details with respect to the person who has contacted or engaged the petitioner to defend him before the Commissioner Inland Revenue Zone 5. The respondent No.4 issued summons to the petitioner when the petitioner failed to provide the information so required and because he did not respond to letter dated 7-6-2013. There is no cavil to the proposition that the respondents can summon any person under section 37 of the Act of 1990 in relation to a pending inquiry. However in this case the question is whether an Advocate who has been engaged by a client can be summoned under section 37 of the Act of 1990 to provide information with respect to his client. Respondents Nos.3, 4 and 5 are conducting an investigation of tax fraud against the Client. They are unable to locate the proprietor of the Client, hence in the first instance they required the petitioner to file a power of attorney in the inquiry pending before them and then required the petitioner to provide information with respect to the person who had engaged him for representation before the Commissioner Inland Revenue. I am of the opinion that letter dated 1-6-2013 issued

by the respondents requiring the petitioner to furnish a power of attorney in the inquiry pending before the respondent No.4 is totally without any legal justification. The respondent No.4 does not have the authority to compel or even require an Advocate to represent a person who is under inquiry before him. The very request of the respondent No.4 in letter dated 1-6-2013 is misconceived. The petitioner responded to the respondent No.4 by stating that the Client has not engaged him for the inquiry pending before the respondent No.4, therefore, he cannot file a power of attorney in that inquiry. Instead of accepting the reply of the petitioner, the respondents went further to demand particulars from the petitioner with respect to his client. Specifically the petitioner has been summoned to provide information with respect to the identity of his Client and the whereabouts of his Client so that the Client can be interrogated by the respondents.

6. Article 9 of the Order of 1984 reads as follows:--
"No Advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or conditions of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this Article shall protect from disclosure;
(1) any such communications made in furtherance of any illegal purpose; or

(2) any fact observed by any advocate, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to such fact by or on behalf of his client.
Professional communication is privileged communication meaning that an advocate cannot be asked to disclose any communication made to him by his client in the course of his employment as the advocate. This privilege is necessary to ensure that a client has absolute confidence in his advocate from whom he seeks professional advice. The privilege promotes the freedom of consultation with legal advisors by clients. Communication held to be privileged information includes instructions, advice, documents communicated to the advocate during the course of his professional relationship with a client. It extends to information that the advocate becomes acquainted with in the course of his employment. Reliance is placed on the case titled 'Syed Ali Nawaz Gardezi v. Lt. Col. Muhammad Yusuf' (PLD 1963 SC 51). The identity of a client or the fact that a person has become a client of an advocate would generally not be termed as professional communication, hence it is not considered as privileged communication. This is because the relationship of advocate-client is generally not confidential information and is not information given by the client for the purposes of the employment as his advocate. It is usually a pre-requisite to the advocate-client relationship. However the circumstances in the instant case are unusual. The Client has engaged the petitioner to represent it before

the Commissioner Inland Revenue in relation to a notice issued under section 21(2) of the Act of 1990. The matter pertains to fraudulent input tax adjustment and issuance of fake sale tax invoices. The notice under section 21(2) of the Act of 1990 was also copied to the Director, Directorate of Intelligence and Investigation, Inland Revenue with a request to depute an officer to attend the hearing along with record. The respondent No.4 on the basis of the same show cause notice initiated an investigation against the Client. Since the stated respondent was unable to identify and contact the proprietor of the Client, he required that the same information be provided to him by the petitioner. Essentially the respondent No.4 required the petitioner to identify the Client so that the investigation initiated by the respondent No.4 can proceed against its proprietor. The respondents have argued Article 9(2) of the Order of 1984 in their defense, however the said Article is not applicable or relevant as the identity of the Client is not a fact that the petitioner observed in the course of his employment. A communication is professional communication for the purposes of Article 9 of the Order of 1984 when it is made to the advocate in confidence, not intended to be disclosed to any person. The privilege is that of the client and not the advocate. The question of whether a client's identity is privileged communication is one of fact and should be decided on the basis of the facts of that case. In this case the Client has not required the petitioner to appear or represent the Client before the respondent No.4 and it has not disclosed the identity of its proprietor before the respondent No.4. The petitioner has been called upon to disclose the identity of the Client because the petitioner has been engaged by the Client in a case and the respondent No.4 wants to use the information that the petitioner has about the Client in furtherance of his investigation. It is also important to note that the Client has not revealed its identity to the respondent No.4 in its ongoing investigation. In such a situation the identity of the client becomes privileged communication under Article 9 of the Order of 1984. The respondents cannot use the machinery available to them for the purposes of investigation to compel an advocate engaged by a client to disclose the whereabouts of his client when the whereabouts and the identity of the client are under investigation. In the instant case, the petitioner has been summoned so that he may provide the identity and the whereabouts of the Client so that the Client can be interrogated with respect to the allegations of tax fraud levied against it. This fact is apparent from the letter issued by the respondent No.4 dated 7-6-2013 wherein the respondent No.4 has clearly stated that he is unable to locate the proprietor of Pearl Enterprises and that the petitioner should reveal the identity of the proprietor of Pearl Enterprises, the Client, since he is representing the Client in a matter pending before the Commissioner, Inland Revenue. The respondent No.4 cannot compel the petitioner to disclose the identity of the Client on the grounds that he is representing the Client before some other forum or in some other case. In such a circumstance the identity of the client becomes privileged communication under Article 9 of the Order of 1984.

7. n view of the aforesaid, this petition is allowed and the impugned summon dated 21-6-2013 issued by the respondent No.4 is declared to be illegal.
MH/H-4/L Petition allowed.

2014 C L D 763
[Lahore]
Before Mrs. Ayesha A. Malik, J
NIB BANK LTD.---Plaintiff
Versus
HIGHNOON TEXTILE LTD.and 3 others---Defendants
Civil Original Suit No.22 of 2006, decided on 16th December, 2013.

(a) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----Ss. 9(2) & 10(4)---Bankers' Books Evidence Act (XVIII of 1891) Ss.2(8) & 4---Suit for recovery---Application for leave to defend---Certification of the statement of accounts---Mode of proof of entries in bankers' book---Persons authorized to certify statement of accounts---Scope---Interpretation of S. 2(8) of the Bankers' Books Evidence Act, 1891---Contention of the defendants/ applicants was inter alia that statement of accounts had not been certified by the competent authority in terms of S. 2(8) of the Banker's Books Evidence Act, 1891 which was a requirement under S.9(2) of the Financial Institutions (Recovery of Finances) Ordinance, 2001---Validity---Statement of accounts filed with the plaint had been certified by the Senior Vice-President, Accounts Department as well as the Senior Vice-President and the Assistant Vice-President of the plaintiff Bank---Section 2(8) of the Banker's Books Evidence Act, 1891 required that certification be made by the principal accountant or the manager of the bank with his name and official title and said definition did not provide for the designation or title of the principal accountant or manager of the bank but required that a responsible officer of the bank certify the statement of accounts---Such an officer would provide his official title in the certification, meaning thereby, that the official title did not have to be a principal accountant or manager of the bank---Title of the persons maintaining the books of accounts may vary from bank to bank and may also change over time and the intent was to ensure that a responsible officer whose work related to accounts or management sign the certificate---In the present case, the certification had been issued by the Senior Vice-President, Accounts Department which was a certification by the principal accountant and the signature of the Senior Vice-President and Assistant Vice-President of the bank was a certification by the manager of the bank---Certification through the responsible officer meant the bank owned the statement of accounts and certified that the same represented the true and correct statement, as maintained in its books of accounts---Such certification enabled the court to consider the copies of the statement of accounts as admissible evidence in the suit---Requirements of S. 2(8) of the Act of 1891 was not mandatory but directory and that sufficient compliance would depend upon the facts and circumstances of each case---Where the accounts were duly signed by the agent of the bank, it implied that it was a true copy maintained by the bank in its ordinary course of business and that such book was in the custody of the bank---Contention that leave to defend had to be granted to ascertain that the signatures were that of the principal accountant and the manager of the bank was related to the authority of the persons signing the statement of accounts and no such objection had been made with regard to said

authority in the present case---High Court held that the statement of accounts was compliant with S. 2(8) of the Banker's Books Evidence Act of 1891.
Mian Muhammad Shahbaz Sharif through Attorney v. Election Commission of Pakistan, Islamabad and 15 others PLD 2003 Lah. 646; Pakistan Kuwait Investment Company (Pvt.) Limited through Authorized Representative v. Messrs Active Apparels International and 6 others 2012 CLD 1036; Messrs Soneri Bank Limited v. Messrs Compass Trading Corporation (Pvt.) Limited through Director/Chief Executive and 3 others 2012 CLD 1302; Fine Textile Mills Ltd. v. Haji Umar PLD 1963 SC 163; Ali Khan & Co. v. Allied Bank of Pakistan PLD 1995 SC 362; Ravi Associate (Pvt.) Ltd. v. Industrial Development Bank of Pakistan 2005 CLD 393; Bankers Equity Ltd. v. Betnonite Pakistan Ltd. 2010 CLD 651; Suo Motu Case No.18 of 2010 dated 8-8-2011 2012 PLC (C.S.) 394 and Messrs Muhammad Siddiq Muhammad Umar and another v. The Australasia Bank Ltd. PLD 1966 SC 684 ref.
Barthels and Luders GmbH v. M.V. Dominique AIR 1988 Bombay 380 and Barker v. Wilson (1980) 2 All ER 81 rel.

(b) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----Ss. 10 & 9---Suit for recovery---Application for leave to defend---Counter-claim made by the defendant---Effect---Res judicata in relation to counter claim of the defendant--- Procedure of Banking Court--- Scope---Contention of the defendant was that leave to defend be allowed on the ground that defendant had raised counter-claim against the plaintiff bank---Validity---Counter-claim of the defendant was based on the failure of the plaintiff Bank to disburse the total facility amount in terms of a commitment made by it, whereas the plaintiff Bank had filed a suit for the recovery of amounts disbursed to and due from, the defendant---Such were two separate and distinct issues where the suit of the plaintiff Bank would not operate as res judicata against the claim of the defendant---Section 9(3) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 clearly provided that the suit should specifically provide as to what finance had been availed, what amounts had been paid and what amounts were due from the defendants and under S.10 of the Ordinance, the defendant in their leave to defend application had to show the finance availed and the finance due from them---Recovery suit was with respect to finance availed and due to the plaintiff where the issues were not directly and substantially the same as in a counter claim for damages being claimed on account of the conduct of the plaintiff bank---Held, that any grievance that the defendant had with respect to amounts not disbursed would not operate as res judicata against the defendants and such a counter claim could not be included in the leave to defend application as the leave to defend under S. 10 of the Ordinance was merely an application stating the grounds on the basis of which the defendant sought leave from the court with respect to the questions of law and fact for which evidence needed to be recorded specifically with respect to finance availed and finance due---Claim for damages could not be included in the leave to defend application as it did not give rise to the same questions of law or fact on the basis of which the court would adjudicate to decide on the claim of the plaintiff---Question of sustaining losses by the borrowers on account of conduct of the bank could be sorted out in

some other forum instead of claiming relief from the Banking Court---Counter-claim related to damages was not germane to the issues raised for the purposes of grant of leave---Application for leave to defend was dismissed, in circumstances. Siddique Woollen Mills and others v. Allied Bank of Pakistan and others 2003 CLD 1033 and Messrs Razzaq and Company v. Messrs Riazeda (Pvt.) Ltd. 1990 CLC 1243 rel.

(c) Bankers' Books Evidence Act (XVIII of 1891)---

----S. 2(8)---Interpretation of S.2(8), Bankers' Books Evidence Act, 1891.
Syed Ali Zafar for Plaintiff.
Salman Aslam Butt for Defendants Nos.1 to 3.
Shams Mehmood Mirza for Defendant No.4.
Date of hearing: 4th November, 2013.

JUDGMENT

MRS. AYESHA A. MALIK, J.---This is a suit for recovery of Rs.112.102 million as on 24-3-2006 under section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (F.I.O. 2001) along with cost of funds, markup, liquidated damages and other charges till realization of whole amount, through sale of mortgaged properties and other assets of the defendants.

2. After service of notices, Preliminary Leave Application (P.L.A.) No.45-B of 2006 and PLA No.59-B of 2006 were filed by the defendants Nos.1-3 and defendants No.4 respectively. The defendant No.1 is a public limited company duly incorporated under the Companies Ordinance, 1984 with its registered office at Lahore. The defendants Nos.2 and 3 have issued personal guarantees in favour of the plaintiff for the liabilities of the defendant No. 1. The defendant No.4 is holding pari passu mortgage on the immovable property of the defendant No.1. The defendant No.4 has been arrayed as a pro forma defendant and no relief is being claimed against it.

3. The case of the plaintiff is that the plaintiff issued a facility letter dated 8-11-2003 sanctioning a finance facility in the amount of Rs. 150.00 million for setting up a new yarn dyeing unit. The defendant No.1 passed a resolution on 1-12-2003 to obtain the finance of Rs.150.00 million for the purchase of machinery for the yarn dyeing unit. The finance agreement was executed on 24-12-2003 by the defendant No.1 along with the security documents including Demand Promissory Note. On 29-12-2003 personal guarantees were executed by the defendants Nos.2 and 3 and the property of the defendant No.1 was mortgaged vide a Memorandum of Deposit of Title Deed (MDTD) dated 29-12-2003. Letter of Hypothecation and Deed of Floating Charge were issued with respect to the moveable assets of the defendant No.1 on 29-12-2003. The mortgage and charge was duly registered with the Securities and Exchange Commission of Pakistan (SECP) on 31-12-2003. Finance of Rs.48.840 million was disbursed to the defendant No.1 for execution of civil

works. In this regard the loan account of the defendant No.1 was debited on 31-12-2003. The plaintiff paid Rs. 36.557 million to PICIC Commercial Bank Limited to meet the liabilities under the letters of credit established by the defendant No.1. Two Letters of Comfort dated 11-11-2004 for Rs.45.628 million and Rs. 13.464 million were issued by the plaintiff in favour of the defendant No.1 against the LCs opened by the defendant No.1 for import of machinery. At present the defendant No.1 is liable to pay Rs. 11.505 million and Rs. 11.839 million under the Letter of Comfort. Total amount due from the defendants Nos.1-3 is Rs. 112.102, Rs.108.742 million being finance availed and the balance being mark up, rebate and pre-payment premium.

4. The learned Counsel for the defendants Nos.1-3 argued that the defendants were entitled to unconditional leave to defend in the suit. The learned counsel raised an objection with respect to the statement of accounts (SOA). It is the case of the defendants that the SOA have not been certified by the competent authority as required under section 2(8) read with section 4 of the Banker's Book Evidence Act, 1891 (Act of 1891). The learned counsel argued that as per section 2(8) of the Act of 1891, the principal accountant or manager of the bank has to certify the SOA. In the instant case the SOA has been certified by the Senior Vice-President and the Assistant Vice-President of the plaintiff bank. Learned counsel argued that this is not in accordance with the mandate of section 2(8) read with section 4 of the Act of 1891 and they were not the officers contemplated under the section. He further argued that in terms of section 9(2) of the F.I.O. 2001, the certification of the SOA must be strictly in terms of the Act of 1891 otherwise it cannot be considered as a SOA under the Act of 1891. Learned counsel further argued that the SOA does not show any debit entries and therefore the SOA as filed with the plaint cannot be treated as a SOA contemplated under the Act of 1891 and the F.I.O., 2001. The second objection is with respect to the counter claim raised in the PLA. Learned counsel argued that the counter claim entitles the defendants to grant of leave as the defendants have a right to set off under Order VIII, Rule 6 of the Civil Procedure Code on account of the counter claim raised in the PLA against the plaintiff. Learned counsel further argued that leave has to be granted in this case because if the PLA of the defendants is dismissed, the counter claim of the defendants will be hit by the principle of res judicata. The third objection raised by the learned counsel is that the finance and security documents were novated on 26-10-2004 through a supplemental agreement which has not been appended with the plaint. Learned counsel argued that since the relevant documents have not been filed with the plaint, the defendants Nos.1 to 3 are entitled to leave to appeal. Defendants' counsel has relied upon the cases titled 'Mian Muhammad Shahbaz Sharif through Attorney v. Election Commission of Pakistan, Islamabad and 15 others' (PLD 2003 Lahore 646), 'Pakistan Kuwait Investment Company (Pvt.) Limited through Authorized Representative v. Messrs Active Apparels International and 6 others' (2012 CLD 1036), 'Messrs Soneri Bank Limited v. Messrs Compass Trading Corporation (Pvt.) Limited through Director/Chief Executive and 3 others' (2012 CLD 1302), 'Fine Textile Mills Ltd. v. Haji Umar' (PLD 1963 SC 163), 'Ali Khan & Co. v. Allied Bank of Pakistan' (PLD 1995 SC 362), 'Ravi Associate (Pvt.) Ltd. v. Industrial

Development Bank of Pakistan' (2005 CLD 393), 'Bankers Equity Ltd. v. Betnonite Pakistan Ltd.' (2010 CLD 651), 'Suo Motu Case No.18 of 2010 dated 8-8-2011' (2012 PLC (C.S.) 394) and 'Messrs Muhammad Siddiq Muhammad Umar and another v. The Australasia Bank Ltd.' (PLD 1966 SC 684).

5. I have heard the learned counsel for the parties and reviewed the record available on the file.

6. The first issue raised by the defendants' counsel is with respect to the certification of the SOA filed with the plaint. Learned counsel has relied on section 2(8) read with section 4 of the Act of 1891, which read as follows:--
"(8) Certified copy" means a copy of any entry in the books of a bank together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business, and that such book is still in the custody of the bank, such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title."
4. Mode of proof of entries in bankers' book. Subject to the provision of this Act, a certified copy of any entry in a bankers' books shall in all legal proceedings be received as prima facie evidence of the existence of such entry, and shall be admitted as evidence of the matter, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise".

The SOA filed with the plaint has been certified by the Senior Vice-President, Accounts Department as well as the Senior Vice-President and the Assistant Vice-President of the Plaintiff bank. The objection is that the signatories of the SOA are neither the principal accountant nor the manager of the bank. Section 2(8) of the Act of 1891 requires that the certification be made by the principal accountant or the manager of the bank with his name and official title. The definition does not provide for the designation or title of the principal accountant or manager of the bank. It requires that a responsible officer of the bank certify the SOA. Such an officer would provide his official title in the certification meaning thereby that the official title does not have to be principal accountant or manager of the bank. The title of the persons maintaining the books of accounts may vary from bank to bank and may also change over time. The intent is to ensure that a responsible officer whose work relates to accounts or management sign the certificate. Hence in this case the certification has been issued by the Senior Vice-President, Accounts Department which is a certification by the principal accountant and the signature of the Senior Vice-President and Assistant Vice-President of the bank is a certification by the manager of the bank. The certification through the responsible officer means the bank owns the SOA and certifies that the SOA represent the true and correct statement, as maintained in its books of accounts. The certification enables the Court to consider the copies of the statement of accounts as admissible evidence in the suit. In this regard it has been held in the case titled 'Barthels and Luders GmbH v. M.V. Dominique' (AIR 1988 Bombay 380) that the requirements of section 2(8)

of the Act of 1891 is not mandatory but directory and that sufficient compliance would depend upon the facts and circumstances of each case. The court was of the view that where the accounts were duly signed by the agent of the bank, it implied that it was a true copy maintained by the bank in its ordinary course of business and that such book was in the custody of the bank. In the case titled 'Barker v. Wilson' 1980 (2 All ER 81) at page 83 it has been held that for the purposes of Bankers' Books Evidence Act, 1879, the Bankers' Book would include a micro film. Lord Bridge LJ held that 'I agree that the Bankers' Books Evidence Act, 1879 was enacted with the practice of Bankers in 1979 in mind. It must be construed in 1980 in relation to the practice of Bankers as we now understand it. So construing definition of the Bankers Books and the phrase an entry in the Bankers Books it seems to be that clearly both phrases are apt to include any form of permanent record kept by the Bank of transactions relating to the Bank's business made by any of the methods which modern technology makes available including in particular micro film.' The Learned Counsel has also argued that leave has to be granted to ascertain that the signatories are that of the principal accountant and the manager of the bank. However in order for leave to be granted on this issue the defendants would have to raise an issue with respect to the authority of the persons signing the SOA. No such objection has been made in the PLA. Learned counsel has also argued that the SOA do not show debit credit entries. No particular date or entry has been questioned. It is a general objection raised against the SOA. A perusal of the SOA shows that the debit and credit entries are there and the learned Counsel was unable to point out a single entry on the basis of which this objection was made. Therefore, I find no merit in this argument and find that the SOA are compliant with section 2(8) of the Act of 1891.

7. The second objection is with respect to the counter claim raised by the defendant No.1 in the PLA. The counter claim is for Rs.617,389,000 on account of loss and damages for failure to disburse the finance in terms of the commitment between the plaintiff and the defendant No.1. Consequently, the defendant No.1 claims that it has suffered loss of profit, marginal loss and financial loss as detailed in para 16 of the PLA. The counter claim filed in the PLA is one for damages, which has no nexus with the suit of the plaintiff for recovery of amounts due to it. The counter claim is based on the failure to disburse the total facility amount in terms of a commitment made by the plaintiff, whereas the plaintiff has filed a suit for the recovery of amounts disbursed to the defendants and due from them. These are two separate and distinct issues where the suit of the plaintiff will not operate as res judicata against the claim of the defendants Nos.1 to 3. Section 9(3) of the F.I.O., 2001 clearly provides that the suit should specifically provide what finance has been availed, what amounts have been paid and what amounts are due from the defendants. Under section 10 of the F.I.O. the defendants in their PLA have to show the finance availed and the finance due from them. Therefore a recovery suit is with respect to finance availed and due to the plaintiff where the issues are not directly and substantially the same as in a counter claim for damages being claimed on account of the conduct of the bank. Therefore in the instant suit, any grievance that the defendants have with respect to amounts not disbursed will not operate as res

judicata against the defendants. Furthermore I am of the opinion that such a counter claim cannot be included in the PLA as the leave to defend under section 10 of the F.I.O., 2001 is merely an application stating the grounds on the basis of which the defendant seeks leave from the court with respect to the questions of law and fact for which evidence needs to be recorded specifically with respect to finance availed and finance due. Hence a claim for damages cannot be included in the PLA as it does not give rise to the same questions of law or fact on the basis of which this Court will adjudicate to decide on the claim of the plaintiff. Reliance is placed on the case titled 'Siddique Woollen Mills and others v. Allied Bank of Pakistan and others' (2003 CLD 1033) wherein it was held by the Hon'ble Supreme Court that the plea of the borrowers neither constituted a defence in their favour independently nor it gave rise to a bona fide dispute between the parties because in such cases the court was required to examine the liability and acceptance by the borrowers. Question of sustaining losses by the borrowers on account of conduct of the bank could be sorted out in some other forum instead of claiming relief from the banking court. It has also been held in the case titled 'Messrs Razzaq & Company v. Messrs Riazeda (Pvt.) Ltd.' (1990 CLC 1243) that a counter claim related to damages was not germane to the issues raised for the purposes of grant of leave. Therefore in view of the aforesaid there is no merit in the objection raised.

8. The third objection raised by the learned Counsel for the defendants is with respect to the novation of the finance agreements. Learned counsel for the defendants has relied upon a date mentioned in the letter of hypothecation on the basis of which the entire argument of novation is built. To my mind, there is no merit in this argument. Nothing has been brought on the record to show that the agreement of finance was novated between the parties. The reliance of the date in the letter of hypothecation has not been connected with any other document of the plaintiff or relied upon by the plaintiff. Hence there is no merit in this objection.

9. The availing of the finance, creation of security in favour of the bank, mortgage deed and the execution of the documents have been duly established by the plaintiff. The liability is admitted in the balance sheet as at December 31, 2004. Disbursement of Rs.48,840,000 on 31-12-2003, Rs.700,000 dated 10-3-2005, Rs.2,204,460 dated 23-6-2005, Rs.809,566 dated 24-6-2005, Rs.3,604,833 dated 1-9-2005, Rs.8,511,932 dated 13-9-2005, Rs. 16,100,070 dated 18-2-2006 and Rs.4,627,213 dated 20-3-2006 are duly shown in the SOA. The total claim is for Rs. 108.741 plus Rs.23.344 million under the Letters of Comfort. The plaintiff also prays for mark-up of Rs.5.161 million and rebate of Rs.1.664 million and pre-payment premium of Rs.1.517. The plaintiff is not entitled to pre-payment premium of Rs.1.517 million.

10. Therefore, the suit of the plaintiff is decreed in favour of the plaintiff and against the defendants Nos.1, 2 and 3 under section 9 of the F.I.O., 2001 jointly as well as severally in the sum of Rs.110.585 million together with the cost of funds calculated from the date of default i.e. 24-3-2006 till realization of the decreetal amount. The plaintiff shall also be entitled to the costs of the suit.

11. The defendants Nos. 1, 2 and 3 shall have 30 days to pay the decreetal amount to the Decree Holder whereafter this decree shall automatically stand converted into execution proceedings without the need to file a separate application and no fresh notice shall be issued to the Judgment Debtors in this regard. Particulars of the mortgaged/hypothecated assets of the Judgment Debtors shall be filed by the Decree Holder for consideration of this Court on expiry of the afore-noted period of 30 days.

KMZ/N-3/L Suit decreed.

2014 C L D 803
[Lahore]
Before Mrs. Ayesha A. Malik, J.
TANVEER SHAKOOR---Petitioner
Versus
FEDERATION OF PAKISTAN through Secretary Interior Division and another---Respondents
Writ Petitions Nos.22349 and 22356 of 2013, heard on 6th March, 2014.

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

----Ss. 2 & 3(2)---Exit From Pakistan (Control) Rules, 2010---Constitution of Pakistan, Arts 10A & 199--- Constitutional petition---Placement of name on Exit Control List on request by Financial Institution---"Default"---Scope---Petitioners impugned placement of their names on Exit Control List on account of outstanding liability to pay amounts to a Financial Institution (Bank)---Contention of the petitioners was that placement of their names on the Exit Control List on request of the Financial Institution and the State Bank of Pakistan was illegal---Held, that where a Financial Institution was seeking to recover amounts due from a customer, the Banking Court, after due process of law, adjudicates upon the matter and decides the question of default and without clear determination from a court of competent jurisdiction on the question of default, the State Bank could not use State machinery for recovery purposes---Key word used in R.2(e) of the Exit From Pakistan (Control) Rules, 2010 was "default" of loans or liabilities, and admittedly, there was no decree against the petitioners with respect to amounts stated to be due to the Financial Institution---State machinery could not be used for purposes of exerting pressure or in a private dispute unless government interest was at stake, and the same was clearly provided in R.2(2)(a) of the Exit from Pakistan (Control) Rules, 2010---Petitioners' names therefore had been placed on ECL without application of mind, in a mechanical manner and without considering the element of public interest by the respondents; and they had been denied their fundamental rights without due process of law--- High Court directed that the names of the petitioners be removed from ECL---Constitutional petition was allowed, accordingly.

Mian Ayaz Anwar v. Federation of Pakistan through Secretary Interior and 3 others PLD 2010 Lah. 230 and Dossani Travels Pvt. Ltd. and 4 others v. Messrs Travels Shop (Pvt) Ltd. and others 2013 SCMR 1749 ref.
Miss Naheed Khan v. Government of Pakistan and others PLD 1997 Kar. 513 and Munir Ahmad Bhatti v. Government of Pakistan Ministry of Interior through Secretary and others PLD 2010 Lah. 697 rel.
Muhammad Shoaib Rashid for Petitioners.
Muhammad Zikria Sheikh, D.A.G. along with Mubashir Ahmad Tirmazi, AD/FIA for Respondents.
Date of hearing: 6th March, 2014.

JUDGMENT

MRS. AYESHA A. MALIK J.---This single judgment decides upon the common issues raised in W.Ps. Nos.22349 and 22356 of 2013 as both the petitioners have impugned the placement of their names on the Exit Control List (ECL) vide Office Memorandum dated 9-4-2013.

2. The case of the petitioners is that they are directors/shareholders in various corporate entities. Based on a request by the State Bank of Pakistan (SBP) and United Bank Limited (UBL) their names were placed on the ECL under Section 2 of the Exit from Pakistan (Control) Ordinance, 1981 (1981 Ordinance). In terms of the Office Memorandums, the names of the petitioners were placed on the ECL on account of some outstanding liability of UBL against each of the petitioners.

3. Learned counsel for the petitioners argued that the placement of the names of the petitioners on the ECL is illegal and without any justification. No notice was issued to the Petitioners prior to passing the impugned order. He argued that there is no determination that there is a default of any amount from the petitioners yet on the request of UBL and SBP the respondents have placed the names of the Petitioners on the ECL. Learned counsel argued that inclusion of the names of the petitioners on the ECL is a violation of the fundamental right of freedom of movement guaranteed under the Constitution of Islamic Republic of Pakistan, 1973 (Constitution). Further argued that the placement of names of the petitioners on the ECL cannot be used for collateral purpose for the recovery of bank dues. Learned counsel argued that the order of placing the names of the petitioners on the ECL is the result of highhandedness and abuse of authority as it is not a case of public interest but simply a case of recovery of amounts claimed by a financial institution. Further argued that mechanism for recovery is provided to financial institution under the Financial Institutions (Recovery of Finances) Ordinance, 2001 (FIO 2001) and as such the respondents cannot use State machinery to coerce the petitioners in paying an amount which may or may not be due against the petitioners. Learned counsel argued that the Writ Petitions are maintainable against the order directing the placement of the names of the petitioners as they are patently illegal. Further argued that the remedy available under section 2(3) of the 1981 Ordinance is not an adequate remedy. In this regard he has placed reliance on the case titled "Mian Ayaz Anwar v. Federation of Pakistan through Secretary Interior and 3 others "(PLD 2010 Lahore 230).

4. Report and parawise comments have been filed by the respondents. Admittedly, the names of the petitioners have been placed on the ECL by the Ministry of Interior on the request of State Bank of Pakistan through its letter dated 29-3-2013. Learned DAG has placed copies of both the letters on the file. Learned DAG has relied upon the request made by UBL to the Director Banking Policy and Regulation Department, State Bank of Pakistan. Learned DAG has argued that public interest is always involved in money matters. Further argued that the petitioners are defaulters and should not be allowed to leave the country. While relying on the case titled

"Dossani Travels Pvt. Ltd. and 4 others v. Messrs Travels Shop (Pvt.) Ltd. and others" (2013 SCMR 1749), learned DAG states that this is a policy matter and should not be interfered with by the Court. He has also placed reliance on the case titled "Miss Naheed Khan v. Government of Pakistan and others" (PLD 1997 Karachi 513) wherein it has been held that freedom of a person can be restricted in public interest.

5. Heard the learned counsel for the parties and reviewed the record available on the file.

6. The Office Memorandums dated 9-4-2013 state that the names of the petitioners have been placed on the ECL pursuant to a request made by the State Bank of Pakistan on behalf of UBL dated 29-3-2013. As per the record both the petitioners are obligated to pay some amounts to UBL. Since they have failed to pay, UBL made a request to SBP for placement of names on ECL. Copies of the request letters sent by UBL to the State Bank of Pakistan are available on the file. UBL requested that the names of the petitioners be placed on the ECL for the following reasons:--
"Various efforts are being made for the recovery of funding extended to Paramount Spinning Mills Limited by all the banks/financial institutions and we fear that the main sponsors may leave the country to avoid any legal repercussions. In order to protect the interest of the bank and to exert pressure on the management for a workable solution, we see SBP 's approval to place name of the following Director/Sponsor of Paramount Spinning Mills Limited on the Exit Control List (ECL) under Exit from Pakistan (Control) Ordinance, 1981 on an urgent basis."
A bare review of the reason provided in the said letters shows that the financial institution is using State machinery to exert pressure on the petitioners to repay amounts due to it. Nothing has been appended with the letters to show the default, if any, or to show that the default has been established by a Court of competent jurisdiction. The FIO, 2001 is a special law with exclusive jurisdiction to adjudicate upon disputes between the financial institution and its customer. Where the financial institution is seeking to recover amounts due to it from a customer, the Banking Court after following due process of law adjudicates upon the matter and decide whether or not the customer is in default. Without a clear determination from the Court of competent jurisdiction on the question of default, the State Bank cannot use State machinery for recovery purposes.

7. Rule 2(e) of the Exit from Pakistan (Control) Rules, 2010 (Rules 2010) provides that case of two or more key or main directors of a firm, in default of loan or liabilities exceeding one hundred million rupees. The key word in this Rule is 'default' of loan or liabilities. Admittedly, there is no decree against the petitioners with respect to the amount stated to be due to UBL. The 1981 Ordinance aims to control the exit of certain persons from Pakistan. The Rules provide for the grounds to prohibit persons from proceeding abroad. In the case of petitioner in W.P. No.22349 of 2013 the outstanding liability due against him is stated to be Rs.307.216 million. Similarly in the case of the petitioner in W.P. No.22356 of 2013 the outstanding liability due against him is stated to be Rs.711.141 million.

However there is no decree from the Banking Court declaring the petitioners to be in default. Furthermore there is no explanation provided by UBL or SBP as to whether the petitioners are main directors of the company whose loan is due. A review of the record shows that the respondents did not require any information from the SBP or from UBL but simply processed the request of the SBP for placing the names of the petitioners on the ECL with immediate effect. The SBP did not question the request of the UBL and instead mechanically placed the request before the respondents. To the mind of this Court, the reasons given by UBL for the placement of the names of the petitioners on the ECL are not legal. A review of the request shows that they clearly want to put pressure on the petitioners for 'workable solution'. State machinery cannot be used for the purposes of extorting pressure. Furthermore State machinery cannot be used for the purposes of a private dispute unless government interest is at stake. This is clearly provided in Rule 2(2)(a) of the Rules 2010 that persons involved in private disputes where government interest is not at stake, except cases of fraud against foreign banks and reputable companies with significant foreign investments. In the case cited at "Munir Ahmad Bhatti v. Government of Pakistan, Ministry of Interior through Secretary and others" (PLD 2010 Lahore 697) it was held that the respondents should keep in mind public interest that is the interest of the country being a common interest and not just for the interest of an individual before placing the name of citizen on the ECL. In the case of cited at "Hassan Raza through Lawfully Constituted Attorney v. Federation of Pakistan through Secretary Ministry of Interior, Islamabad and 2 others" (2012 CLD 92), it was held that ECL Rules 2010 are not applicable in the case where person is involved in a private dispute unless government interest is at stake or where person is involved in fraud against foreign banks and reputable companies with significant foreign investment or if it is shown that person involved in heinous crime or in drug trafficking. In the case cited at "Wasatullah Jaffery v. Ministry of Interior through Secretary, Federal Government of Pakistan and 4 others" (PLD 2014 Sindh 28) it was held that where a Ministry of Interior has placed the name of a person on the ECL in a mechanical manner without applying its mind, without passing a speaking order and without disclosing the basis of its intention of exercising power under section 2(3) of the 1981 Ordinance, then such action on the part of the Ministry of Interior was unfair, unreasonable; not in a good faith and in violation of a fundamental right.

8. Therefore in terms of the law laid down the names of the petitioners have been placed on the ECL without application of mind, in a mechanical manner and without considering the element of public interest by the respondents. The petitioners have been denied their fundamental right without due process of law.

9. In view of the aforesaid, these Petitions are allowed. The request of the UBL through letter dated 13-2-2013 is set aside and the name of the petitioners be removed from the ECL forthwith.

KMZ/T-6/L Petition allowed.

PLJ 2014 Lahore 675
Present: Ayesha A. Malik, J.
SHAHID GHAFOOR--Petitioner
versus
PAKISTAN CRICKET BOARD through its Chairman and 5 others--Respondents
W.P. No. 30570 of 2013, decided on 7.4.2014.

Constitution of Pakistan, 1973--

----Art. 199--Constitutional petition--Election of cricket club--Interim committee was constituted to make arrangement for holding of elections--Interim committees were dissolved and matter was handed over to D.C.D.--Executive decisions cannot be challenged in a constitutional petition--Question of--Whether P.C.B could had issued letter and done away interim committee--Determination--Maintainability of Petition--Wherein the interim committees were dissolved with immediate effect and role of interim committees was handed over to PCB Domestic Cricket Department until the completion of electoral process--Petitioner has no vested right on basis of which it can claim that the decision to constitute the interim committees should continue until the election process was completed--Decision was reviewed and the work of the interim committees was handed over to PCB Domestic Cricket Department for the same reasons, to ensure fairness and transparency in the election process--Members of the interim committees themselves were participating in the election process, therefore allowing them to facilitate the election process and allow them to run day to day affairs of the Cricket Association would adversely affect the election process is a justified reason for handing over the work of the interim committees to the PCB Domestic Cricket Department--Petitioner has failed to show the mala fide of the respondent and has also failed to show how he is adversely affected by the impugned letter--Petitioner has been able to show how the election process is being managed or manipulated by P.C.B. and in particular consequent to the decision in the impugned letter. [P. 678] A & B
Mr. M. Irfan Khan Ghaznavi, Advocate for Petitioner.
Mr. Taffazul Haider Rizvi, Mr. Haider Ali Khan, Advocates alongwith Mr. Salman Naseer, Manager legal, PCB for Respondent.
Date of hearing: 25.3.2014.

Judgment

Through this Petition, the Petitioner has impugned the letter dated 19.11.2013 issued by the Respondent No. 1, Pakistan Cricket Board (PCB).

2. The facts of the case are that the Petitioner is the president of an active club i.e. `Baghbanpura Cricket Club' and has submitted his nomination papers for the seat of Secretary of the North Zone Cricket Association. The Governing Body of the Respondent No. 1 decided on 8.5.2013 that interim committees of Regions and District/Zones would facilitate the holding of elections at Regional/District/Zonal

Cricket Associations. This appointment of interim committees for Regions and Districts was challenged through several constitutional petitions where-after this Court ordered on 20.5.2013 that the role of interim committee shall be limited to make arrangement for holding of elections and facilitating the same. The committee can also look after the day to day matters of the Associations till the elected office bearers take charge of the Associations. The elections have not been held yet the Respondent No. 1 issued the impugned letter dated 19.11.2013 whereby the interim committees were dissolved with immediate effect and the PCB Domestic Cricket Department are to manage and regulate the affairs of the LCCA/LRCA until the electoral process was completed. The grievance of the Petitioner is that by dissolving the interim committees the process of transparency has been done away with mala fide reasons as the Respondent No. 1 wants to control the election results. The strength of the argument of the learned counsel for the Petitioner is based on the order dated 20.5.2013 in W.P. No. 12166/2013 as he argued that the Court had allowed the continuation of the interim committees until the finalization of the election process and the new elected office bearers take charge. Learned counsel for the Petitioner argued that the interim committee was to continue until the new office bearers took charge and it was only then the interim committees would dissolve. Hence the Petitioner is aggrieved by the fact that his nomination and participation in the election is adversely affected by the impugned letter as the Respondent No. 1 will only allow persons of its own choosing to succeed in the District/Zonal elections.

3. Report and parawise comments have been filed by the Respondents. Learned counsel for the Respondents has raised a preliminary objection that the Petitioner claims to be the president of the `Baghbanpura Cricket Club', however nothing has been appended with the instant Writ Petition to show that he is the president or that he has been authorized by the club to institute the instant petition. Furthermore he has raised the objection that the Petition is not maintainable against an executive decision. Further argued that there is nothing in the orders of this Court dated 20.5.2013 in W.P. No. 12166/2013 wherein the Respondent No. 1 was directed to continue with the interim committees. The interim committees were set up to ensure fair and transparent elections by way of an executive decision. Subsequently the Respondent No. 1 found that many of the members of the interim committees were themselves contesting the elections, hence in order to ensure fairness in the election process, the interim committees were dissolved and the matter was handed over to the Domestic Cricket Department. Learned counsel argued that these are executive decisions and as such cannot be challenged in a constitutional petition. Learned counsel further argued that these decisions are made in the best interest of the game to ensure transparency in the election process.

4. Heard learned counsel for the parties and reviewed the record available on the file.

5. The basic objection with respect to the authorization of the Petitioner is based on merit consideration as the Petitioner has filed this petition in his individual capacity

as a contestant in the election for the seat of Secretary North Zone Cricket Association, hence no requirement of authorization to be filed by the Cricket Club of which the Petitioner asserts to be the president.

6. The question before this Court is whether the Respondent No. 1 could have issued the impugned letter and done away with the interim committees that it had originally set up. The interim committees were constituted vide letter dated 9.5.2013 to facilitate the election process of the Regional Cricket Associations. The committees were not involved in any substantive work other that facilitating the election process. The committees were also to look after day to day routine matters till such time that the election process was completed and the new office bearers would take charge. In WP No. 12166/ 2013 the constitution of the interim committees was challenged and it was held in order dated 20.5.2013 that without prejudice to the right of the petitioners to raise objections regarding legality of appointment of the interim committee, and without recording any finding on the same, that the role of the said committee shall be strictly limited to making arrangements for holding of the elections of the associations and facilitating the same. The committee shall not directly or indirectly take any steps for disqualification of any member/association. Further, the elections shall be held on a date within one week commencing 18th June, 2013. The exact date shall be fixed by the Election Commission in strict compliance with the requirements of the Constitution of PCB. The Committee may also look after routine day-to-day matters of Associations till the elected office bearers take charge of the Associations. This order of 20.5.2013 was upheld in ICA No. 549/2013 on 3.6.2013. A review of both the orders shows that there was no direction to maintain the interim committees. Based on the submissions made by the Respondent PCB the constitution of the interim committees was maintained for a limited purpose. Subsequently the Respondent No. 1 keeping in mind the changed circumstances issued the impugned letter dated 19.11.2013 wherein the interim committees were dissolved with immediate effect and the role of the interim committees was handed over to the PCB Domestic Cricket Department until the completion of the electoral process. The Petitioner has no vested right on the basis of which it can claim that the decision to constitute the interim committees should continue until the election process is completed. To the mind of this Court the decision was taken in order to ensure transparency and fairness in the election process. With the same spirit in mind, the decision was reviewed and the work of the interim committees was handed over to the PCB Domestic Cricket Department for the same reasons, to ensure fairness and transparency in the election process. The explanation rendered by the learned counsel for the Respondents that the members of the interim committees themselves are participating in the election process, therefore allowing them to facilitate the election process and allow them to run day to day affairs of the Regional Cricket Association would adversely affect the election process is a justified reason for handing over the work of the interim committees to the PCB Domestic Cricket Department. Furthermore the decision to constitute interim committees is a policy decision made by the Respondent No. 1 and the impugned letter dated 19.11.2013 is also a policy decision made by the Respondent No. 1. The

Petitioner has failed to show the malafide of the Respondent No. 1 and has also failed to show how he is adversely affected by the impugned letter. His primary objective is to participate in a fair and transparent election. Nothing has been brought on the record or argued before thus Court on the basis of which the Petitioner has been able to show how the election process is being managed or manipulated by the Respondents and in particular consequent to the decision in the impugned letter.

7. Under the circumstances, no case for interference is made. Petition is dismissed.

(R.A.) Petition dismissed.

P L D 2014 Lahore 486
Before Mrs. Ayesha A. Malik, J
TIPU SALMAN MAKHDOOM---Petitioner
Versus
FEDERATION OF PAKISTAN through Secretary and 2 others---Respondents
Writ Petition No.83 of 2014, decided on 14th March, 2014.

Public Procurement Rules, 2004---

----Rr. 5 & 3---Constitution of Pakistan Art. 199---Constitutional petition---Public procurement---International and inter-governmental commitments of the Federal Government---Scope---Procurement of vaccines---Contention of the petitioner was that respondent Ministry of Health had in the past procured vaccine through open tenders, however, in the present financial year, no bids were advertised, and contract for procurement was awarded to UNICEF, contrary to Public Procurement Rules, 2004---Contention of the respondent Ministry of Health was inter alia, that Pakistan was working with GAVI Alliance, and upon default of its co ;financing obligations to GAVI Alliance, Government of Pakistan was compelled to procure vaccine from UNICEF-Held, that no justification for not following Public Procurement Rules, 2004 was available to the department and R. 5 of the Public Procurement Rules, 2004 was not applicable for the purposes of co financing obligation with GAVI Alliance---Commitment with GAVI Alliance was not an international treaty nor was an agreement with the State or an agreement with an international financial institution, therefore it could not prevail over the Public Procurement Rules, 2004---Government could not bypass the procurement process as provided under the PPRA Rules and any commitment with GAVI Alliance fell outside the scope of R. 5 of the Public Procurement Rules, 2004-High Court directed that procurement of vaccines be carried out through open tenders in accordance with Public Procurement Rules, 2004 and observed that the commitment of Government with UNICEF for procurement of vaccine was illegal being contrary to Public Procurement Rules, 2004--Constitutional petition was allowed, in circumstances.

Human Rights Cases Nos. 4668 of 2006, 1111 of 2007 and 15283-G of 2010 PLD 2010 SC 759 and Atta Ullali Khan Malik v. Federation of Government of Pakistan through President of Pakistan and 3 others PLD 2010 Lah. 605 ref.
Ahmad Awais and Muhammad Hammad Munir for Petitioner.
Mian Tariq Ahmad, Dy. Attorney-General along with Dr. Ejaz Ahmad Khan NPM EPI, Umar Hayat, Project Officer EPI, Munawar DID EPI and Rana Muhammad Safdar, National Programme Manager, EPI for Respondents.
Date of hearing: 20th February, 2014.

JUDGMENT

MRS. AYESHA A. MALIK, J.---Through this petition, the petitioner has impugned the decision of the respondent No.2 to purchase pentavalent vaccine from

UNICEF without following the procedure under the Public Procurement Regularity Authority Ordinance, 2002 (PPRA Ordinance).

2. The case of the petitioner is that the respondent No.2, Ministry of National Health Services, Regulations and Coordination, Islamabad provides free vaccination to the children up to the age of five years. The respondents invite open bids for the procurement of the required vaccination. The pentavalent vaccine has been procured by the respondent No.2 through public tender in the years 2010, 2011 and 2012. However, by virtue of a proclamation issued on 17-12-2013 bids for the procurement of vaccination for the financial year 2013-2014 were made in which the pentayalent vaccine was not advertised. The grievance of the petitioner is that the respondent No.2 has not followed the procurement procedure and instead has awarded the contract to purchase pentavalent vaccine to UNICEF, which is against the settled law.

3. Learned counsel for the petitioner argued that this issue has already been decided in Writ Petition No.2902 of 2011 and I.C.A. No.132 of 2006 wherein this Court held that the vaccine procured for the Expending Program of Immunization (EPI) must be done through the Public Procurement Rules, 2004 (PPRA Rules). Learned counsel argued that instead of following the prescribed procedure and the law, the respondents have entered into an agreement with UNICEF for the purchase of the vaccine. Learned counsel argued that the agreement is against public interest because the vaccine must be of a prescribed standard, must contains the required potency, efficacy and quality and that must not be expired. Further argued that in the minutes of meeting held on 9-5-2012 under the Chairmanship of the Special Secretary, Health Department, it was observed that in terms of the Memorandum of Understanding (MOU) signed with UNICEF, UNICEF is absolved of any liability with regard to the value, adequacy, quality, stability or usefulness of the supplies made. UNICEF does not take responsibility for any defective medication nor does it offer any warranty for the vaccine that is provided. On the basis of this, it was discussed and recommended that free supply of vaccines should not be accepted. It was also discussed that UNICEF did not participate in the competitive process, hence its prices should not be accepted. Finally, it was agreed that no procurement should be made with public money without obtaining proper warranty of the vaccine. Learned counsel emphasized the fact that at this meeting it was unanimously agreed that the vaccine procured for the EPI program would be in terms of the PPRA Rules and the PPRA Ordinance. Learned counsel argued that under the PPRA Ordinance in the event that there is a conflict with an international or internal government commitment arising out of international treaty or an agreement then the international commitment or agreement shall prevail. Learned counsel argued that in the instant case there is no international treaty or commitment with the state or with any international institution, hence the respondents cannot take the benefit of Rule 5 of PPRA Rules. Learned counsel further argued that there is no justification for deviating from the prescribed procedure, which the respondents have themselves followed for some time. Learned counsel has relied upon the case cited at "Human Rights Cases Nos.4668 of 2006, 1111 of 2007 and

15283-G of 2010" (PLD 2010'SC 759) in support of his contention that for the purposes of public money, open bidding must be undertaken in every project of the government. Learned counsel argued that this not only ensures the best price offered but also protects the quality and fairness in the process. Reliance has also been placed upon the case titled "Atta Ullah Khan Malik v. Federation of Government of Pakistan through President of Pakistan and 3 others" (PLD 2010 Lahore 605).

4. Report and parawise comments have been filed by the respondents Nos.2 and 4. Learned DAG explained that the Government of Pakistan is implementing the EPI policy. In its effort, the Government is supported by a number of partners including GAVI Alliance, which is an international immunization financing institution. With the help of GAVI Alliance, Pakistan is able to procure vaccine including the pentavalent vaccine for routine immunization. Learned DAG argued that the respondents have been procuring this vaccine through an open tender, however on account of a default in its obligations, GAVI Alliance has compelled Pakistan to purchase the vaccine from UNICEF. He further argued that another reason for not following the procurement process was that the only person that opted for local tender was Novartis Pharma, who has been enjoying this contract for the last several years as it is the single bidder in each auction. Resultantly, the price being offered by Novartis Pharma is far higher than that being offered by the UNICEF. Learned DAG has explained that under the GAVI Alliance, a country enters into default status when it does not fulfil its co-financing commitment by 31st of December. In the instant case, Pakistan did not fulfil its co-financing status by 31-12-2013, hence a letter was issued by GAVI Alliance that Pakistan should procure the pentavalent vaccine through UNICEF. He argued that the purchase of pentavalent vaccine through UNICEF is covered under Rule 5 of the PPRA Rules as the Government is honouring an international commitment. He further argued that the procurement of the vaccine needs to be done urgently as the government is running out of its stock. Learned DAG stated that under these circumstances the petitioner has no vested interest and is not an aggrieved person to file the instant writ petition. Rana Muhammad Safdar, National Programme Manager, EPI explained that for the pentavalent vaccine there is only one manufacturer in the world and whether the vaccine is purchased through UNICEF or through a local bidder, it has to be procured from the same source. He explained that all required warranties are taken from the manufacturer and it is ensured that the vaccine procured is not expired and is of the required standard.

5. No one has entered appearance' on behalf of the Respondent No.3 nor has any reply been filed on his behalf.

6. Learned counsel for the petitioner submitted that, a reply was filed in the similar writ petition by the respondent No.3 wherein he stated that the agreement between the respondent No.1 and UNICEF does not fall within the ambit of Rule 5 of the PPRA Rules. Learned counsel has also placed on record a letter dated 21-1-2014 to show that the Public Procurement Regulatory Authority, Islamabad had given its legal opinion on the issue stating that MOUs signed between the respondent No.2

and UNICEF does not fall under Rule 5 of the PPRA Rules. He has placed on record the opinion given by the respondent No.2 on 3-10-2013 that before procuring vaccine from UNICEF exemption from the Public Procurement Regulatory Authority, Islamabad should be obtained.

7. Learned DAG pursuant to the orders of this Court has placed on record the relevant documentation to show the approval process for procurement of the pentavalent vaccine from UNICEF. In terms of the documents on 4-12-2013 the issue was referred for approval to the Secretary, Ministry of National Health Services, Regulations and Coordination, Islamabad on the ground that Rule 5 of the PPRA Rules was not applicable. On 10-12-2013 Deputy Director Procurement advised that there is no conflict with the PPRA Rules or with the decision of the Court. On the basis of this opinion, payment of Rs.1,272,184,985/ to UNICEF was approved for the purchase of pentavalent vaccine. On 27-12-2013 it was informed that the competent authority has allowed advance payment of Rs. 1,272,184,985/- to UNICEF for the purchase of vaccine, syringes and safety boxes.

8. I have heard the learned counsel for the parties and reviewed the record available on the file.

9. The issue before this Court is with respect to the purchase of the pentavalent vaccination. Under the EPI, Pakistan has been approved for support by GAVI Alliance. As per the GAVI Alliance policy vaccination is provided for routine immunization of children under 12 months of age and Pakistan is required to co-finance the cost of the vaccination. As per the contentions made by the learned DAG and Rana Muhammad Safdar, National Programme Manager, EPI, 10% of the total cost has to be co-financed by Pakistan. In terms of the MOU executed with GAVI Alliance, Pakistan is required to communicate the steps that it has taken to co-finance its portion of the approved vaccination. In the event that this commitment of co-financing is not followed and notified by the respondent No.1, it is considered as a default under the GAVI Alliance policy and the participating country is put to notice of its default and thereafter required to purchase the vaccination from UNICEF. In theinstant case on 15-10-2013 the respondent No.2 was informed that Pakistan has been approved by GAVI Alliance for the procurement of pentavalent vaccination and that GAVI Alliance required proof of satisfying the co-financing requirement for the year for which the vaccination has been approved. On 7-11-2013 GAVI Alliance informed the respondent No.2 that Pakistan appears to be at risk of entering into a default status with GAVI as UNICEF has not reported the necessary steps to procure the vaccination to meet the GAVI co-financing commitment for the year, 2013. Through this letter dated 7-11-2013 Pakistan was informed that it has to procure the vaccination through the UNICEF. On 22-11-2013 the costs estimates were sent for procurement through UNICEF. On 4-12-2013 the matter was discussed and Dr. Rana Muhammad Safdar, NPM, EPI who gave his recommendation that the procurement and the co-financing with GAVI Alliance is covered under clause 5 of the PPRA Rules, therefore, the amount of Rs.1,272,184,985.00 should be paid to UNICEF. On 10-12-2013 Deputy

Director (Procurement) agreed with the advice of Dr. Rana Muhammad Safdar, NPM, EPI stating that there was no conflict with Rule 5 of the PPRA Rules and there was no conflict with the judgment rendered by this Court in I.C.A. No.132/2006 because the question of default as per GAVI co-financing facility had not been considered. The matter was subsequently approved by the Secretary and the amount of Rs. 1,272,184,985/- in favour of the UNICEF as advance payment was allowed. The record shows that Pakistan was in default in the year, 2012 on its co-financing requirement and again was in default in the year, 2013. A MOU was signed with UNICEF for the supply of the vaccination on 17-12-2013. On 21-1-2014 the Federal Public Procurement Regulatory Authority communicated its advice that this was in violation of Rule 5 of PPR Rules. Rule 5 of the PPRA Rules reads as follows:-

"Whenever these rules are in conflict with an obligation or commitment of the Federal Government arising out of an international treaty or an agreement with a State of States, or any international financial institution the provisions of such international treaty or agreement shall prevail to the extent of such conflict"

The Procurement Rules have been made under the PPRA Ordinance wherein the basic objective is to regulate the public procurement of goods or services. In the instant case the pentavalent vaccination is to be procured. Through an order in an earlier W.P. No.1858 of 2006, on 10-11-2006 the respondents Nos.l and 2 agreed to follow the PPRA Ordinance and the PPRA Rules for the purchase of the vaccines from the next fiscal year. Against this order an appeal was filed wherein it was' held on 30-5-2007 that the respondents shall follow the PPRA Ordinance and the PPRA Rules in letter and spirit to procure the vaccination under the EPI. They also ensured that the medicines are supplied strictly in accordance with the laws applicable in Pakistan. Since then the record shows that the respondents have been procuring the pentavalent vaccination as per the process laid down in the PPRA Ordinance and the PPRA Rules. The issue for the respondents arose in the year, 2013 on account of the fact that only one bidder was appearing in the past in the tendering process for the procurement of the pentavalent vaccines. It has been emphasized at great length that the bidder being Novartis Pharma is offering a higher rate than the rate being offered by the UNICEF, hence the PPRA Ordinance and the PPRA Rules were not followed. I am of the opinion that this argument is not available to the respondents. PPRA Ordinance and the PPRA Rules are there to ensure transparency in spending public money. Under the circumstances there is no justification not to adhere to the PPRA Ordinance and the PPRA Rules simply because a single bidder is appearing in the bidding process. Therefore this argument has no merit.

10. It has also been argued at great length that Pakistan entered into a default situation with GAVI Alliance in its co-financing obligation, hence the respondents were compelled to procure the vaccination from UNICEF. Both the petitioner and the respondents have placed documents on file to show the manner in which the procurement of the vaccination through UNICEF was allowed. I am of the opinion that the emphasis on the argument of the default in the co-financing requirement is

not available to the respondents because the default if caused is by the respondents themselves. They were aware of the obligation of co-financing the procurement of the pentavalent vaccination and there is nothing on the record to show that a default was caused or even that a default situation arose. In the numerous explanations offered before the Court nothing has been brought forward which explains or justifies the delay caused by the respondents in meeting up with their co-financing requirement. Furthermore the record shows that the respondents were in default in the year 2012 and GAVI Alliance anticipated a default for its future commitment for the year, 2013-14, hence it informed the respondents that in order to avoid a default situation, the vaccination should be procured through UNICEF. This is evident from the letter communicated by GAVI Alliance on 15-10-2013. The letter provides that GAVI Independent Review Committee has considered Pakistan's Annual Progress Report submitted in May, 2013 and on the basis of this report has rendered support for the pneumococcal and pentavalent vaccines for the year 2014. Appendix A with the said letter communicates the co-finance requirement. Appendix B details the vaccination support programme and for the pentavalent vaccination it says that the country shall release its co-finance payment each year to UNICEF. Subsequently a follow up letter was issued on 7-11-2013 wherein it provides that Pakistan appears to be at risk of entering into default status with the GAVI Alliance, as UNICEF has not reported that the necessary steps to procure vaccines to meet the GAVI co-financing commitment for 2013. Therefore a direction was given by GAVI Alliance that in order to avoid default status and to ensure that the co-financing commitment for 2013 is fulfilled before 31-12-2013, the country should procure its co-finance portion of the approved vaccines through UNICEF. Immediately state machinery was put to work and the advance payment of Rs.1,272,184,985.00 was approved before 30-12-2013. The quickness of the respondents in their approval was based on the understanding that Rule 5 of the PPRA Rules was not applicable and the commitment made in W.P. No.1859 of 2006 and I.C.A. No.132 of 2006 was also not applicable. To the mind of this Court, the justification for not following the PPRA Rules is not available to the respondents. Not only did they give their commitment before the Court in W.P. No.1859 of 2006 as well as in the I.C.A. No.132/2006 that they would adhere to the PPRA Ordinance and the PPRA Rules but Rule 5 of the PPRA Rules shows that the same is not applicable for the purposes of the co-financing obligation with GAVI Alliance. The commitment with GAVI Alliance is not an international treaty nor is it an agreement with the State nor is it an agreement with an international financial institution that it would prevail over the PPRA Rules. On the basis of Rule 3 of the PPRA Rules all procurements made by the Federal Government within or outside Pakistan, the PPRA Rules are applicable. It is also observed that respondent No.3 first took the stance that the PPRA Rules were not applicable (Ref. Deputy Director (Procurement) dated 10-12-2013) and then took the contradictory stance, after all approvals were given, that the PPRA Rules were mandatory (Ref. Deputy Director (Legal) letter dated 21-1-2014).

11. Under the circumstances, the respondents cannot bypass the-procurement process as provided under the PPRA Ordinance and the PPRA Rules. Any

commitment with GAVI Alliance falls outside the scope of Rule 5 of the PPRA Rules, hence not applicable to the case at hand.

12. Therefore in view of the aforesaid, this Writ Petition is allowed. The respondents are directed to hold open tenders under the PPRA Rules for the procurement of the pentavalent vaccination and the commitment it has entered into with UNICEF for the procurement of pentavalent vaccine is illegal for being contrary to the PPRA Ordinance and the PPRA Rules.

KMZ/T-5/L Petition allowed.

2014 P T D 1285
[Lahore High Court]
Before Mrs. Ayesha A. Malik, J
TREET CORPORATION LTD. through Company Secretary and others
Versus
FEDERATION OF PAKISTAN through Ministry of Finance and others
Writ Petitions Nos.28287, 28917, 31630, 29398, 29404, 39408, 30625, 31964, 29402, 30070, 29473, 28920, 29712, 29707, 28356, 28354, 28355, 30617, 31629, 31429, 30060 and 31390 of 2013, 430, 2604, 634, 1401, 1196, 313, 2392, 500, 1941, 999, 3894, 5505, 5288, 5292, 5496, 4700 and 5643 of 2014, decided on 7th March, 2014.

Sales Tax Act (VII of 1990)---

----Ss. 2(22A), 7, 2(20)(c) & 2(4)---Constitution of Pakistan, Art. 199---Constitutional petition---Interpretation of Ss. 2(22A) and 7 of the Sales Tax Act, 1990---Provincial sales tax---Adjustment of provincial input tax by the taxpayer under S. 7(1) of the Sales Tax Act, 1990---Specific nature of right of adjustment of input tax---Determination of sales tax liability---Petitioner / taxpayer impugned denial of input tax adjustment on provincial sales tax paid by petitioner---Such adjustment was denied to the petitioner by the Department on the ground that notwithstanding promulgation of provincial sales tax law in three Provinces, the same were not recognized as provincial sales tax law for the purpose of input tax adjustment by the Department---Department further contended that S. 2(22A) of the Sales Tax Act, 1990 provided a discretion to decide as to which provincial sales tax should be allowed for adjustment of input tax under S. 7 of the Sales Tax Act, 1990---Held, that basic right of the petitioner was provided under S. 7(1) of the Sales Tax Act, 1990 wherein taxpayer was entitled to adjustment of input tax from their output tax for a given tax period---Sales Tax Act, 1990 had clearly defined input tax under S. 2(14) and output tax under S. 2(20)(c) to mean provincial sales tax levied on services rendered or provided to the person---Section 2(22A) of the Sales Tax Act, 1990 defined provincial sales tax to mean tax levied under provincial laws which meant provincial sales tax as promulgated in any or all of the Provinces of Pakistan and further defined that for purposes of the Islamabad Capital Territory, provincial sales tax would be that which was declared by the Federal Government to be a provincial sales tax for purposes of input tax adjustment, which declaration was required in the Official Gazette only for the purpose of Islamabad Capital Territory---Respondent Department, in the present case, had assumed under the cover of S.2(22A) of the Sales Tax Act, 1990 a discretionary power to decide as to which provincial sales tax should be allowed for input tax adjustment, and such discretion had the effect that S. 7 of the Sales Tax Act, 1990 had become subject to the discretion of the Department and the Federal Government; which clearly was not within the scheme of the Sales Tax Act, 1990 which on the contrary, provided a specific right of adjustment of input tax---Section 2(22A) of the Sales Tax Act, 1990 could not be used to deny the right of input tax adjustment by a declaration in the Official Gazette---High Court directed the Department to accept sales tax return

filed by the petitioner by allowing adjustment claimed by the petitioner of provincial sales tax on services under provincial laws---Constitutional petition was allowed, accordingly.

Shahzad A. Elahi and Shoaib Rashid, for Petitioners.
Muhammad Zakria Sheikh, D.A.G. and Nadeem Mahmood Mian for Respondent No.1/FOP.
Ch. Muhammad Zafar Iqbal, Mian Qamar ud Din Ahmad, Siraj Ahmad and Muhammad Ilyas Khan for Respondent No.2./FBR.
Sarfraz Ahmad Cheema, Mrs. Kausar Parveen, Tariq Saleem Sheikh and M. Zafar Iqbal Mian, and Nadeem Salah-ud-Din, Deputy Commissioner (Legal) Punjab Revenue Authority for Respondent No.3/CIR.
Date of hearing: 7th March, 2014.

JUDGMENT

Mrs. AYESHA A. MALIK J.---Through this single judgment, the instant writ petition along with all the writ petition detailed in Schedule-A are being decided as all the petitioners have impugned the decision of the respondents wherein they have denied adjustment of input tax under section 2(22A) of the Sales Tax Act, 1990 (STA) as amended by the Finance Act, 2013 to the petitioners.

2. The grievance of all the petitioners is that respondent No.2, Federal Board of Revenue has misinterpreted section 2(22A) of the S.T.A. whereby adjustment of input tax to the Provinces including the Provinces of Punjab and Sindh are not being allowed whereas the adjustment of input tax for the Islamabad Capital Territory and Balochistan is being allowed.

3. Learned counsel for the petitioners have argued that the petitioners acquire services on which the sales tax is paid by them to the provincial governments such as Government of Punjab under Punjab Sales Tax on Services Act, 2012 and the Government of Sindh under the Sindh Sales Tax on Services Act, 2011. Learned counsel argued that in terms of section 2(14) of the STA provincial sales tax levied on services rendered or provided to a registered person constitutes input tax. Similarly, in terms of section 2(20)(c) of the STA provincial sales tax levied on services rendered or provided by a person falls within the definition of output tax. Provincial sales tax is defined under section 2(22A) of the STA. Learned counsel for the petitioners have argued that the scheme of the law is that under section 7(1) of the STA a registered person is entitled to claim the adjustment of input tax for the purposes of its sales tax liability subject to section 8 of the STA. Section 8(1)(a) of the STA provides that all provincial sales tax on services are adjustable as input tax except where the services used or to be used for any purpose other than for taxable supplies. Consequently all provincial sales tax on services are adjustable as input tax except where the services used are for purpose other than making taxable supplies. Section 2(22A) of the STA defines provincial sales tax to mean sales tax levied under provincial law for all the Provinces and sales tax levied in Islamabad

Capital Territory through a notification in the official Gazette by the Federal Government. Learned counsel argued that section 2 (22A) of the STA is being misinterpreted by the respondent No.2 wherein they are of the opinion that the Federal Government through a notification will declare which provincial sales tax is relevant for the purposes of claiming input tax. Learned counsel further argued that this is an incorrect interpretation of the law as they have interpreted the said section to mean that it can only include those provincial sales tax, which have been duly notified in the official Gazette. Learned counsel argued that such an interpretation is against the scheme of the STA which clearly entitles a registered person to claim adjustment of input tax for the purposes of determination of his sales tax liability. Further argued that the provincial sales tax on services shall be determined by a provincial law and the provincial law does not require a declaration of a Federal Government through a notification deeming it to be a law for the purposes of input tax adjustment. Learned counsel argued that the Federal Government cannot control the applicability of a provincial law through a notification. Further argued that the petitioners are entitled to the adjustment of input tax on the basis of the STA being a clear statutory right and the mandate of the law cannot be such that it would allow the Federal Government to control this right through a notification. It has been argued that although the vires of the section have been challenged, essentially the petitioners are aggrieved the interpretation given to section 2(22A) of the S.T.A. by the respondent No.2.

4. Report and para wise comments have been filed by the respondent No.2 in Writ Petition No.28917/2013, which have been adopted in all the writ petitions. In terms of the report and para wise comments filed by the respondent No.2, section 7 of the S.T.A. provides for a procedure regarding the determination of a tax liability. Input tax on provincial services is admissible when the law permits it in terms of section 2(14) read with section 2 (22A) of the STA, this means that input tax on provincial services are only admissible and available to the petitioners when notified by the Federal Government. The Federal Government has not issued any such notification for any of the Provinces. The input tax is being allowed for the Islamabad Capital Territory because it is a Federal Territory and for Balochistan because it has not promulgated its provincial sales tax law. The respondent No.2 has further explained that the respondent No.2 has always collected sales tax on specified services under the STA and has allowed adjustment of input tax with respect to such sales tax. After the Eighteenth Amendment three Provinces with the exception of Balochistan promulgated separate statutes for the levy of sales tax on services. These three Provinces have set up their own collecting authorities and therefore, for all intents and purposes the provincial sales tax is a separate tax collected by the different provincial authorities irrespective of the sales tax collected under the STA. It is for this reason that insertion of section 2(22A) of the STA was brought through the Finance Act, 2013 such that provincial sales tax can only be levied under provincial law if it is declared by the Federal Government through the notification that the provincial sales tax can be considered as input tax for the purposes of adjustment under section 7 of the STA. Learned counsel for the respondent No.2 argued that since no provincial sales tax law has been notified by the Federal Government

therefore, the petitioners are not entitled to claim input tax adjustment under the STA. Learned counsel further explained that the Federal Government is in the process of developing arrangements with the Provinces whereby the mutual adjustment of input tax will be allowed. However, this shall be on the basis of an agreement with the Provinces. Learned counsel has also stated that to date on the basis of the interim order passed by this Court, the respondents have accepted the manually filed sales tax returns from the petitioners.

5. Report and para wise comments have also been filed by the respondents Nos.4 and 5. It is their case that they are in full agreement with the contentions made by the petitioners. They have explained that the STA enables the Federal Board of Revenue to collect sales tax on services and make adjustments in order to avoid multiple taxes. After the Eighteenth Amendment, the Federal Board of Revenue is no longer entitled to levy sales tax on services in the Provinces, hence each Province was to promulgate its own law and devise its own mechanism for the levy and collection of sales tax. So far only three Provinces Sindh, Punjab and Khyber Pakhtunkhwa have promulgated their own laws and have started collection of sales tax on services within the Provinces. The sales tax on service in the Province of Balochistan has not commenced as they have not promulgated any law or set up any mechanism. Hence the respondent No.2 is allowing the adjustment of input tax against the Province of Balochistan. Similarly, there is no provincial law for the purposes of the Federal Capital Territory, hence the respondent No.2 is allowing input tax adjustment in the Federal Capital Territory of Islamabad. They argued that this unilateral action by the respondent No.2 and is against the mandate of the law.

6. Heard the learned counsel for the parties and reviewed the record available on the file.

7. The basic dispute in all these petitions is with respect to the Federal Board of Revenues (FBRs) interpretation of section 2(22A) of the STA. Section 2(22A) of the STA provides for the definition of provincial sales tax. The significance of this definition is that under section 7(1) of the STA a registered person is entitled to deduct input tax paid or payable during the tax period for the purposes of taxable supplies made or to be made by it from the output tax. The definition of input tax and output tax as provided in the STA means provincial sales tax levied on services rendered or provided by the person. The question arises what is provincial sales tax. Section 2 (22A) of the STA reads as follows:--

"(22A) provincial sales tax means tax levied under provincial laws or laws relating to Islamabad Capital Territory, which are declared by the Federal Government, through notification in the official Gazette to be provincial sales tax for the purposes of input tax"

The respondent No.2 has denied the petitioners input tax adjustment on the grounds that notwithstanding the promulgation of provincial sales tax law in three Provinces, they are not recognized as provincial sales law for the purposes of input tax

adjustment by the respondents. The respondent No.2 claims that it is for the respondent No.1 to decide which provincial tax is relevant for input tax adjustment, because section 2(22A) of the STA gives the respondents Nos.1 and 2 the discretion to decide which provincial sales tax should be allowed under section 7 of the STA for input tax adjustment.

8. I have heard the learned counsel for the respondents at length and find that the manner in which the respondent No.2 is interpreting section 2(22A) of the STA is totally contrary to the mandate of the law. The basic right of the petitioners is provided for under section 7(1) of the STA wherein they are entitled to adjustment of input tax from their output tax for a given tax period. The STA has clearly defined input tax under section 2(14) of the STA and output tax under section 2(20)(c) of STA to mean provincial sales tax levied on services rendered or provided to the person. Section 2(22A) of the STA defines provincial sales tax to mean tax levied under provincial laws. This means provincial sales tax as promulgated in any or all of the Provinces. Section 2(22A) of the STA further defines that for the purposes of Islamabad Capital Territory, provincial sales tax will be that which is declared by the Federal Government to be a provincial sales tax for the purposes of input tax adjustment. This declaration in the official Gazette is required for the Islamabad Capital Territory, which is not a Province. The respondents Nos.1 and 2 under the cover of section 2(22A) of the STA have assumed a discretionary power to decide which provincial sales tax should be allowed for input tax adjustment. The effect of this discretion is that the provisions of section 7 of STA become subject to the discretion of the respondent No.1. This clearly is not the scheme of the STA, which provides a specific right of adjustment to input tax. I am of the opinion that section 2(22A) of the STA cannot be used to deny the right of input tax adjustment by a declaration in the official Gazette. Furthermore admittedly there is no declaration in the official gazette yet adjustment is being allowed for the province of Balochistan and for the Islamabad Capital Territory. This act of the respondents shows that their understanding of section 2(22A) of the STA is that they have the ability to decide who should be granted input tax adjustment. Such an understanding is clearly against the specific provisions of the STA granting input tax adjustment.

9. In view of the aforesaid, these petitions are allowed and the respondents are directed to accept the sales tax return of the petitioners electronically or manually by allowing adjustment claimed by the petitioners of provincial sales tax on services under provincial laws.

SCHEDULE-A

Details of Writ Petitions mentioned in judgment dated 7-3-2014
passed in Writ Petition No.28287 of 2013

Sr. No.	Writ Petitions Nos.	Parties Name	Counsel Name
1.	28287/13	Treet Corporation Ltd. v. FOP and others	Mr. Shehzad A. Elahi, Advocate.

2.	28917/13	Messrs Mayfair Ltd. v. FOB and others	Mr. Waseem Ahmed Malik, Advocate.
(1)	(2)	(3)	(4)
3.	31630/13	Akzo Nobel Pakistan Ltd. v. FOP and others	Mr. Shahzad A. Elahi, Advocate.
4.	29398/13	Messrs Nishat Chunian Ltd. v. FOP and others	Mr. Waseem Ahmed Malik, Advocate.
5.	29404/13	Messrs Nishat Chunian Power Ltd v. FOP and others	-do-
6.	29408/13	Messrs Ghani Gases Ltd. v. FOP and others	-do-
7.	30625/13	Brothers Sugar Mills Ltd. v. FOP and others	-do-
8.	31964/13	Messrs Crescent Fibers Ltd. v. FOP and others	Mr. Muhammad Ajmal Khan, Advocate.
9.	29402/13	Messrs Srena Industries and Embroidery Mills Ltd. v. FOP and others	Mr. Waseem Ahmed Malik, Advocate.
10.	30070/13	Messrs Hamza Vegetable Oil Refinery and Ghee Mills (Pvt.) Ltd. v. FOP and others	Mr. Sumair Saeed Ahmad, Advocate.
11.	29473/13	Hyundai Engineering Pakistan (Pvt.) Ltd. v. FOP and others	Mr. Mansoor Usman Awan, Advocate.
12.	28920/13	Messrs Asian Food Industries Ltd. v. FOP and others	Mr. Waseem Ahmed Malik, Advocate.
13.	29712/13	Messrs Bata Pakistan Ltd. v. FOP and others	Mr. Waseem Ahmed Malik, Advocate.
14.	29707/13	Messrs Qareshi Industries (Pvt.) Ltd. v. FOP and others	Mr. Waseem Ahmed Malik, Advocate.
15.	28356/13	D.G. Khan Cement Co. Ltd. v. FOP and others	Mr. Mansoor Usman Awan, Advocate.
16.	28354/13	Nishat Mills Ltd. v. FOP and others	-do-
17.	28355/13	Nishat Linen (Pvt.) Ltd. FOP and others	-do-
18.	30617/13	Nishat Power Ltd v. FOP and others	-do-
19.	31629/13	Pepsi Cola International (Pvt.) Ltd. FOP and others	Mr. Shehzad A. Elahi, Advocate.
20.	31419/13	Atalas Power Ltd. v. FOP and others	Mr. Mansoor Usman Awan, Advocate.
21.	30060/13	Messrs Sufi Soap and Chemical Industries (Pvt.) Ltd. FOP and others	Mr. Sumair Saeed Ahmad, Advocate.
22.	31390/13	Messrs Azhar Corporation (Pvt.) Ltd. v. FOP and others	Mr. M.M. Akram, Advocate.
23.	430/14	Pak Arab Refinery Ltd. v. FOP and others	Mr. Naveed A. Andrabi, Advocate.

24. 2604/14	Sapphire Electric Co. Ltd. v. FOP and others	Mr. Mansoor Usman Awan, Advocate.
25. 634/14	Messrs Services Sales Corp. Ltd. v. FOP and others	Mr. Sumair Saeed Ahmad, Advocate.
26. 1401/14	Firhaj Footwear (Pvt.) Ltd. v. FOP and others	Mr. Ahmad Bilal, Advocate.
27. 1196/14	Messrs Riaz Bottlers (Pvt.) Ltd. v. FOP and others	Mr. Waseem Ahmed Malik, Advocate.
28. 313/14	Messrs Siddique Leather Works (Pvt.) Ltd. v. FOP and others	Mr. Mustafa Kamal, Advocate.
29. 2392/14	Nippon Paint Pakistan (Pvt.) Ltd. v. FOP and others	Mr. Shahbaz Butt, Advocate.
30. 500/14	Messrs Service Industries Ltd. v. FOP and others	Mr. Waseem Ahmad Malik, Advocate.
31. 1941/14	Kohinoor Energy Ltd. v. FOP and others	Mr. Mansoor Usman Awan, Advocate.
32. 999/14	Messrs Haier Pakistan (Pvt.) Ltd. v. FOP and others	Mr. Waseem Ahmad Malik, Advocate.
33. 3894/14	Messrs Mitchell's Fruit Farms Ltd. v. FOP and others	Mr. Angbeen Atif Mirza, Advocate.
34. 5505/14	Umar Farms (Pvt.) Ltd. v. FOP and others	Mr. Khalil ur Rehman, Advocate.
35. 5288/14	Messrs H. Sheikh Noor ud Din and Sons (Pvt.) Ltd. v. Federation of through Secretary and others	Mr. Sumair Saeed Ahmad, Advocate.
(1) (2)	(3)	(4)
36. 5292/14	Messrs Millat Tractors Ltd. v. FOP and others	Mr. Akhtar Ali, Advocate.
37. 5496/14	Messrs Gharibwal Cement Ltd. v. FOP and others	Mr. Sajid Ijaz Hotiana, Advocate.
38. 4700/14	Newage Cables (Pvt.) Ltd. v. FOP and others	Mr. Naeem Khan, Advocate.
39. 5643/14	Messrs Rafiq Spinning Mills (Pvt.) Ltd. v. FOP and others	Mr. Mustafa Kamal, Advocate.

KMZ/T-7/L Order accordingl

2014 P L C (C.S.) 871
[Lahore]
Before Mrs. Ayesha A. Malik, J
UMAR HAYAT KHAWAJA
Versus
NATIONAL BANK OF PAKISTAN through President and 2 others
Writ Petitions Nos.1991, 23107, 30394, 24912 and 26449 of 2012, heard on 14th April, 2014.

Constitution of Pakistan---

----Art. 199---National Bank of Pakistan Instruction Circulars Nos.37/99 and 57/99---Constitutional petition---Unutilized Privilege Leave, payment of---Grievance of petitioners (retired officers of National Bank of Pakistan] was that by virtue of National Bank of Pakistan Instruction Circular No.37/99 the Privilege Leave on the unutilized amount was frozen for encashment at the time of retirement; that at the time of their retirement they were not granted said Privilege Leave---Validity---National Bank of Pakistan Instruction Circular No.57/99 provided that frozen unutilized Privilege Leave balance could be claimed up to a maximum of 180 days at the time of retirement subject to availability of funds---Petitioners admitted that Privilege Leave amount for 180 days had been given to them, therefore there was no further amount due to them---Petitioners had filed present constitutional petition after having availed all retirement benefits when all outstanding dues were paid at the time of their retirement at which point no claim for any amount was made---Petitioners retired in the years 2002, 2005, 2006 and 2011 respectively, therefore their claim was also hit by laches as present constitutional petition was filed in the year 2012---Constitutional petition was dismissed in circumstances.

Umar Hayat Khawaja for Petitioner.
Ch. Muhammad Ashraf Khan and Umar Abdullah for Respondents.
Date of hearing: 14th April, 2014.

JUDGMENT

MRS. AYESHA A. MALIK, J.--- Through this single judgment, I intend to decide Writ Petitions Nos.1991, 23107, 30394, 24912 and 26449 of 2012 as all the petitioners seek a direction to be paid their unutilized Privilege Leave (PL).

2. The case of the petitioners is that, they are all retired officers of National Bank of Pakistan. During the course of their employment through a decision made on 16-6-1999 by virtue of Instruction Circular No.37/99, the PL, on the unutilized amount was frozen w.e.f. 31-12-1998 for encashment at the time of retirement. The grievance of the petitioner is that they were not granted this PL at the time of their retirement and they are entitled to the same.

3. Learned counsel argued that petitioners claim the balance PL of their frozen PL, which they are entitled to and in this regard several representations were made. However, nothing was forthcoming from the respondents and ultimately in the year 2011, the respondents denied the petitioners unutilized amount of their PL on the ground that Circular 57/99 subsequently curtails the entitlement to 180 days.

4. Report and parawise comments have been filed by the respondents. Learned counsel for the respondents argued that the petitioner is relying on Circular No.37/99 whereas Circular No.57/99 clearly provides that the frozen PL can be enchashed upto 180 days at the time of retirement subject to availability of funds. He argued that in the case of the petitioners, they have all availed the benefit of PL, for 180 days. Further states that there is no further amount that is due to the petitioners and that at the time of retirement they were given PL for 180 days. Learned counsel further argued that this is specifically provided for in the Instructions Circular 57/99.

5. Heard learned counsel for the parties and reviewed the record available on the file.

6. The issue before this Court is whether the petitioners are entitled to any amount exceeding 180 clays for PL. Learned counsel for the petitioners admits that PL amount for 180 days has been given to the petitioners and that through the instant petitions, they seek the balance unutilized amount. Circular 57/99 in this regard is clear as it is provided therein that frozen PL balance can be claimed upto a maximum of 180 days at the time of retirement. Therefore, the PL amount has been availed by the petitioners and there is no further amount due to them. It is also noted that the petitioner in W.P.No.1991 of 2012 retired in 2006, the petitioner in W.P.No.23107 of 2012 retired in 2005, the petitioner No.2 in W.P.No.26449 of 2013 retired in 2002, and petitioner No.1 in W.P.No.24912 of 2012 retired in 2011. The claim of the said petitioners is hit by laches as the petitions were filed in 2012. Furthermore all the petitioners have filed the instant petitions after having availed all retirement benefits when all outstanding dues were paid at the time of retirement at which point no claim for any amount was made.

7. Under the circumstances, no case for interference is made out, Petitions dismissed.

MWA/U-8/L Petition dismissed.

2014 P L C (C.S.) 876
[Lahore High Court]
Before Mrs. Ayesha A. Malik, J
KOKAB IQBAL
Versus
MANAGER NATIONAL BANK OF PAKISTAN, LAHORE and 3 others
Writ Petition No.16300 of 2011, heard on 14th April, 2014.

(a) Constitution of Pakistan---

----Art. 199---Constitutional petition---Laches---Bank employee---Delay in seeking relief for (ante dated) promotion---Effect---Petitioner worked as a clerk-cum-typist with National Bank of Pakistan ("Bank")---Grievance of petitioner was that he was entitled to promotion as Grade-III officer with effect from 1-1-1992, but he was denied such promotion for no justifiable reason---Validity---Record showed that petitioner was promoted to Officer Grade-III on 5-1-2006---Petitioner accepted his promotion in the year 2006 without any objection---Issue of (ante-dated) promotion was not agitated by petitioner until filing of present constitutional petition, therefore it was hit by laches---Nothing on record substantiated claim of petitioner rather it showed that he was told time and again that the issue of his (ante dated) promotion was closed and that he had no claim---Admittedly petitioner presently stood retired and sought a promotion, which he was repeatedly told he was not entitled to---Constitutional petition was dismissed in circumstances.

(b) Constitution of Pakistan---

----Art. 199---Constitutional petition---Non-disclosure of fact in petition--- Effect---Bank employee--- Claim for (1ante dated) promotion---Petitioner had already retired at the time he filed present constitutional petition seeking ante dated promotion---Such fact of retirement was not disclosed in the constitutional petition---Petitioner was not entitled to relief claimed on such ground alone---Constitutional petition was dismissed accordingly.

Umar Hayat Khawaja for Petitioner.
Umar Abdullah for Respondents.
Date of hearing: 14th April, 2014.

JUDGMENT

MRS. AYESHA A. MALIK, J.--- Through this petition, the petitioner seeks promotion w.e.f. 1-1-1992.

2. The case of the petitioner is that he worked as a clerk-cum-typist with the National Bank of Pakistan. He was entitled to promotion as Grade-III officer w.e.f. 1-1-1992. However, he has been denied the said promotion for no justifiable reason. Learned counsel states that petitioner made several representations before the

respondents. However, no positive action was taken by the respondents. It has also been stated that it is a case of discrimination against the petitioner because others have been promoted yet the petitioner has been denied his promotion.

3. Report and parawise comments have been filed by the respondents. At the very outset, learned counsel for the respondents raised the preliminary objection that the petition is grossly barred by laches. He argued that the petitioner was promoted on 5-1-2006 to Grade-III and never agitated this issue at that time. He further argued that the petitioner retired on 9-2-2008 and this fact has not been mentioned in the petition. Learned counsel argued that petitioner has sat on this issue since 2006 and brought it before this Court after more than five years. Further argued that there is no right to promotion after the retirement particularly when the petitioner was promoted and never agitated the issue at the relevant time.

4. Learned counsel for the petitioner argued that petitioner was pursing his remedy before the competent forum and therefore, the instant writ petition was filed late.

5. Heard learned counsel for the parties and reviewed the record available on the file.

6. The basic objection raised by the learned counsel for the respondents is that the petitioner seeks promotion from 1992, which is barred by laches. The record shows that the petitioner was promoted to Officer Grade-III on 5-1-2006. Learned counsel for the petitioner has argued that this promotion was subject to a decision in some appeal. However, learned counsel for the respondents has denied that any such insertion was made on the said letter regarding any appeal. The petitioner accepted his promotion in 2006 without any objection. This issue has not been agitated since until the filing of the instant petition. Hence it is hit by laches. Furthermore, the petitioner retired on 9-2-2008 which fact he has not been disclosed in the petition. On this ground alone he is not entitled to the relief claimed. Even otherwise, the petitioner's case rests upon the letter dated 26-11-1992 wherein it is stated that in case he is promoted w.e.f. 1-1-1992 he will have to adjust three special increments that he has received in the pay scale. The letter does not promise any promotion from 1992, it simply suggests that the petitioner will have to refund the three special increments that he has received in case of his promotion form 1992. There is nothing on the record to substantiate his claim or even to show that the matter is pending. The record shows that the petitioner was told time and again that the issue is closed and that he has no claim. Now he admittedly stands retired w.e.f. 9-2-2008 and wants a promotion which he was repeatedly told he is not entitled to.

7. Under the circumstances, no case for interference is made out. Petition dismissed.

MWA/K-24/L Petition dismissed.

2014 P T D 1549
[Lahore High Court]
Before Mrs. Ayesha A. Malik, J
FESCO
Versus
FEDERATION OF PAKISTAN and others
Writ Petition No.24140 of 2013, heard on 3rd December, 2013.

Sales Tax Act (VII of 1990)---

----S.48(I)(ca)---Constitution of Pakistan, Art. 199---Constitutional petition---Recovery during restraining order---Grievance of petitioner was that authorities made recovery of demand notice from its bank accounts despite issuance of restraining order by Appellate Tribunal---Validity---Notices under S.48(I)(ca) of Sales Tax Act, 1990, were issued on 11-9-2013, and authorities on the same day ensured its compliance by respondents---Undue haste was demonstrated on the part of authorities to recover amounts from petitioner---Authorities acted in total disregard of orders passed by Appellate Tribunal and due process---High Court directed the authorities to look into the matter and to ensure that such an act was not repeated---High Court further directed the authorities to refund amounts recovered from accounts of petitioner by authorities as the same were illegal---Petition was dismissed in circumstances.

Attock Cement Pakistan Ltd. v. Collector of Customs, Collectorate of Customs and Central Excise, Quetta and 4 others 1999 PTD 1982 rel.
Mian Ashiq Hussain for Petitioner.
Mian Asif Hashmi for Respondents Nos. 2 to 6.
Mansoor Baig for Respondent No.9.
Date of hearing: 3rd December, 2013.

JUDGMENT

MRS. AYESHA A. MALIK, J.---Through this petition, the petitioner has impugned the recovery of Rs.90,471,388, Rs.107,217 and Rs.43,920 by the respondents Nos.2 to 6 as the same were made during the pendency of a stay order issued by the Appellate Tribunal on 11-9-2013.

2. The case of the petitioner is that show-cause notices were issued to him on 19-2-2013 and 2-4-2013. Replies of the same were made by the petitioner on 26-2-2013 and 17-4-2013 respectively. Thereafter, the order-in-original was passed on 25-4-2013, which culminated into a demand of Rs.6,888,265,303. The petitioner filed an appeal against the order-in-original before the Commissioner Inland Revenue (Appeal), Faisalabad. Against the order in appeal dated 16-8-2013, the petitioner filed an appeal before the Appellate Tribunal. Thereafter, the respondents Nos.2 to 6 issued recovery notice under section 48(1)(ca) of the Sales Tax Act, 1990 (Act, 1990) to the petitioner on 3-9-2013. The petitioner moved a miscellaneous

application seeking a restraining order against the respondents for the recovery of any amount during the pendency of the appeal before the Appellate Tribunal. On 6-9-2013 the Appellate Tribunal heard the petitioner and granted a stay against the recovery to the petitioner. The respondents Nos.2 to 6 notwithstanding the order of the Appellate Tribunal dated 6-9-2013 pursued the recovery proceedings and sought recovery of amounts of Rs.90,471,388, Rs.107,217 and Rs.43,920 from the respondents Nos.7, 8 and 9.

3. The grievance of the petitioner is that the respondents Nos.2 to 6 could not have pursued the recovery on account of the stay order issued on 6-9-2013. Learned counsel for the petitioner argued that respondents Nos.2 to 6 pursued the recovery proceedings notwithstanding the stay order of 6-9-2013 and the respondents Nos.7, 8 and 9 complied with the request of the respondents Nos.2 to 6 issued on 11-9-2013 to attach all the bank accounts of the petitioner notwithstanding the stay order of 6-9-2013. He further argued that the stay order of 6-9-2013 was made in the presence of the respondents and therefore there was no justification for pursuing the recovery and attaching the bank accounts of the petitioner. Learned counsel further argued that when the respondents Nos.2 to 6 approached the respondents Nos.7, 8 and 9 on 11-9-2013, they did not give the stated respondents any time to confirm from the petitioner whether or not any stay order has been issued in favour of the petitioner and instead compelled the respondents Nos.7, 8 and 9 to facilitate the recovery proceedings by attaching the bank accounts and issuing pay orders in favour of the respondents Nos.2 to 6. Learned counsel argued that such an act on the part of the stated respondents is illegal and in defiance of an order issued by the Appellate Tribunal. Further argued that respondents acted with mala fide intent in total disregard of the order of Appellate Tribunal and so the petitioner is entitled to immediate refund of amounts so recovered.

4. Report and para wise comments on behalf of respondents Nos.7, 8 and 9 have been filed. In terms of the report and para wise comments filed by the stated respondents and the arguments made by the learned counsel for the respondent No.9, the respondents Nos.2 to 6 contacted the respondent No.9 on 11-9-2013 and immediately required that two pay orders in the amount of Rs.18,885 and Rs.25,085 be issued in favour of the Officer Inland Revenue, Regional Tax Office, Faisalabad. Learned counsel argued that respondent No.6 did not give any time to the respondent No.9 to contact the petitioner or to confirm whether any stay order has been issued in favour of the petitioner. The respondent No.9 in compliance with the recovery notice under section 48 (I)(ca) of the Act, 1990 made two pay orders and handed them over to the respondent No.6. In terms of the report and para wise comments filed by the respondent No.7, the respondent No.6 issued notice under section 48(I)(ca) of the Act, 1990 for the attachment of the bank accounts of the petitioner maintained with the respondent No.7. The respondent No.6 served the respondent No.7 with notice on 11-9-2013 and required immediate compliance. As per the report and para wise comments filed by the respondent No.7, the respondent No.6 raided the respondent Bank with armed personnel, waving handcuffs and creating harassment so as to effectuate compliance of notice issued under section 48

(I)(ca) of the Act, 1990. On the same day, immediate compliance was made, the accounts were attached and a cashier cheque in the amount of Rs.5,113,805 was issued to the respondent No.6.

5. Report and para wise comments have been filed by the respondents Nos.2 to 6. Learned counsel for the respondent No.6 argued that even though the stay order was passed on 6-9-2011, it was communicated to the respondents Nos. 2 to 6 in the later hours of 11-9-2013 and was informed to the respondent No.3 on 12-9-2013. Since the stated respondents did not have any knowledge of the stated order of 6-9-2013, hence they acted totally in accordance with law and have in no manner violated the order of 6-9-2013. Learned counsel argued that no harassment was made to the respondents Nos.7, 8 and 9 for recovery. He argued that in terms of the procedure under the Act, 1990 due process was followed as no valid stay order was served upon the respondent No.6. He further argued that now the proper course for the petitioner is to file an application before the respondent No.3 for refund of any amount which feels that it is entitled to. Learned counsel argued that petitioner is not entitled to the relief claimed before this Court as no order for refund can be made.

6. Heard learned counsel for the parties and reviewed the record available on the file.

7. The basic issue before this Court is whether the recovery made by the respondent No.6 from the respondents Nos.7, 8 and 9 pursuant to notices issued on 3-6-2013 were legal recoveries? The basic case of the petitioner is that the said recovery was made during the subsistence of a stay order issued by the Appellate Tribunal on 6-9-2013. The pendency of the appeal and the issuance of stay order of 6-9-2013 by the Appellate Tribunal is not denied by the respondents Nos.2 to 6. The case of the respondents Nos.2 to 6 is primarily that they had no knowledge of the stay order and that the stay order would be effective when communicated to the respondents. Since they had not been served with the stay order, hence it was not effective and therefore, the recovery made on 11-9-2013 in the amount of Rs.90,471,388, Rs.107,217 and Rs.43,920 is in accordance with law. A review of the order dated 6-9-2013 shows that the respondents were present before the Appellate Tribunal on that day. Mr. Muhammad Jameel Bhatti DR was present before the Appellate Tribunal and this fact is not denied by the respondents Nos.2 to 6. Therefore, the basic contention of the respondents Nos.2 to 6 that they had no knowledge of the order of 6-9-2013 or that they were not served with the order of 6-9-2013 is factually incorrect. The stay order was made in the presence of the respondents, Hence they had knowledge of the order of 6-9-2013. The respondent No.6 notwithstanding the order of 6-9-2013 pursued the recovery proceedings and ensured recovery on 11-9-2013 through the bank accounts of the petitioner maintained with the respondents Nos.7, 8 and 9. To my mind this act of the respondent No.6 is in gross violation of a stay order issued by the Appellate Tribunal and therefore, is totally illegal. The respondent No.6 could not have continued with the recovery process when the recovery proceedings had been

specifically stayed for a period of 30 days by the Appellate Tribunal. The respondents Nos.2 to 6 have no justification whatsoever to state that they had no knowledge of the order of 6-9-2013 when Mr. Jameel Bhatti DR was present before the Appellate Tribunal on 6-9-2013. Hence the order of 6-9-2013 was served upon the respondents and duly communicated to them. Learned counsel for the respondents Nos.2 to 6 argued that Mr. Jameel Bhatti DR did not inform the stated respondents, hence they did not know about the order of 6-9-2013. If that is the case, then it is an internal issue between Mr. Jameel Bhatti DR and the respondents Nos.2 to 6 for which the petitioner should not be made to suffer. The argument of the learned counsel for the respondents Nos.2 to 6 that the petitioner should now move an application for refund of the amount is also totally misconceived for the reason that the recovery itself was illegal and there is no reason for the petitioner to move an application before the respondents for refund of amounts illegally recovered. Learned counsel for the respondents Nos.7, 8 and 9 have stated in their report and para wise comments and argued before this Court that respondent No.6 caused immense pressure on the stated respondents to effectuate the recovery from the bank accounts of the petitioner without allowing them to complete their due process in order to comply with the demand made under section 48(I)(ca) of the Act, 1990. The Hon'ble Supreme Court of Pakistan in the case titled "Attock Cement Pakistan Ltd. v. Collector of Customs, Collectorate of Customs and Central Excise, Quetta and 4 others" (1999 PTD 1982) has condemned the extra ordinary zeal shown by the respondents for the recovery of amounts from the appellant on the ground that an impatient department with a view to achieving a target of recovery of revenue also reflects upon the mala fide of their demand. In the instant case, the notices under section 48(I)(ca) of the Act, 1990 were issued on 11-9-2013 and the respondent No.6 on the same day ensured its compliance by the respondents Nos.7, 8, and 9. This clearly suggests undue haste on the part of the respondent No.6 to recover amounts form the petitioner. Therefore, the respondent No.6 has acted in total disregard of the orders of the Appellate Tribunal and due process. The respondent No.3 is directed to immediately look into this matter and to ensure that such an act is not repeated. Compliance report to be filed within three weeks time through Deputy Registrar (Judicial) of this Court.

8. Therefore, in view of the aforesaid, this petition is accepted. The recoveries made from the accounts of the petitioner by the respondents Nos.7, 8 and 9 in the amount of Rs.90,471,388, Rs.107,217 and Rs.43,920 are illegal and the respondents Nos.2 to 6 are directed to refund the said amount to the petitioner within 15 days of the receipt of certified copy of this order.

MH/F-18/L Petition allowed.

2014 P L C (C.S.) 963
[Lahore High Court]
Before Mrs. Ayesha A. Malik, J
MUHAMMAD ALAMGIR
Versus
NATIONAL BANK OF PAKISTAN through Regional Head and others
Writ Petition No.9361 of 2012, heard on 31st May, 2012.

(a) Constitution of Pakistan---

----Art. 199---Constitutional petition---Retired bank employee---Non-entitlement to promotion---Scope---Promotion notification---Prospective effect---Notification applicable to existing employees and not retired employees---Petitioner who was an employee of the Bank retired on 10-4-2008---Subsequent to that on 29-4-2008 the Bank approved its promotion policy, and issued a notification whereby promotion was given to regular employees of the Bank with effect from 1-1-2008---Claim of petitioner was that in light of said notification, he was entitled to promotion, notwithstanding the fact that he had retired from the bank on 10-4-2008---Validity---Plain reading of the notification in question showed that its operation was prospective, and it applied to all 'existing officers'---Nothing in the language of the notification suggested that its benefit would apply to retired employees, rather it suggested that it would apply to all officers presently employed---By way of notification in question only those employees were eligible for promotion who were in the service of the Bank at the relevant time---Notification could not have retrospective effect unless it was specifically stated---If the notification was intended to include retired employees it would clearly say so---No reason existed to assume that effective date of promotion would include retired employees---Constitutional petition was dismissed in circumstances.

(b) Constitution of Pakistan---

----Art. 199---Constitutional petition---Retired Bank employee---Entitlement to promotion---Scope---Retired employee could not take benefit of a (promotion) notification (issued by the employer) after his retirement---Once employee had retired he had severed all ties with the employer and there was no basis upon which any benefit could be claimed.

(c) Notification---

----Prospective effect---Scope---Notification which was prospective in its operation from the date of its issuance, could not be given retrospective effect unless specifically stated.

Senior Member BOR and others v. Sardar Bakhsh Bhutta and another 2012 SCMR 864 rel.

Umar Hayat Khawaja for Petitioner.
Umar Abdullah for Respondents.
Date of hearing: 31st May, 2012.

JUDGMENT

MRS. AYESHA A. MALIK, J.--- Through this writ petition, the petitioner prays for his promotion as per the terms given in Notification No.94/2008 dated 19-8-2008 issued by the respondent Bank.

2. The case of the petitioner is that he was an employee of the respondent No.1 for 29 years and retired on 10-4-2008. On 29-4-2008, the respondent approved its Promotion Policy 2008, giving promotion to the regular employees of the bank from clerical to Officer Grade-3 Staff and up to EVP Cadre, w.e.f. 1-1-2008. It is the case of the petitioner that he is entitled to a promotion, notwithstanding the fact that he retired from his job on 10-4-2008. It is also the case of the petitioner that as a consequence of being denied promotion, the petitioner suffers monetary loss, as the promotion would entitle him to better monetary benefits.

3. Learned counsel for the respondent-Bank argued that this petition is not maintainable and in any event suffers from laches. On maintainability, he argued that since there are no statutory service rules for the respondents, hence no writ can be filed against the respondents. The Staff Service Rules of the respondent-Bank are the 1980 Rules, which have not been notified. He places reliance on the cases titled "National Bank of Pakistan and another v. Punjab Labour Appellate Tribunal and 2 others" (1993 SCMR 105), "Pakistan International Airline Corporation and others v. Tanveer-ur-Rehman and others" (PLD 2010 SC 676) and "Pakistan Telecommunication Co. Ltd. through Chairman v. Iqbal Nasir and others" (PLD 2011 SC 132). On laches, learned counsel for the respondents argued that petitioner retired on 10-4-2008 and the notification from which he seeks benefit is dated 19-8-2008, whereas this petition was filed in the year 2012. He relies upon the cases titled. "Shahbaz Khan Mohmand v. Islamic Republic of Pakistan and another" (1975 SCMR 4), "Muhammad Latif v. Chief Settlement Commissioner and others" (1975 SCMR 217) and "Tayyab Iqbal v. Member (Colonies) Board of Revenue Punjab Lahore and 3 others" (2005 CLC 1447).

4. Learned counsel for the petitioner argued that the writ petition is maintainable, as the respondents are governed by the 1973 Rules, which Rules are statutory. On laches, he argued that since this was a service matter, therefore, the question of any delay would be considered differently, as held in a case titled "M.H. Mirza v. Federation of Pakistan through Secretary Cabinet Division, Government of Pakistan, Islamabad and 2 others" (1994 SCMR 1024).

5. Although much emphasis has been placed on the maintainability of this writ petition due to the non statutory nature of the present staff service rules governing

the respondents, in a recent judgment dated 13-7-2007 passed by the Hon'ble Supreme Court of Pakistan in C.P.No.552/2007 it was held that:---
"The submission has been considered. In fact there are two sets of service rules framed by the petitioner-bank. One framed in 1973 and the other in 1980. The former rules are statutory but the latter are not statutory. This is not disputed by the learned counsel for the petitioner, but he submits that the latter rules will prevail. We do not subscribe to the argument. The statutory rules will prevail as against non-statutory rules as held by this Court in National Bank of Pakistan and another v. Punjab Labour Appellate Tribunal and 2 others (1993 SCMR 105).
Therefore it would be in the interest of justice to decide this matter on merits as both parties argued at length on the merits of their respective case.

6. Learned counsel for the respondents, argued that once an employee retires from the service he cannot seek benefit under any prospective circular. He further argued that a retired employee is not entitled to promotion. Going through the notification dated 19-8-2008 the learned counsel argued that this notification does not grant any promotion to the petitioner as it applies to those officers who were in service of the respondents at that time. He places reliance on the cases titled "The Collector, Customs and Central Excise, Peshawar and other v. Messrs Rais Khan Limited through Muhammad Hashim (1996 SCMR 83), "Shafiul Mulk v. Chairman Agriculture Development Bank of Pakistan, Islamabad and 5 others" (2000 PLC (C.S.) 1034), "Wali-ur-Rehman and others v. State Life Insurance Corporation and others (2006 SCMR 1079) and "Abdul Hameed v. Ministry of Housing and Works, Government of Pakistan, Islamabad through Secretary and others" (PLD 2008 SC 395). Learned counsel for the petitioner submits that the notification shall apply to all those persons who were in the employment of the respondent-Bank from 1-1-2008, being the effective date. Since the effective date is 1-1-2008, and the petitioner was in employment at the time, he is entitled to promotion.

7. Heard learned counsel for the parties and reviewed the record available on the file.

8. The entire case of the petitioner is based on notification dated 19-8-2008. The notification pertains to promotion from OG-III to OG-II and OG-II to OG-I of those, who were last promoted on or before 1-12-2002. The petitioner seeks promotion from OG-III to OG-II. For OG-III to OG-II the notification provides that all officers in OG-III are promoted to next higher Grade OG-II. The effective date of promotion as per the notification reads as under:---
"(a) Officers who have completed 25 years of total service as on 31-12-2006 will be promoted with effect from 1-1-2007.
(b) All others to be promoted with effect from 1-1-2008."
The petitioner's representation before the respondent dated 17-2-2010 provides that the petitioner seeks promotion from Grade-III to Grade-II as he has put in 29 years of service and he is a Graduate from the University of Punjab, meaning thereby that he has fulfilled the criteria laid down for the promotion in the notification. A plain reading of the notification shows that its operation is prospective. It applies to all

existing Officers in Grade-III who should be promoted to Grade-II. Of these officers, all those, who have completed 25 years as on 31-12-2006, will be promoted w.e.f. 1-1-2007 and all others will be promoted from 1-1-2008. There is nothing in the language to suggest that this benefit will apply to retired employees. To the contrary, states that it will apply to all officers in OG III, meaning thereby all officers presently employed in OG-III. The notification in pursuant to the Promotion Policy, 2008, which also provides that it will apply to all regular employees of the Bank from clerical to OG-III and above upto EVP. Clearly only those employees are eligible for promotion who were in the service of the respondent at the time.

9. Furthermore the notification cannot have retrospective effect unless it is specifically stated. If the notification was intended to include retired employees it would clearly say so. To read into the effective date of promotion being 1-1-2008 that it will include all those employees who were in the employment of the respondent at the time will be extravagant. This does not appear to be the intent of the notification, it does not, by its own terms and conditions state that it will apply to those employees who retired prior to its issuance. Therefore there is no reason to assume that the effective date of promotion will include retired employees. A retired employee cannot take the benefit of a notification issued after his retirement. Once he has retired he has severed all ties with the employer and there is no basis upon which any benefit can be claimed. It is a settled law that notification is prospective in its operation from the date of its issuance and cannot be given retrospective effect unless specifically stated. Reliance is placed on a case titled "Senior Member BOR and others v. Sardar Bakhsh Bhutta and another" (2012 SCMR 864).

10. In this case, the language of the notification does not suggest that it will apply to employees who were in the service of the Bank on 1-1-2008. Petition dismissed.

MWA/M-169/L Petition dismissed.

2014 C L D 1049
[Lahore]
Before Mrs. Ayesha A. Malik, J
BANK AL-HABIB LTD.---Plaintiff
Versus
ANGORA TEXTILE LTD. and others---Defendants
C.O.S. No.38 of 2006, decided on 2nd September, 2013.

(a) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----S. 10(2)---Civil Procedure Code (V of 1908), O. VII, R.11---Suit for recovery---Application for rejection of plaint filed after leave to defend application---Defendants could not raise a new ground challenging the claim of the plaintiff in an application under O.VII, R.11, C.P.C. when such ground was not raised in the leave to defend application (PLA) as doing so would defeat the purpose of S.10(2) of the Financial Institutions (Recovery of Finances) Ordinance 2001; since the defendant could then at any stage raise a new ground through an application, hence rendering the 30 days requirement under S.10(2) of the Ordinance meaningless.
Abdul Basit v. Bank of Punjab 2003 CLD 751; Cantor Index Ltd. v. Thomson 2008 All ER (D 271); Muhammd Shahnawaz v. KESC 2011 PLC (C.S.) 1579; Rauf B. Kadri v. SBP PLD 2002 SC 1111; HRCP v. GOP PLD 2009 SC 507; Muzaffar Abbas v. Pak PVC Ltd. PLD 1998 Kar. 71; Sandoz Limited v. Federation 1995 SCMR 1431; Green Fuels v. Shell Pakistan Ltd. 2005 CLC 1602; PICIC v. Frontier Ceramics Ltd. 2000 CLC 287; Ali Shan v. Essen Hotel Ltd. 2007 SCMR 741; Mrs. Musarrat Shaukat Ali v. Mrs. Safia Khatoon and others 1994 SCMR 2189; Messrs Al-Kashmir Traders and 6 others v. United Bank Limited through Muhammad Jarar 2005 CLD 1116; Apollo Textile Mills Ltd. and others v. Soneri Bank Ltd. 2012 CLD 337; Habib Metropolitan Bank Ltd. v. Mian Abdul Jabbar Gihllin and another 2013 CLD 88; Bolan Bank Limited through Attorneys v. Baig Textile Mills (Pvt.) Limited through Chief Executive and 6 others 2002 CLD 557; Messrs Al-Madan Coal Company (Pvt.) Limited and others v. Regional Development Finance Corporation 2009 CLD 645 and Messrs Mohib Exports Ltd. and 4 others v. Trust Leasing Corporation Ltd. through Chief Executive 2005 CLD 581 rel.

(b) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----Ss. 9 & 2(a)---Civil Procedure Code (V of 1908), O. III, R.1---Persons authorized to institute suits---Power of attorney---Power of attorney, appended with the plaint established sufficient authority on the persons instituting the suit.
Muhammad Arshad Javed and Asim Nazir for Plaintiff.
Muhammad Iftikhar ud Din Riaz for Defendants.
Date of hearing: 26th June, 2013.

JUDGMENT
MRS. AYESHA A. MALIK, J.---This is a suit for recovery of Rs.252.640 Million under section 9 of the Financial Institutions (Recovery of Finances) Ordinance,

2001 with costs of funds in terms of the prayer in the plaint. After presentation of the plaint, notices were duly served and the defendants filed PLA No.74-B of 2006.

2. The case of the plaintiff is that the defendant No.1 is a private company limited by shares and is being sued in the capacity of customer and mortgagor of the plaintiff, whereas, the defendants Nos.2, 3 and 5 to 8 are guarantors for the defendant No.l. The defendant No.4 is being sued in the capacity of mortgagor. The defendant No.1 requested the plaintiff for various credit facilities. The same were approved and sanctioned and the defendants availed them from time to time. The plaintiff's claim as detailed in the plaint is as follows:--

Facilities	Limit Amount	Principal as on 31-5-2006	Mark-up upto 31-6-2006	Total	Expiry date
FAPC-II	100.000	100.000	6.483	106.483	31-5-2006
TF-III	70.000	5.830	0.303	6.133	31-5-2006
TF-IV	4.715	3.143	0.287	3.430	31-5-2006
TF-V	85.000	85.000	6.838	91.838	31-5-2006
Cash Finance	3.000	2.998	0.146	3.144	31-5-2006
FATR Sub Limit of SLC (120 Days)	(25.000)	6.134	0.373	6.507	31-5-2006
Overdue acceptances	25.000	17.6 31 ISLC 3.867	0.983 Nil	18.614 3.867	31-5-2006
L.G.	15.000	12.624	Nil	12.624	31-5-2006
Total	287.715	237.227	15.413	252.640	

Amounts were duly disbursed into the account of the defendant No.1 under the various finance facilities and the finances were duly utilized by the defendants. To avail the aforementioned facilities, finance and security documents were duly executed, copies of which are appended with the instant suit. Property of defendant No.4 was mortgaged by way of deposit of title documents with the plaintiff. Thereafter, the defendants failed to liquidate their liabilities as per the terms of the finance agreements. Hence this suit.

3. The defendants in their application for leave to defend (PLA) have denied the liabilities alleged by the plaintiff Bank in its plaint and submit that the suit under reply is liable to be dismissed. The grounds raised in the PLA are that the suit has not been signed and verified in accordance with law. The statement of accounts have not been duly verified as per the relevant law. The documents have not been properly witnessed in accordance with Article 17 of Qanun-e-Shahadat Order, 1984.

The guarantees do not relate to the finance facility extended by the plaintiff Bank. Reliance has been placed on the cases titled "Abdul Basit v. Bank of Punjab" (2003 CLD 751, 753 (DB LHC), "Cantor Index Ltd. v. Thomson" (2008 All ER (D 271), "Muhammad Shahnawaz v. KESC" (2011 PLC (C.S.) 1579, 1599), "Rauf B. Kadri v. SBP" (PLD 2002 SC 1111, 1121), "HRCP v. GOP" (PLD 2009 SC 507, 519), "Muzaffar Abbas v. Pak PVC Ltd." (PLD 1998 Karachi 71, 78), "Sandoz Limited v. Federation" (1995 SCMR 1431, 1447), "Green Fuels v. Shell Pakistan Ltd. (2005 CLC 1602 1611) "Sandoz Limited v. Federation" (1995 SCMR 1431, 1452), "PICIC v. Frontier Ceramics Ltd." (2000 CLC 287, 289), "Ali Shan v. Essen Hotel Ltd." (2007 SCMR 741, 750).

4. Learned counsel for the defendants also raised an objection with respect to the authority of the person filing the instant suit. The suit has been filed by Mr. Waseem A. Sheikh, who is not the branch Manager. The power of attorney relied upon is signed by one director and counter signed by the company Secretary. It is his contention that the plaintiff bank cannot authorize an officer to institute a suit merely on the basis of a power of attorney, unless they are expressly authorized under the Articles of Association. He argued that neither the Articles of Association nor the board resolution has been filed. Learned counsel argued that a substantial question of fact with respect to the authority of the person filing the suit has been raised, for which leave may be granted. He also argued that the entries in the statement of accounts do not correlate to any of the finance agreements or other documents. In some of the finance agreements there is no date for repayment, hence no liability is made out against the defendants. The main point argued by the learned counsel was that a re-scheduling arrangement was offered by the plaintiff through letters dated 9-3-2006 and 3-4-2006. The defendants accepted the arrangement and performed under the rescheduling agreement but the plaintiff terminated it unilaterally on 8-5-2006. Learned counsel argued that the rescheduling agreement was agreed upon and duly acted upon by the defendants, hence the plaintiff was barred from filing the instant suit on the basis of the original finance and security documents. He argued that the new agreement came into existence vide letter dated 9-3-2006 and 3-4-2006 which has not been pleaded in the plaint. He argued that consequently the previous agreements have been novated, hence there is no liability under the documents relied upon. Learned counsel further argued that even under the novated agreement, the plaintiff is in breach on various counts. In this regard the defendants have filed C.O.S. No.184 of 2009 which suit is pending.

5. Learned counsel for the plaintiff argued that all documents have been duly executed and signed by the defendants. He argued that the documents and disbursement are admitted by the defendants who claim rescheduling of their liabilities. He argued, admittedly no amounts have been paid to the plaintiff under the claimed rescheduling. Learned counsel for the plaintiff argued with respect to the letters dated 9-3-2006 and 3-4-2006 that where only one party to the agreement alleges novation or alteration in the original agreement without any proof of the novation, mere allegation of novation would not absolve the parties from performing the original agreement. Reliance is placed upon the case titled "Mrs.

Musarrat Shaukat Ali v. Mrs. Sofia Khatoon and others" (1994 SCMR 2189). Learned counsel argued that the argument of novation and rescheduling of the agreement was never raised in the PLA. This argument was raised for the first time on 12-10-2011 in the application filed under Order VII, Rule 11 of the Civil Procedure Code (C.P.C.) by the defendants, which application is still pending. He further argued that after filing the PLA no new ground can be added through the application under Order VII, Rule 11, C.P.C. Also that the PLA has to be decided first and foremost before any application filed in the suit of the plaintiff. Reliance is placed upon the case titled "Messrs Al-Kashmir Traders and 6 others v. United Bank Limited through Muhammad Jarar" (2005 CLD 1116). He further argued that the defendants have not satisfied the duties and responsibilities of a customer as provided under the Financial Institutions (Recovery of Finances) Ordinance, 2001 (F.I.O.) whilst filing the leave to defend application as mentioned in the case titled "Apollo Textile Mills Ltd. and others v. Soneri Bank Ltd." (2012 CLD 337). With regard to the objection of the defendants on the statement of account, learned counsel argued that the same have been prepared and certified as per law applicable thereof. The Statement of Accounts attached with the plaint has been generated electronically and is governed under the Electronic Transaction Ordinance, 2002. Reliance is placed upon the case titled "Habib Metropolitan Bank Ltd. v. Mian Abdul Jabbar and another" (2013 CLD 88). The statement of accounts has been filed in accordance with law and show the required debit credit entries. As such no triable case has been made out by the defendants. Learned counsel argued that PLA filed by the defendants is in violation of the mandatory provisions of law contained in section 10(4) and (5) of the F.I.O., 2001. Reliance is placed upon on the case titled "Bolan Bank Limited through Attorneys v. Baig Textile Mills (Pvt.) Limited through Chief Executive and 6 others" (2002 CLD 557). Learned counsel argued that the defence set up by the defendants is evasive and without any substantial question of law or fact requiring recording of evidence. Reliance is placed on the case titled "Messrs Al-Madan Coal Company (Pvt.) Limited and others v. Regional Development Finance Corporation" (2009 CLD 645). Further argued that once the plaintiff has attached with the plaint the statement of accounts and other documents in support of its claim, the burden is shifted upon the defendants to answer the claim.

6. Heard learned counsel for the parties and reviewed the record available on the file.

7. The main argument raised for grant of leave is with respect to the rescheduled agreement. The defendants admittedly raised this plea in the application filed under Order VII, Rule 11, C.P.C. filed by them after filing the PLA. The Defendants rely upon letters dated 9-2-2006 and 3-4-2006 to argue that an agreement re-scheduling the debit was executed by the parties through correspondence. This was duly acted upon by the defendants. On the basis of this agreement the entire liability of the defendant No.1 was re scheduled and an amendment to the arrangement was proposed on 3-4-2006. Learned counsel for the defendants has stressed a great deal on the application under Order VII, Rule 11, C.P.C. as well as on the re-scheduled

agreement, the documents of which have been appended. The record shows that the PLA was filed on 21-7-2006. Thereafter in 2011 through C.M. No.639-B of 2011 the defendants moved the application under Order VII, Rule 11, C.P.C. introducing the ground of rescheduling for the first time. The said application raised a whole new ground challenging the claim of the plaintiff which was not raised in the PLA. I am of the opinion that the defendants cannot raise a new ground through the application under Order VII, Rule 11, C.P.C. after having filed their PLA. In Para xviii the defendants state that they have borrowed Rs.367.43 Million and repaid Rs.627.27 Million. Hence the defendants claim that an excessive amount has been paid to the plaintiff which is liable to be refunded. The new ground agitated in the Order VII, Rule 11 application is that the debt was rescheduled through Correspondence. The stance taken in the PLA and the new ground adopted in the application under Order VII, Rule 11, C.P.C. are clearly contradictory. Through its PLA, the defendants are required to raise all substantial questions of law and fact, within 30 days from the date of first service by any one of the modes prescribed in section 9(5) of the F.I.O. in the instant case, through a C.M. No.639/B of 2011 filed more than four years after filing the PLA, the defendants have raised, as per their contention, a substantial question of law and fact for which evidence needs to be recorded. To my mind, the defendants cannot raise a new ground after filing the PLA as it would defeat the purpose of section 10(2) of the F.I.O. as a defendant could at any stage, after filing the PLA, raise a new ground through an application, hence rendering the 30 days requirement under section 10(2) meaningless. Reliance is also placed upon the case titled "Messrs Mohib Exports Ltd. and 4 others v. Trust Leasing Corporation Ltd. through Chief Executive" (2005 CLD 581) in which it has been held that defendants were not allowed to raise a new plea which was not the subject matter of their PLA, for the first time before the High Court. Furthermore the facts relied upon in the application were available to the defendants at the time when the PLA was filed and should have been raised at that time. The grounds raised therein cannot be considered for the purpose of leave to defend, as it was never raised in the PLA. The plaint reveals a cause of action against the defendants. The same has been defended by the defendants through P.L.A. No.74-B/06. Hence the C.M. No.639-B of 2011 is dismissed.

8. The first ground agitated in the PLA is with respect to the competence of the person filing the suit. The record shows that the suit has been filed by Waseem A. Sheikh and Arif Kamran both holders of a valid power of attorney. The power of attorney appended with the plaint authorizes them to file the suit and verify it. This establishes sufficient authority on the persons instituting the suit. No substantial question arises out of this ground.

9. The second Objection is on the certification on the statement of accounts, that it has not been testified as required under section 2(8) Bankers Book of Evidence Act, 1891. The statement of accounts is certified as required under the Bankers Book of Evidence, 1891. At the end of the statement of accounts the required stamp is available. No ground is made out.

10. The learned counsel for the defendants has argued that there was no disbursement under the agreement and that the repayment dates are not given in some agreements. No specific entry in the statement of accounts has been challenged in the PLA. The plaintiff has shown the disbursement for the FATR; FAPC cash finance and the T.F facilities. The FATR was disbursed on 7-11-2005, on 12-9-2005; on 10-11-2005, on 14-11-2005 and on 21-11-2005. As per the statement of account, the disbursement of the TF-IV was on 16-12-2003. Disbursement of TF-III was in four tranches on 7-1-2003, 14-1-2002, 1-3-2003 and 4-3-2003. TF-V was dismissed on 23-7-2004. Disbursement of FAPC-II was on 30-8-2003 in the amount of Rs.100,000,000. Cash finance was disbursed on 24-6-2005. Details of overdue acceptance is given in the plaint. An amount of Rs.6,134 is due by the defendants. Details of amounts due are given in the plaint. The defendants have admitted that the defendant No.1 availed Rs.367.43 Million yet, there are no details of the claimed repayment of Rs.627.27 Million. As to the SNGPL guarantee, since it has not been encashed, hence no claim is made out against it. The record shows that there is no statement of account showing the mark up being claimed by the bank in the amount of Rs.15.413 Million. Hence the plaintiff is not entitled to claim any mark up. No substantial question of law or fact has been raised in the PLA. The principal amounts disbursed utilized and still outstanding are as follows:-
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1. FAPC Rs.100,000,000
2. TF-III Rs.5,830,000
3. TF-IV Rs.3,143,336
4. TF-V Rs.85,000,000
5. FATR Rs.6.133,646
6. Overdue Acceptance. Rs.17,630,853
7. Cash Finance. Rs.2,998,636.15

Total Rs.220,736,471

Therefore the PLA is dismissed and the suit is decreed in the amount of Rs. 220,736,471 along with cost of funds under section 3 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 from the date of default. The Plaintiff is also entitled to recover the decreed amount through sale of mortgaged and hypothecated properties.

KMZ/B-1/L Order accordingly.

2014 C L D 1275
[Lahore]
Before Mrs. Ayesha A. Malik, J
ACRO DEVELOPERS (PVT.) LTD. through Chief Executive---Plaintiff
Versus
BANK OF PUNJAB through Branch Manager and another---Defendants
C.O.S. No.76 of 2013, decided on 9th October, 2013.

Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----Ss. 15 & 19---Civil Procedure Code (V of 1908) O.XXXIX, Rr. 1 & 2---Auction of mortgaged property---Plaintiff sought to restrain auction of mortgaged property by the Bank on the ground that plaintiff being the owner of the property Bank could not auction the property---Held, that there was nothing on record to show that the plaintiff was the owner of the plots in question---Plaintiff placed on record allotment letters wherein the plaintiff was not shown as a owner of the said plots---Plaintiff had filed a summary of an arbitration award which confirmed that the plaintiff did not own any plot but claimed an interest in the allotment of plots on account of losses it had suffered due to failure of a housing project---Plaintiff had filed a suit for damages and rendition of accounts against the Housing Society, and even if its prayers in the said suit were allowed, it would not be entitled to the plots sought to be auctioned--- Application to restrain the respondents from auctioning the plots was dismissed, in circumstances.

M. Imran Malik for Plaintiff.
Amir Wakeel Butt for Defendant No.1.
Syed Muhammad Shah (in C.M. No.486-B of 2013).

ORDER
C.M. No.460-B of 2013

MRS. AYESHA A. MALIK, J.---This is an application seeking grant of interim relief against the auction dated 28-6-2013 filed by the Plaintiff with respect to its property in Blocks E, F & G of defendant No.2 society. On 1-7-2013 the suit was instituted by the plaintiff and on 11-7-2013 this court ordered that the defendants were not to finalize the auction proceedings scheduled for 28-6-2013 for the plots in Blocks E, F and G. This interim order was extended from 30-7-2013 till today. Today the instant application has been argued at length along with the PLAs. Learned counsel for the Bank had questioned the interim relief given by this court on 11-7-2013 on the ground that the plaintiff is not the owner of the property which have been put to auction.

2. The case of the defendant No.1 Bank is that the plaintiff, Acro Developers (Pvt.) Ltd. is not the owner of the property which was the property for the auction scheduled for 28-6-2013. Learned counsel for defendant No.1 argued that the defendant No.1 re-scheduled the debt of the plaintiff vide proposal dated 22-12-

2010. In terms of this proposal, the principle funded liability as detailed in the proposal was adjusted through the acquisition price of plots of the Acro Group. The plots are 302 in number. Further adjustment was made through acquisition price of plots of BACHS/defendant No.2. Learned counsel argued that these were 103 plots and the total number of plots adjusted were 505 for the benefit of the debt to the plaintiff outstanding against the Bank. The total amount adjusted is Rs .1369.108 Million. Learned counsel for the Bank argued that the plaintiff was neither the owner of these 505 plots nor the owner of 224 plots which were subject to auction. The plaintiff at best is the beneficiary, as its debt was adjusted by the Bank. Learned counsel argued that pursuant to this proposal an agreement was executed on 5-4-2011. The allotment in favour of the original owners were cancelled and the plots were transferred in the name of the bank. Thereafter in July 2011 provisional allotment letters were issued to the Bank and finally the property was transferred to the Bank by virtue of the allotment letters issued on 3-7-2013. Learned counsel for the Bank states that all the provisional and final allotment letters in favour of the bank have been appended through C.M. No.555-B of 2013. He argued that the plaintiff was never the owner of any of these plots and the plaintiff has not brought any title document on the record to show that it was the owner of the 505 plots which were the subject-matter of the adjustment and 224 plots which are the subject matter of the auction.

3. Learned counsel for the plaintiff has relied upon an arbitration award dated 16-1-2010 to show its ownership. The learned counsel argued that it became the joint owner of the plots which were put to auction on the basis of the award. He relies upon para 6 and 7 of the Award to show that certain plots were to be allocated to the petitioners. He argued that in terms of the matter before the Arbitrator the plaintiff was petitioner No.1 who was allocated plots by the Arbitrator. The entire case of the plaintiff for preventing the auction is that since it is owner of the plots put to auction, the same should not be put to auction as the plaintiff did not enter into any settlement with the Bank of its own free will. Learned counsel for the plaintiff argued that the adjustment proposal dated 22-12-2010 and the documents executed thereafter were executed under duress by the plaintiff.

4. I have heard both the learned counsel at length and reviewed the record available on the file.

5. The suit of the plaintiff challenges the offer letter dated 22-12-2010 and 2-3-2011 pursuant to which outstanding facilities were adjusted by the Bank. The plaintiff claims that these documents were executed under duress, hence these documents are void and of no consequences. The plaintiff also claims rendition of accounts and damages in the suit. There is nothing on the record to show that the plaintiff is the owner of the plots which are to be auctioned by the Bank. The plaintiff was given an opportunity to place on record all documents which would establish its claim. On 5-9-2012 this court gave all the parties time to file additional documents on the basis of which C.M. No.460-B of 2013 could be argued. The defendant No.2 has placed on record the allotment letters through C.M. No.546-B of 2013. The plaintiff

is not shown as the owner of any plot in the attached documents. The defendant No.1 has also placed documents on the record evidencing its ownership through allotment letters dated July 2011. Again no document shows the plaintiff as the owner of any plot. A summary by the arbitration award was also filed by the plaintiff through C.M. No.542-B of 2013. A review of the summary confirms that the plaintiff does not own any plot but claims an interest in the allotment of the plots on account of the losses it has suffered due to the failure of the housing project i.e. Banker's Avenue Cooperative Housing Society (BACHS). Furthermore the record shows that the plaintiff was to develop the infrastructure facilities in BACHS, for which BACHS was to make payment based upon work performed. The prayer in the suit is for damages and rendition of accounts, cancellation of letters dated 22-12-2010 and 2-3-2011. I am of the opinion that even if the prayers were to be granted to the plaintiff it would still not be entitled to the plots in the name of the Bank. None of the owners of the plots are before this court. Therefore based on the prayers of the plaintiff in the suit and based on the fact that the plaintiff is not the owner of the plots which are to be auctioned, the defendant No.1 may proceed with the auction strictly in accordance with law.

6. C.M. is dismissed.

C.M. No.486-B of 2013

7. In view of the order passed in C.M. No.460-B of 2013, this application has become infructuous. Disposed of.

P.L.A. No.153-B of 2013

8. To come up for further arguments on the P.L.A. on 4-11-2013.

KMZ/A-6/L Order accordingly.

2014 C L D 1341
[Lahore]
Before Ayesha A. Malik, J
BANK OF PUNJAB through SVP---Plaintiff
Versus
T&N PAKISTAN PVT. LTD. through Chief Executive and 7 others---Defendants
C.O.S. No.71 of 2011, decided on 17th February, 2014.

Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----Ss. 11, 10 & 7---Civil Procedure Code (V of 1908) O. XII, R. 6---Suit for recovery---Admission in pleadings---Interim decree to the extent of the admitted amount---Plaintiff Bank sought interim decree for the amount admitted by the defendants in their application for leave to defend---Validity---Amount was admitted by the defendants as the net amount due and payable to the plaintiff Bank, whereas the suit was filed by the plaintiff was for a greater amount---Section 11 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 read with O.XII, R.6, C.P.C., empowered the court to pass an interim decree on basis of admitted amount---High Court passed a preliminary interim decree for the admitted amount and directed that arguments for leave to defend for the balance amount shall be heard on a later date---Application was allowed, accordingly.

A. W. Butt for Plaintiff.
Haqnawaz Chatha for Defendants Nos. 1 to 6.
Shamas Mahmood Mirza for Defendants.

ORDER

AYESHA A. MALIK, J.---This is an application for interim decree in the sum of Rs.590,947,714 on the basis of admissions made by defendants in their P.L.A. No. 155-B with respect to the claim of the plaintiff in the above titled suit.

2. The case of the plaintiff is that the defendants in the P.L.A. No.155-B have admitted the net amount of Rs.590,947,714 as due and payable to the plaintiff. The defendants have also relied upon the same documents as attached with the plaint including the statement of accounts, dates and figures, hence, under the circumstances; the interim decree can be issued for the admitted amount. Learned counsel for the plaintiff has relied upon Order XII, Rule 6 of the Civil Procedure Code, 1908 to argue that if at any stage of a suit an admission has been made in the pleadings or otherwise then any party can apply to the court for a judgment or order based upon the admission made. In such a situation the person does not have to wait for the determination of any other question between the parties and the court can pass any such order as it deems fit. Learned counsel argued that the court can exercise its power under section 7(a) read with section 11 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 and for the balance amount

arguments may be heard as to whether it is a case in which leave needs to be granted.

3. Learned counsel for the defendants argued that under the Financial Institutions (Recovery of Finances) Ordinance, 2001 if an interim decree is issued then for the balance amount leave has to be granted. He argued that for all disputed amounts leave must be granted in the event that an admission is relied upon. Learned counsel has argued that if this court was to pass an interim decree then since the balance amount is disputed by the defendants leave should be granted.

4. I have heard the learned counsel for the parties and reviewed the record available on the file.

5. A review of the P.L.A. 155-B shows that the amount of Rs.590,947,714 is admitted by the defendants as net amount due and payable to the plaintiff-Bank. The suit filed by the plaintiff is for Rs.1,539,878,000 under section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. Section 11 of the said Ordinance read with Order XII, Rule 6 of the Civil Procedure Code, 1908 empowers this court to pass an interim decree on the basis of admitted amount. In the instant case the defendants are yet to argue their PLA. Under the circumstances the amount of Rs.590,947,714 stands admitted, therefore, a preliminary decree is issued against the defendants Nos.1 to 6 jointly and severally in the amount of Rs.590,947,714. For the balance amount arguments on the PLA shall be heard on 24-3-2014.

KMZ/B-5/L Order accordingly.

2014 P L C (C.S.) 1207
[Lahore High Court]
Before Mrs. Ayesha A. Malik, J
Syed AMJAD ALI SHAH
Versus
MANAGING DIRECTOR, PTV CORPORATION and 40 others
Writ Petition No.22836 of 2013, heard on 14th February, 2014.

Constitution of Pakistan---

----Art. 199---Constitutional petition---Apprehension with regard to disturbance of seniority---Scope---Contention of respondents was that present constitutional petition was based on apprehension and same was not maintainable---Validity---Present constitutional petition was based on apprehension that seniority of petitioner would be disturbed if same was given to the respondents prior to disposal of his representation---No seniority list had been made and prayer of petitioner could not be granted at such stage---Respondents were bound to implement the decisions of Supreme Court and High Court---Issue of seniority inter-se the petitioner and respondents had still not been decided and only appointment letters had been issued in pursuance of judgment of Supreme Court---Grievance of petitioner was premature and he might if so advised seek appropriate remedy if his seniority was adversely affected once a list was made before the competent forum---Constitutional petition was dismissed in circumstances.

Ishtiaque Ahmad for Petitioner.
Munawar Sultan Sial for Respondents Nos.1 to 4.
Malik Amjad Pervaiz for Respondents Nos.5 to 10, 13, 14, 16 to 18, 26 and 34.
Date of hearing: 14th February, 2014.

JUDGMENT

MRS. AYESHA A. MALIK, J.--- Through this petition, the petitioner seeks a direction that representation dated 3-7-2013 filed by the petitioner may be replied to and that the respondents Nos.1 to 4 should not disturb the seniority of the petitioner by giving promotion to the respondents from 8-4-2013.

2. The case of the petitioner is that he was appointed as Engineer PTV Centre Mehmood Ghaznavi Road, Lahore on 30-4-1987 and was confirmed at that post on 30-7-1987. He was allowed to function as a News Producer 1-9-2006 and was re-designated to the post of News Producer/Reporter with effect from 8-4-2007. He was promoted as News Producer and Reporter G-6 with effect from 8-4-2010. The grievance of the petitioner is that the respondents Nos.5 to 41 are being promoted with effect from 8-4-2010 which promotion if granted will affect the seniority of the petitioner. Learned counsel for the petitioner argued that this act of the respondents is contrary to the rules and has relied upon sections 4.02, 4.07 and Chapter 8 of the Pakistan Television Employees Service Rules. Learned counsel argued that

pursuant to a judgment dated 4-11-2010 of the Hon'ble Supreme Court of Pakistan in C.P. No.48 of 2009, respondents Nos.5 to 41 were granted relief, however the petitioner was not heard before the said Bench and his grievance could not be put up before the Hon'ble Supreme Court of Pakistan. He also argued that the petitioner moved a representation before the respondents Nos.1 to 4 on which no positive action has taken place. He argued that if the respondents Nos.5 to 11 are given the seniority from 8-4-2010, it will adversely affect the seniority of the petitioner.

3. Learned counsel on behalf of the respondents Nos.1 to 4 is not present today but had previously argued his case on the last date wherein he had stated that the representation of the petitioner could be decided in accordance with law and that the respondents Nos.5 to 41 are being treated in accordance with the decision of the Hon'ble Supreme Court of Pakistan as well as the decision of the Hon'ble Islamabad High Court.

4. Learned counsel on behalf of the respondents Nos.5 to 10, 13, 14, 16 to 18, 26 and 34 at the very outset raised an objection that the petitioner is not entitled to the relief claimed; he is not entitled to the decision on any representation and he is not entitled to the relief whereby he required the respondents Nos.1 to 4 to be restrained from disturbing his seniority. Learned counsel argued that the entire petition is based on an apprehension which is repeatedly stated in the petition itself. He argued that as such no seniority list has been made and a bare reading of the petition will show that the petitioner on the basis of an apprehension that his seniority will be disturbed has filed the instant petition. Learned counsel argued that the petition is not maintainable when it is based on an apprehension; no right has accrued in favour of the petitioner on the basis of which the instant petition has been filed and no right of the petitioner has been infringed. Further argued that the petitioner requires that the entire process as heard and decided by the Hon'ble Supreme Court of Pakistan be ignored by the respondents and the seniority be determined as per the wishes of the petitioner. Learned counsel argued that the matter was heard by the Hon'ble Supreme Court of Pakistan in C.P. No.48 of 2009 wherein it was decided that respondents Nos.5 to 41 were regularly appointed on probation for a period of two years from 20-2-2006 where-after their probation period has not been extended. Further argued that the respondents were not issued their permanent employment letters, hence it was decided that the permanent employment letters should be issued to those who have completed their probationary period. Learned counsel argued that pursuant to this decision, the respondents Nos.1 to 4 had failed to implement the judgment of Hon'ble Supreme Court of Pakistan whereafter the respondents went before the Hon'ble Islamabad High Court in W.P No.1556 of 2011 which decided that the judgment of the Hon'ble Supreme Court of Pakistan has to be implemented. Thereafter the respondents Nos.5 to 41 had to file a contempt petition pursuant to which the respondents Nos.1 to 4 issued permanent employment letters. Learned counsel further argued that a bare reading of the petition shows that so far no seniority list has been made and that the grievance of the petitioner is pre-emptive and designed to nullify the effect and the decision of the Hon'ble Supreme Court of Pakistan. Learned counsel further argued that in any event notwithstanding the

arguments raised the instant petition is not maintainable as the rules being relied upon by the petitioner are not statutory rules.

5. I have heard the learned counsel for the parties and reviewed the record available on the file.

6. The basic issue is whether the petitioner is entitled to a direction on the basis of which the respondents Nos.1 to 4 would be restrained from disturbing the seniority of the petitioner as maintained. I have reviewed the petition and find that the petitioner has repeatedly stated that the instant petition has been filed on the basis of an apprehension that his seniority will be disturbed. Furthermore the request of the petitioner that the respondents Nos.l to 4 should maintain the seniority of the petitioner is a prayer which cannot be granted at this stage as no seniority list has been made after the issuance of appointment letters and permanent employment of the respondents Nos.5 to 41 as decided by the Hon'ble Supreme Court of Pakistan. The respondents Nos.1 to 4 are obligated to implement the decision of Hon'ble Supreme Court of Pakistan and Hon'ble Islamabad .High Court. The learned counsel for petitioner also requested that his representation be decided, however Malik Amjad Pervaiz, learned counsel for the respondents Nos.5 to 10, 13, 14, 16 to 18, 26 and 34 has objected to such a direction as he stated that the matter in issue has already been decided by the Hon'ble Supreme Court of Pakistan and the petitioner is trying to take a direction from this Court to undo the orders of the Hon'ble Supreme Court of Pakistan. I have reviewed the representation of the petitioner which is pending and on which he seeks a direction. I find that the objection of the learned counsel for the respondents Nos. 5 to 10, 13, 14, 16 to 18, 26 and 34 is correct that the petitioner is in fact seeking the respondents Nos.1 to 4 to review the entire matter and to determine the date on the basis of which the respondents Nos.5 to 41 will be granted their appointment letter. This matter was agitated before the Hon'ble Supreme Court of Pakistan and it was decided that the respondents Nos.5 to 41 should be appointed if they have completed their probationary period. The issue of seniority inter se the petitioner and the respondents has still not been decided as the respondents Nos.1 to 4 have not issued the seniority list. At this point in time only appointment letters which have been issued in pursuance of the judgment of the Hon'ble Supreme Court of Pakistan. The grievance of the petitioner at this stage regarding seniority is premature and the petitioner may if so advised, seek appropriate remedy if his seniority is adversely affected once a list is made, before the competent forum.

7. In view of the aforesaid, this petition is dismissed.

AG/A-75/L Petition dismissed.

2014 P L C (C.S.) 1256
[Lahore High Court]
Before Mrs. Ayesha A. Malik, J
TAHIRA YASMIN and others
Versus
GOVERNMENT OF THE PUNJAB and others
Writ Petitions Nos.7072, 4118, 4651 4652, 8828, 11906, 17989, 30917 of 2013 and 504 of 2014, decided on 5th June, 2014.

(a) Civil service---

----Contract appointment---Regularization---Regularization of one post would not entitle persons on another post to demand regularization and on the same terms.

(b) Civil service---

----Contract appointment---Regularization---Not a vested right---Contract appointees did not have a vested right of regularization.
2013 SCMR 304 rel.

(c) Constitution of Pakistan---

----Art. 199---Constitutional petition---Posts for a particular program/project---Contract appointment---Regularization---Not a vested right---Regularization of petitioners/contract employees only after recommendation by Public Service Commission---Similarly placed contract appointees from other departments regularized without recourse to Public Service Commission---Whether discrimination---Contention of petitioners/contract employees that they should not be discriminated against, and their services should also be regularized without recourse to Public Service Commission---Validity---Policy of Government was that contract appointees on project/programme posts would be regularized on the recommendations of the Commission---Contract employees from other departments who had been regularized without recourse to Commission were holding posts different from the ones held by petitioners---When considering discrimination in regularization, each post had to be seen, and not the regularization of every post in the department---Petitioners did not have a vested right for regular appointment---Besides petitioners never moved the competent authority for regularization---Constitutional petition was dismissed accordingly.

2013 SCMR 304 ref.
Hafiz Tariq Nasim for Petitioners (in Writ Petition No.7072 of 2013).
Ahmad Awais for Petitioners (in Writ Petition No.4118 of 2013).
Mehmood Ahmad Qazi for Petitioners (in Writ Petitions Nos.4651, 4652 and 11906 of 2013).
M. Asif Bhatti for Petitioners (in Writ Petition No.504 of 2014).
Malik Saleem Iqbal Awan for Petitioners (in Writ Petition No.30917 of 2013).

Khalid Ishaq for Petitioners (in Writ Petition No.17989 of 2013).
Rao Athar Akhlaq for Petitioners (in Writ Petition No.8828 of 2013).
Mrs. Samia Khalid, A.A.-G. along with Asif Mushtaq Law Officer, S&GAD, Abdul Hamid, Superintendent (G-II), Health Department for Respondents.
Date of hearing: 25th March, 2014.

ORDER

MRS. AYESHA A. MALIK, J.--- This Writ Petition decides upon the issues raised in W.Ps. Nos.7072, 4118, 4651 4652, 8828, 11906, 17989, 30917 of 2013 and 504 of 2014.

2. There are two common issues that have been raised in the instant petitions. The first issue is that the petitioners were appointed on contract posts. Their contracts were extended in 2012 for a period of five years. However through an arbitrary and unilateral act, the respondents cancelled the five years extension and reduced the contract period to one year. This issue was heard and decided vide order dated 21-11-2013 wherein the respondents impugned letter dated 22-2-2013 was set aside and the term of contract was maintained as per its last extension in the year 2012.

3. The second issue that is common to all the writ petitions is the prayer for regularization. The petitioners seek regularization in the same manner as the similarly placed colleagues who were regularized by the respondents in the years 2009, 2010, 2011 and 2012. The case of the petitioners is that they were employed as School Health and Nutrition Supervisors (SH&NS) (BS-17) in the Health Department, Government of Punjab on contract basis. Their contracts were extended from time to time. During the course of their employment, under various different policies, similarly placed colleagues in the Health Department were regularized by the respondents. The petitioners are aggrieved by the policy set out in the Notification No.DS(O&M) (S&GAD)5-3/2013 dated 1-3-2013 on the basis of which their case for regularization is to be considered. The grievance of the petitioners is that under the notification of 1-3-2013, the cases of the petitioners will be considered after determination by the Punjab Public Service Commission (PPSC) of their suitability for appointment on regular basis. In this regard, the petitioners have impugned paragraphs 'C' and 'D' of the Notification No.DS(O&M) (S&GAD)5-3/2013 dated 1-3-2013.

4. Learned counsel for the petitioners in W.P. No.7072 of 2013 argued that the competent authority has regularized the services of their colleagues without reference to the PPSC and therefore it is discriminatory for the petitioners cases to be sent to the PPSC on the basis of the notification dated 1-3-2013. Learned counsel argued that the petitioners were appointed to the post of the SH&NS (BS-17) in pursuance of different advertisements through Selection Committees. However for the purposes of regular appointment, the petitioners' cases will be referred to the PPSC which is discriminatory because others who have been regularized in the Health Department have been regularized without recourse to the PPSC. Learned

counsel has relied upon Notifications No.SO.D.G(Dev)(LG)9-3/2010/BDA dated 28-3-2011 issued by the Government of Punjab, Local Government and Community Development Department, Lahore to show regularization of Director Community Development and Administration, Deputy Director (CD), Assistant Director (CD), Research Officer, Director Engineering, Deputy Director Construction, Assistant Director, Auto Cad Draftsman, Sub-Engineer (Mechanical), Draftsman, Sub-Engineer (Civil), Lab. Assistant, Assistant Director Finance, Deputy Director Computer, Computer Programmer, Assistant Computer Programmer, Computer Operator, Junior Clerk, Office Assistant, Senior Clerk, Junior Clerk, Driver, Daftri, Naib Qasid, Chowkidar, Mali and Sweeper, S.O.WMO/Misc-16/2008 dated 1-1-2010 to show regularization of Women Medical Officers, No.S.O.WMO/1-1/2009(MNCH)(DEGREE) dated 5-1-2010 to show regularization of Women Medical Officer, No.S.O.WMO/1-1/2009(MNCH)(DEGREE) dated 5-5-2010 to show regularization of Women Medical Officer, S.O.WMO/1-1/2009(MNCH)(DEGREE) dated 23-11-2010 to show regularization of Women Medical Officers, S.O.WMO/1-1/ 2009(MNCH)(DEGREE) dated 7-3-2010 to show regularization of Women Medical Officer, S.O.WMO/1-1/2009(MNCH)(DEGREE) dated 17-6-2010 to show regularization of Women Medical Officer, S.O.WM0/1-1/ 2009(MNCH)(DEGREE) dated 27-3-2010 to show regularization of Women Medical Officer, No.S.O.WMO/1-1/2009(MNCH)(P) dated 26-1-2011 to show regularization of Women Medical Officer, issued by the Government of the Punjab, Health Department, No.SO(CD)1-R-56/2009 dated 16-7-2010 issued by the Government of the Punjab, Home Department to show regularization of all officers in BS-16 and above of the Punjab Emergency Service (Rescue 1122), No.1-16/2011-Admn dated 12-11-2013 issued by the Government of Pakistan, Ministry of Education, Trainings and Standards in Higher Education, Islamabad to show regularization of contract persons of BPS 19, 18, 17, 16, 15, 9, 7, 4 and 1 of National Commission for Human Development (NCHD), Islamabad and No.F.5(3)/2012-HW/LHWs dated 21-1-2013 issued by the Government of Pakistan, Ministry of Inter-Provincial Coordination, Islamabad to show regularization of LHWs etc.

5. Learned counsel for the petitioners in W.Ps. Nos.11906, 4651 and 4652 of 2013 argued that many different employees of the Health Department have been regularized without recourse of to the PPSC and the petitioners should not be sent to the PPSC for regularization. Learned counsel further argued that the respondents have formulated a policy of pick and choose and regularize those who they desire and impose harsh conditions on those who they do not want to regularize. Learned counsel has also relied upon various different notifications to show that employees of the Health Department have been regularized on the recommendations of the Recruitment Committees taking their posts out of the purview of the PPSC.

6. Learned counsel for the petitioners in W.P. No.4118 of 2013 argued that it is the fundamental right of the Petitioners to be regularized and not to be discriminated against. He argued that employing the petitioners on contract is a form of exploitation when regular posts are available and there is no justification for the

change in the policy of regularization so far as the petitioners are concerned. He argued that the contract employees are vulnerable and at the mercy of their employers. He argued that the petitioners are entitled to be regularized under a fair policy across the board being the same for all government employees.

7. Learned counsel for the petitioners in W.Ps. Nos.8828, 17989, 30917 of 2013 and 504 of 2014 argued that the petitioners since their initial appointment against the posts have been performing their responsibilities and assignments to the satisfaction of their superiors. The petitioners are entitled to be regularized without recourse to the PPSC. Learned counsel argued that regularization of employees in the same category but on different principles is unfair and unjust.

8. Report and parawise comments have been filed on behalf of the respondents. Learned Law Officer argued that the petitioners have all been appointed on contract on the recommendations of the relevant Selection Committees. Learned Law Officer argued that as per the terms of their contract, their appointment is a temporary appointment on contract basis extendable by the appointing authority. Learned Law Officer further argued that the contract specifically provides that the petitioners have no right of regular appointment. Learned Law Officer argued that the posts at which the petitioners have been appointed are programme posts and they cannot be equated with other posts where people have been regularized. Learned Law Officer further argued that the petitioners can be considered for regularization under the relevant notifications and prevailing policy. The fact that similarly placed employees were regularized under the different terms and conditions does not create a case of discrimination against the petitioners. Learned Law Officer argued that many of the petitions have been filed prematurely because the petitioners have not filed any representation before the competent authority to be considered for regularization. Learned Law Officer further argued that some employees did approach the Secretary Health, where-after he gave due consideration to this matter and passed an order bearing No.SLO/WP-30854/2012 dated 7-2-2013. In terms of the order, it was found that Basic Health Unit was created to cater to health facilities at school level on temporary basis and all posts were filled on contract, on the basis of recruitment criteria. Their regularization, if at all, will be done after a decision is made by the competent authority to regularize the post. Learned Law Officer further submitted that the petitioners fall under the 2013 policy for which their cases have to be referred to the PPSC.

9. Heard the learned counsel for the parties and reviewed the record available on the file.

10. The basic issue before this Court is whether the petitioners are entitled to regularization without referring their cases to the PPSC. The impugned notification of 1-3-2013 provides for the procedure for appointment of contract employees in BS-16 and above working against project posts, programme posts, PMUs and PMOs. The gist of the policy is that regularization will be done on the recommendations of the PPSC. The cases of contract employees in BS-16 and

above who were appointed on the recommendations of the Selection Committee may be referred to the PPSC for determining their suitability for appointment on regular basis against the posts held by the contract employees. The contract employees who were appointed on the recommendations of Departmental Selection Committee will be referred to the PPSC for determining their suitability for appointment on regular basis against the posts held by the contract employees. The contract employees who were appointed on the recommendations of the PPSC are to be considered for regular appointment by the competent authority subject to the framing of service rules stipulating the basic eligibility criteria, qualifications and experience required for regular appointment. The petitioners are aggrieved by paragraph 'C' and 'D' of the notification of 1-3-2013 because on the basis of the said paragraphs, their cases will be referred to the PPSC for appointment on regular basis. The petitioners have relied upon numerous notifications of the Health Department wherein they have regularized services of Medical Officers, Women Medical Officers, Registrars, Assistant Anesthetists, Demonstrators, Blood Transfusion Officers, Assistant Professor of Pediatrics and Charge Nurse. The petitioners have also relied upon the notifications issued for Elementary School Teachers, Educators, Headmasters, Headmistress and Subject Specialists who were regularized without referring their cases to the PPSC. I have reviewed the notifications which have been appended with the petitions and relied upon by the petitioners. The regularization notifications relied upon by the petitioners are not for the post of SH&NS. They include different posts in the Health Department, Education Department, Home Department, Local Government and Community Development Department, Ministry of Education, Trainings and Standards in Higher Education and Ministry of Inter-Provincial Coordination. The Government of Punjab has from time to time regularized different posts in terms of its policy. Regularization of one post will not entitle persons on another post to demand regularization and on the same terms. In terms of the dicta of the Hon'ble Supreme Court of Pakistan held in S.M.C. No.15 of 2010 and C.M.As. Nos.2689, 3244 of 2010 and C.M.As. Nos.5383, 3068 of 2011 (2013 SCMR 304), the petitioners do not have a vested right for regular appointment. The record shows that the petitioners have never been denied regularization as the petitioners have not even moved the competent authority for the purposes of regularization. Furthermore it has been stated by the learned Law Officer that these are programme posts which have not been converted to regular posts at the moment, hence the petitioners' cases, presently, cannot be considered for regularization. The petitioners are working under their contract and can always apply to the competent authority for regularization of their post. However, the fact that others in the Health Department have been regularized without recourse to the PPSC does not create a case of discrimination simply because all employees who were regularized previously were working in the Health Department. For the purposes of discrimination in regularization, each post has to be seen, and not the regularization of every post in the department. Furthermore none of the petitioners have placed anything on the record to show that the Government of Punjab has regularized SH&NS under the 1-3-2013 notification without recourse to the PPSC. The petitioners on the basis of the order of this Court dated 21-11-2013 have a subsisting contract for 3 to 5 years. The

petitioners during the subsistence of their contract may apply for regularization before the competent authority. However there is no illegality with the impugned Notification dated 1-3-2013, simply on the strength that others in the Health Department have been regularized without recourse to the PPSC.

11. Under the circumstances, no case for interference is made out. Petitions are dismissed.

MWA/T-19/L Petition dismissed.

2014 C L D 1516
[Lahore]
Before Mrs. Ayesha A. Malik, J
FIVE STAR INTERNATIONAL (PVT.) LTD.---Petitioner
Versus
REGISTRAR OF COMPANIES---Respondent
C.O. No.6 of 2014, heard on 30th April, 2014.

Companies Ordinance (XLVII of 1984)---

----Ss. 96, 97, 98 & 101---Reduction in share capital of Company---Power of the court to dispense with addition to name of company of "and reduced"---Petitioner Company sought reduction of its share capital as decided by special resolution passed by its Directors---Contention of the petitioner Company was that said reduction in share capital would not affect ownership or voting rights of shareholders, and would not be detrimental to any Director or shareholder of the Company; and further that nothing was due to any creditor---Held, that special resolution was duly registered with Securities and Exchange Commission of Pakistan under Form 26 and there were presently no creditors and no prejudice would be caused by reduction in share capital to any share holders---High Court allowed petition for reduction in share capital and directed that the petitioner Company was exempted from writing the words "and reduced" as part of the name of the company upon reduction of its capital.

Ms. Saadia Malik for Petitioner.
Umair Mansoor and Aftab Ahmad, Manager Credit, Soneri Bank, Main Branch, Faisalabad for Respondent.
Date of hearing: 30th April, 2014.

JUDGMENT

MRS. AYESHA A. MALIK, J.---Through this petition, under Section 97 of the Companies Ordinance, 1984 (1984 Ordinance), the petitioner seeks consideration of reduction of capital from 9,456,752 of Rs.10 each to ordinary share face value equivalent to Rs.10 each to Rs.7,000,000 ordinary shares divided into 700,000 ordinary shares of Rs.10 each.

2. According to the petition, petitioner is a company limited by shares. As per the Memorandum and Articles of Association of the Company, the authorized capital of the company at the time of incorporation was Rs.100,000,000 divided into 10,000,000 ordinary shares of Rs.10 each with the power to increase, reduce, consolidate or otherwise re-organize the share capital and to divide the shares of the company into different classes in accordance with the provisions of 1984 Ordinance. The shareholder directors of the petitioner company through a special resolution held in its meeting on 20-12-2013 unanimously decided that the paid up

capital of the petitioner company from Rs.9,456,752 be reduced to Rs.7,000,000 divided into Rs.7,000,000 ordinary shares of Rs.10 each.

3. Learned counsel for the petitioner argued that the reduction of capital would not in any manner affect the ownership or voting rights of the shareholders. Similarly the same will not be detrimental to the rights of any director, shareholder or the petitioner company, hence it may be allowed. Further, argued that presently the petitioner company does not have any creditors. The previous creditor is in Court to state that no amount is due to it and they have no objection to the reduction.

4. Learned counsel for the respondent SECP stated that the respondent SECP has no objection. Further stated that there are no creditors of the petitioner company, as such no prejudice is caused.

5. I have heard the learned counsel for the parties and reviewed the record available on the file. The petitioner company was incorporated on 20-3-2006. The resolution dated 20-12-2013 is duly registered with the Securities and Exchange Commission of Pakistan (SECP) under Form 26. There are presently no creditors and no prejudice is caused to the shareholders.

6. In view of the aforesaid, this petition is allowed with the direction that the petitioner company can reduce its capital from Rs.9,456,752 of Rs.10 each to ordinary share face value equivalent to Rs.10 each to Rs.7,000,000 ordinary shares divided into 700,000 ordinary shares of Rs.10 each as per the shareholders special resolution dated 20-12-2013 which reduction stands confirmed. The petitioner company is exempted from writing the words 'and reduced' as part of the name of the company upon reduction of its capital.

KMZ/F-16/L Petition allowed.

2015 P T D 221
[Lahore High Court]
Before Ayesha A. Malik and Shams Mahmood Mirza, JJ
KAMALIA SUGAR MILLS LTD. through General Manager
Versus
FEDERATION OF PAKISTAN through Ministry of Finance and 3 others
I.C.A. No.124 of 2014 in Writ Petition No.33429 of 2013, decided on 11th September, 2014.

(a) Sales Tax Act (VII of 1990)---

----S. 40B---Federal Excise Act (VIII of 2005) S. 45(2)---Constitution of Pakistan, Art. 199---Constitutional petition---Posting of Officers of Inland Revenue/Federal Board of Revenue ("FBR") at manufacturing premises of taxpayer/petitioner---Exercise of powers under S. 40B of the Sales Tax Act, 1990 and S. 45(2) of the Federal Excise Act, 2005; interpretation and scope---Show-cause notice not required before exercising of powers under S. 40B of the Sales Tax Act, 1990 and S.45(2) of the Federal Excise Act, 2005---Taxpayers had impugned orders of Chief Commissioner Inland Revenue/FBR under S.40B of the Sales Tax Act, 1990 and 45(2) of the Federal Excise Act, 2005 whereby officers of Inland Revenue were posted at the manufacturing premises of the taxpayers---Contention of taxpayers was that such powers had been exercised without issuance of a show-cause notice to the taxpayers; therefore due process was not followed and principles of natural justice were violated---Held, that word "monitor" meant observe and check over a period of time and the FBR understood monitor to mean that team posted at manufacturing premises physically watched the production, sales and stock positions and collected data maintained by taxpayers---Respondent FBR needed to ascertain whether collected tax had been duly deposited and therefore power to monitor under the Federal Excise Act, 2005 and the Sales Tax Act, 1990 was to watch and observe and to take information maintained by the taxpayer with respect to its daily production, sales and stock position---At such stage, there was no investigation or inquiry but a simple desire to ascertain whether volume of business was duly reflected in tax returns of the taxpayers---For purposes of the FBR/Inland Revenue, no restriction had been placed by the Sales Tax Act, 1990 and Federal Excise Act, 2005 on power of monitoring; however said statutes required the Commissioner to have material evidence and pass a speaking order under S. 45(2) of the Federal Excise Act, 2005 and S.40B of the Sales Tax Act, 1990---Said sections envisioned a specific distinction in the manner in which powers were to be excised by the FBR, Chief Commissioner and Commissioner---Section 4(1)(o) of the Federal Board of Revenue Act, 2007 gave powers to make regulations, policies, programs and strategies in order to carry out purposes of said Act---In the present case, it was explained by the Chief Commissioner Inland Revenue that the entire sugar industry was under review for not paying required tax and previous data provided by taxpayers showed discrepancies when compared with present data therefore it was decided that the taxpayer's mill was to be monitored---Decision of the FBR or Chief Commissioner did not require material evidence but could be a

decision based on broader principles---While at present there was no specific allegation raised against the taxpayers for evasion of tax and the taxpayers were given due notice under S. 40B of the Sales Tax Act, 1990 and S. 45(2) of the Federal Excise Act, 2005 and were given sufficient reasons for invoking of said sections---Show-cause notice, was therefore, not required and similarly a hearing was also not required because an order under S. 40B of the Sales Tax Act, 1990 and S.45(2) of the Federal Excise Act, 2005 was not an adverse order against the taxpayers---High Court also observed that the taxpayers in the present case had not challenged the vires of said sections but only impugned the orders for monitoring---High Court further observed that in order to prevent arbitrary exercise of powers , that when such an order was passed such order must provide a reasonable timeframe within which monitor would take place and be completed and in the event that the required data and information was not obtained within the contemplated time, the FBR, Chief Commissioner or Commissioner were always free to extend the time by informing the taxpayer---Appeals and Constitutional petition of the taxpayers were dismissed, in circumstances.
Concise Oxford English Dictionary rel.

(b) Words and Phrases----

----"Monitor", meaning of---Word "monitor" means to observe and check over a period of time.
Concise Oxford English Dictionary rel.

Ali Sibtain Fazli for Appellant (in I.C.A. No.124 of 2014).
Shehzad A. Elahi for Appellant (in I.C.A. No.129 of 2014).
Ali Sibtain Fazli for Petitioner (in Writ Petition No.5072 of 2014).
Nadeem Mahmood Mian, Muhammad Ilyas Khan, Sarfraz Ahmad Cheema, Muhammad Asif Hashmi and Rana Muhammad Luqman, Commissioner, Inland Revenue, Faisalabad for Respondents.
Date of hearing: 15th April, 2014.

JUDGMENT

AYESHA A. MALIK, J.---Through this single judgment, we have decided upon the common issues arising in I.C.As. Nos.124, 129 of 2014 and Writ Petition No.5072/2014 with respect to the exercise of powers by the respondents under section 40B of the Sales Tax Act, 1990 (Act of 1990) and section 45(2) of the Federal Excise Act, 2005 (Act of 2005).

2. The appellants are both sugar mills and the petitioner is a textile mill. I.C.As. Nos.124 and 129 of 2014 have been filed against judgment dated 3-2-2014 passed in Writ Petition No.33429/2013 and Writ Petition No.1824/2014 and Writ Petition No.5072/2014 has been filed against the impugned order dated 21-2-2014 passed by respondents Nos.3 and 5 (Chief Commissioner and the Commissioner Inland Revenue) wherein they have issued an order under section 40B of the Act of 1990

and section 45(2) of the Act of 2005 to post officers of the Inland Revenue at the manufacturing premises of the petitioner.

3. The case of the appellants (in I.C.As. Nos.124 and 129/2014) is that vide an order dated 13-12-2013 issued by the respondent No.3 powers under section 40B of the Act of 1990 and 45(2) of the Act of 2005 have been invoked to post officers, at the business premises of the appellants, with immediate effect, in order to monitor production, sales of taxable goods and their stock position. The appellants received letter dated 19-12-2013 in which the respondent No.3 in pursuance of the earlier letter dated 13-12-2013 of the respondent No.3 posted officers at the business premises of the appellants with immediate effect.

4. The grievance of the appellants is that the powers under section 40B of the Act of 1990 and section 45(2) of the Act of 2005 have been exercised without any show-cause notice to the appellants. It is their case that the principles of natural justice were violated as the respondents levied allegations of under declaration and tax evasion against the appellants, on the basis of which they decided to monitor production, sales of taxable goods and stock position of the appellants, by posting officers within their business premises. Learned counsel argued that no reason or justification has been given for exercising powers under section 40B of the Act of 1990 and section 45(2) of the Act of 2005. They argued that this is contrary to the mandate of the law as provided under section 24A of the General Clauses Act, 1897 which requires public functionaries to give reasons while exercising powers under any statute. It was also argued that where any action adversely affects the vested rights of a party, show-cause notice or a preliminary hearing must be given before passing any order. It has also been argued that the concerned person must be aware of the reasons considered by the respondents before invoking section 40B of the Act of 1990 and section 45(2) of the Act of 2005.

5. The learned counsel stated that the impugned judgment dated 3-2-2014 passed by the learned Single Judge in Chamber holds that the show-cause notice was not required because no adverse action was contemplated in the order dated 19-12-2013 and the appellants have not been prevented from doing their lawful business. The impugned judgment also finds that since the officers were posted simply to monitor production, sales of taxable goods and stock position, therefore, no right of the appellants was prejudiced and the principles of natural justice are not violated. Learned counsel argued that in terms of the impugned judgment, the learned Single Judge in Chamber held that the respondents can post officers to the premises of a registered person to monitor production, sales of taxable goods and stock position. The learned Counsel argued that this is not the spirit of the law as the monitoring team sits and monitors the business of the appellants within their business premises which act is intrusive and infringes upon their fundamental right to do lawful trade, business or profession. They argued that it also means that the respondents are collecting data, which they will use against the appellants in the case of tax evasion which the respondents are building against the appellants. This seriously prejudices the rights of the appellants to defend themselves in any proceedings initiated by the

respondents. Learned counsel further argued that any action under section 40B of the Act of 1990 and section 45(2) of the Act of 2005 can only be initiated if there is material evidence showing involvement of the taxpayer in evasion of sales tax or federal excise duty or fraud. Learned counsel argued that in the instant cases no material evidence was presented before the court nor was there any material evidence available on the basis of which the order dated 13-12-2013 was issued by the Chief (Automation & ST).

6. Learned counsel also objected to the competence of the Chief (Automation & ST) to direct the Chief Commissioner to invoke section 40B of the Act of 1990 and section 45(2) of the Act of 2005 against the appellants. They argued that letter dated 13-12-2013 was issued by the Chief (Automation & ST) to all Chief Commissioners Inland Revenue and that he was not the competent authority to pass any order with respect to section 40B of the Act of 1990 and section 45(2) of the Act of 2005. They further argued that the Chief Commissioner cannot act on the directions of the Chief (Automation & ST) as was directed in the letter of 19-12-2013. Learned counsel argued that the subsequent letter issued by the Chief Commissioner dated 19-12-2013 was on the direction of the Chief (Automation & ST) who is not the competent authority to pass any such order. Learned counsel argued that this factor was not considered by the learned Single Judge in Chamber who has upheld the posting of officers under section 40B of the Act of 1990 and section 45(2) of the Act of 2005.

7. Report and para wise comments have been filed by the respondents. Learned counsel on behalf of the respondents argued that the respondents have acted totally in accordance with law, hence the impugned order issued on 19-12-2013 was upheld by the learned Single Judge in Chamber. Learned counsel argued that the appellants are involved in under declaration of production and sales, they are not paying due tax and do not provide correct data. Hence it was decided that the provisions of section 40B of the Act of 1990 and section 45(2) of the Act of 2005 should be invoked and officers be posted at the premises of the appellants to monitor their production, sales of taxable goods and stock position. Learned counsel argued that this order was passed in compliance with the directions issued by the Federal Board of Revenue (FBR) on 13-12-2013. Learned counsel argued that the proceedings are meant simply to monitor the production, sales of taxable goods and stock position and do not in any way interfere in the normal business operations of the appellants. Learned counsel further argued that the objective is to collect data from the business premises. They argued that the respondents are not conducting any inquiry or investigation within the business premises but simply monitoring the process and collecting data as compiled by the appellants on their production, sales and stock position. On the basis of the data so collected the respondents are then able to ascertain whether the appellants are making a full and proper declaration and paying the required tax and federal excise duty. Learned counsel argued that no adverse action is taken against the appellants and no fundamental right of the appellants has been violated by the respondents.

8. In Writ Petition No.5072/2014 the petitioner has called into question order dated 21-2-2014 passed by the respondents Nos.3 and 5 under section 40B of the Act of 1990 and section 45(2) of the Act of 2005. Hence the same issues and questions arise in the Writ Petition as in the two I.C.As. before us.

9. We have heard the learned counsel for the parties and have gone through the record available on the file.

10. The appellants and the petitioner have questioned the invoking of section 40B of the Act of 1990 and section 45(2) of the Act of 2005 by the order issued on 19-12-2013 by the respondents Nos.3 and 4. They have challenged the exercise of power by the Chief (Automation & ST) as well as the fact that due process was not followed and the principles of natural justice were violated. The impugned judgment upheld the powers exercised under section 40B of the Act of 1990 and section 45(2) of the Act of 2005 on the ground that show-cause notice was not required, no adverse order or action was being taken against the appellants and that it was issued by the competent authority. The impugned judgment finds that section 40B of the Act of 1990 and section 45(2) of the Act of 2005 simply post officers to monitor production, sales and stock position which does not render the appellants as tax evaders nor does it find them guilty of tax evasion.

11. Section 40B of the Act of 1990 and section 45(2) of the Act of 2005 are reproduced below for ease of reference:--

40B Posting of Inland Revenue Officer.---Subject to such conditions and restrictions, as deemed fit to impose, the Board or Chief Commissioner may post Officer of Inland Revenue to the premises of a registered person or class of such persons to monitor production, sale of taxable goods and the stock position:

Provided that if a Commissioner on the basis of material evidence has reason to believe that a registered person is involved in evasion of sales tax or tax fraud, he may, by recording the reason in writing, post an Officer of Inland Revenue to the premises of such registered person to monitor production or sale of taxable goods and the stock position.

45 Access to records and posting of excise staff, etc.

(1)

(2) Subject to such conditions and restrictions, as deemed fit to specify, the Board or Chief Commissioner may, post an officer of Inland Revenue' to the premises of registered person or class of such persons to monitor production, removal or sale of goods and the stock position or the maintenance of records:

Provided that if a Commissioner on the basis of material evidence has reason to believe that a registered person is involved in evasion of duty, he may, by recording the reason in writing, post an officer of Inland Revenue to the premises of such registered person to monitor production, removal or sale of goods and the stock position or maintenance of records.

In terms of section 40H of the Act of 1990 and section 45(2) of the Act of 2005 the Board or the Chief Commissioner may post an officer to the premises of a registered person or class of persons to monitor production, sale of taxable goods and stock position. The impugned orders dated 19-12-2013 have been issued by the Chief Commissioner, Faisalabad. The orders provide that the appellants are

involved in under declaration of production/supplies and are not paying due amount of tax in the national exchequer with respect to the volume of business. Hence it is believed that they may be involved in the evasion of tax and duties. In terms of the orders, ten officers were placed with immediate effect at the business premises of the appellants. The officers included two Auditors, four Inspectors, two Havaldars/Constables and two Notice Servers/Naib Qasids. The first grievance of the appellants is that this notice dated 19-12-2013 was issued on the directions of the Chief (Automation & ST) who was not the competent authority to pass any such order. The direction of the Chief (Automation & ST) dated 13-12-2013 is based on a decision of the FBR to post Inland Revenue Officers to the premises of all sugar mills to monitor their production, sale and stock position. The basic challenge of the appellants is that the Chief (Automation & ST) cannot issue any direction to the Chief Commissioner and that the Chief Commissioner must pass its own independent order. In both the I.C.A. No.124/2014 the order of the Chief Commissioner is dated 19-12-2013 and the order of Chief (Automation & ST) is dated 13-12-2013. In Writ Petition No.5072/2014 the order of the Chief Commissioner is dated 21-2-2014 and available on the record.

12. The Chief Commissioner, Faisalabad appeared before us on 9-4-2014 on which date he explained the reasons and basic rationale for invoking section 40B of the Act of 1990 and section 45(2) of the Act of 2005. He stated that soft data was reviewed and it was found that production for the current year was less than the preceding year notwithstanding the fact that the circumstances were the same. He explained that after analysis of the data it was recommended that section 40-B of the Act of 1990 be imposed. He explained that the modalities for monitoring the process under section 40B of the Act of 1990 and Section 45(2) of the Act of 2005 is simply to check the production, stock and sale position. He further explained that the data collected is countersigned by the Management and generally there is no dispute in relation to the data that is collected. Further stated that in the event of any dispute it can always be brought to the notice of the Assistant Commissioner or any senior member of the Monitoring Team. He explained that each case was reviewed and the overall sector was also considered. He stated that it was found that certain sectors such as the sugar mills were not paying the required tax and duty. Hence an effort was being made by the respondents to collect data from such mills or industries so as to determine whether they are paying the required tax and duty. He stated that the process of monitoring enabled the respondents to determine whether the information provided by the taxpayer was correct and reflective of the industry and its income. He further explained that the respondents did not have any other means to check the data and information provided to them because the appellants and the petitioner are assessed to tax under the Self Assessment Scheme. They are required to furnish their details online and the system determines the tax that is due. The respondents while comparing this years data with the previous years and with other information found that the appellants and the petitioner are paying less tax than the previous years for no apparent or justifiable reasons. Hence he stated that the law specifically caters to such a situation and allows the respondents to monitor the sale, purchase and stock positions maintained by the registered person.

13. We have gone through the contents of the notices dated 19-12-2013 and 21-2-2014. The first objection to these notices is that they have been issued at the instance of the Chief (Automation & ST) dated 13-12-2013. We are of the opinion that the notices dated 19-12-2013 and 21-2-2014 sufficiently explain the reasons for its issuance. We also find that the letter of 13-12-2013 issued by the Chief (Automation & ST) can at best be called a guideline, however in each case before us the respondent No.3 has thought through the issues before invoking section 40B of the Act of 1990 and section 45(2) of the Act of 2005. Furthermore the Chief Commissioner is not required under the stated sections to give detailed reasons for invoking section 40B of the Act of 1990 and section 45(2) of the Act of 2005. Therefore with respect to the basic objection on the competence of the order issued on 19-12-2013 we find that in terms of section 40B of the Act of 1990 and section 45(2) of the Act of 2005, the Chief Commissioner was competent to issue the orders of 19-12-2013 and 21-2-2014 and that he is not required to provide material evidence before invoking section 40B of the Act of 1990 and section 45(2) of the Act of 2005. We also find that the letter of 13-12-2013 issued by the Chief (Automation & ST) is at best a guideline issued on the direction of the FBR. Therefore there is no merit in this objection.

14. The second set of objections pertains to due process and the violation of the principles of natural justice. Section 40B of the Act of 1990 is divided into two parts. The first part empowers the Chief Commissioner or the Board to post officers for the purposes of monitoring production, sale of taxable goods and the stock position. The proviso states that the Commissioner can also pass an order for posting of Inland Revenue Officers only if there is material evidence before him and he has reason to believe that the registered person is involved in evasion of sales tax or tax fraud. In such a situation the Commissioner has to record his reasons in writing, before passing such an order. The argument made before us essentially was that no show-cause notice was issued, no hearing was given and that the fundamental rights of the appellants and the petitioner to do their business have been violated. We have considered the meaning and the scope of the power to "monitor" under section 40B of the Act of 1990 and 45(2) of the Act of 2005. The word 'monitor' has not been, defined anywhere in the stated Acts. In the Concise Oxford English Dictionary, eleventh edition, the word 'monitor' means observe and check over a period of time. The respondents understand monitoring to mean that the team posted at the manufacturing premises physically watches the production, sales and stock positions and collects the data maintained by the appellants and the petitioner. They are observing and recording the data as maintained by the appellants and the petitioner. The voluminous data produced before us by the respondents also shows that the respondents are collecting data made by the appellants and the petitioner related to production, sale and stock positions. They watch over the process and collect the relevant information as maintained and documented by the appellants and the petitioner on a daily basis. This enables the respondents to collect data for a given period of time and consequently ascertain whether due tax is being paid. The reasons explained by the Chief Commissioner was that in these cases the taxpayer did not provide the correct information with

respect to the volume of their business and the stocks maintained. The appellants and the petitioner file their returns under the Self Assessment Scheme which means that they provide the total income for the relevant period, which is then assessed to tax. The respondents state that the appellants and the petitioner do not reflect the correct position in their returns and the respondents cannot determine the factual position for the purposes of levy of tax. Furthermore the appellants and the petitioner collect the sales tax from the end consumer and deposit it with the national exchequer. Hence the respondents need to ascertain whether the collected tax has been duly deposited. Therefore we understand that the power to monitor is to watch and observe and to take the information maintained by the taxpayer with respect to its daily production, sales and stock position. At this stage there is no investigation or inquiry but simply a desire to ascertain whether in fact the volume of business in the form of purchase, sale and stock positions is duly reflected in the tax returns.

15. The basic function of the FBR is to declare a tax system and collect tax as per the Act. Section 40B of the Act of 1990 and 45(2) of the Act of 2005 gives the FBR or the Chief Commissioner the authority to post an officer to monitor production, sales of taxable goods and stock positions. For the purposes of the FBR or the Chief Commissioner no restriction has been placed by the Act of 1990 or Act of 2005 on the power of monitoring. However the said sections require the Commissioner to have material evidence and pass a speaking order under the said sections. We are of the opinion that 40B of the Act of 1990 and 45(2) of the Act of 2005 envisions a specific distinction in the manner in which the power under Section 40B of the Act of 1990 and section 45(2) of the Act of 2005 is to be exercised by the FBR, Chief Commissioner and the Commissioner. The Federal Board of Revenue Act, 2007 (Act of 2007) provides for the establishment of the FBR and its powers and functions. Section 4 of the Act of 2007 provides for the powers and functions of the FBR such that 4(1)(c) provides that the FBR may adopt modern effective tax administration methods, information technology system and policies in order to consolidate assessments, improve processes and widen the tax base. Section 4(1)(b) provides that the FBR should promote voluntary tax compliance and to implement comprehensive policies and programs to ensure efficient collection of tax. Section 4(1)(o) of the Act of 2007 gives the powers to make regulations, policies, programs, strategies in order to carry out the purposes of the Act of 2007. The provision of monitoring under section 40B of the Act of 1990 and section 45(2) of the Act of 2005 essentially means that the respondents need to watch over the production, sales and stocking of taxable goods in order to ascertain whether the returns being filed and the information provided is reflective of the actual production, sales and stocks maintained by the taxpayer. In the instant cases, as explained by the Chief Commissioner, the entire sugar industry was under review and it was opined that the sugar industry was not paying the required tax. Furthermore previous data was compared with present data and the respondents could not reconcile the discrepancies. Hence it was decided that the petitioner's mill be monitored. The decision of the FBR or the Chief Commissioner does not require material evidence but can be a decision based on broader principles. At this point, there is no specific

allegation raised against the appellants or the petitioner for evasion of tax. The appellants and the petitioner were given due notice under 40B of the Act of 1990 and 45(2) of the Act of 2005 and were given sufficient reasons for invoking these sections. Hence a show cause notice is not required and a hearing is not required because an order under sections 40B of the Act of 1990 and 45(2) of the Act of 2005 is not an adverse order against the appellants or the petitioner for which a show-cause notice or hearing is required. In this regard we note that the appellants and the petitioner have not challenged the vires of the sections but have only challenged the impugned orders dated 19-12-2013 and 21-2-2014.

16. We have also taken notice of the arguments raised by the appellants and the petitioner that the respondents can utilize sections 40B of the Act of 1990 and 45(2) of the Act of 2005 to enter and sit within their business premises for an unlimited period of time and disturb their ability to do business. The orders dated 19-12-2013 and 21-2-2014 issued by the Chief Commissioner do not provide any timeframe within which the process of monitoring should be completed by the officers. However the section also does not stipulate any time frame. In order to prevent arbitrary exercise of powers under sections 40B of the Act of 1990 and 45(2) of the Act of 2005, we are of the opinion that when such an order is passed by the FBR or the Chief Commissioner or Commissioner, the order must provide a reasonable timeframe within which the monitoring will take place and be completed. In the event that the required data and information is not obtained within the contemplated time, the FBR, the Chief Commissioner or Commissioner are always free to extend the time by informing the taxpayer.

17. Therefore in view of the aforesaid, we find no merit in these appeals and the petition which are dismissed.

KMZ/K-46/L Appeals dismissed.

PLJ 2015 Lahore 248

Present: **MRS. AYESHA A. MALIK, J.**

RABAB ZAHIRA--Petitioner

versus

UNIVERSITY OF AGRICULTURE, FAISALABAD through its Registrar, Main Campus, University of Agriculture, Faisalabad and 5 others--Respondents

W.P. No. 8640 of 2010, heard on 28.11.2013.

Constitution of Pakistan, 1973--

----Art. 199--Constitutional petition--Ad-hoc appointment on contract basis--Restrained from delivering lecturers at university through verbal order--Challenge to--Grievance of petitioners is that after expiry of contract period, petitioners requested for further extensions, they were denied same even though they were recommended by their departments for extensions in ad-hoc appointments--No right to continue lecturing after expiry date of their contract period--No vested right for seeking extension or regular appointment--No reason to issue any notice or inform them that they are no longer required to continue delivering lectures, as petitioners knew that they were appointed as ad-hoc lecturer and that such contract was for a limited period of time--After its expiry, there was no reason for university to issue any notice or inform petitioners that their contract period had expired--No procedural violation and no right of natural justice has been violated as she has been duly heard, interviewed and more importantly pursuant to her own application before Supreme Court, her matter was heard by Vice Chancellor who passed a detailed order with respect to her allegations of appointments being based on favouritism and nepotism--Petitions dismissed. [Pp. 253 & 254] A, B & C

Mr. Tipu Salman Makhdoom, Advocate for Petitioner (in W.P. Nos. 8640 & 10882 of 2010).

Hafiz Khalil Ahmad, Advocate for Petitioner (in W.P. Nos. 15312 and 19178 of 2010).

Mr. Muhammad Shahzad Shaukat and Sardar Tariq Mehmood, Advocates for Respondents.

Date of hearing: 28.11.2013.

JUDGMENT

Through this common judgment, I intend to decide upon the common issues arising in the following Writ Petitions:--

W.P. Nos.	Title
8640/2010	*Rabab Zahira vs. University of Agriculture etc.*
10882/2010	*Dr. Abdul Ghaffar vs. University of Agriculture etc.*
15312/2010	*Dr. Asif Javaid vs. University of Agriculture etc.*
19178/2010	*Mohsin Saleem etc. vs. University of Agriculture etc.*

2. A description of the petitions is as follows:--

(i) **WP No. 8640/2010.** The Petitioner in WP No. 8640/2010 was appointed ad-hoc on contract basis for a period of six months by the Respondents *vide* notification dated 4.4.2007 with effect from 29.3.2007 which stipulates the terms and conditions of the contract of the Petitioner. The name of the Petitioner is at Sr.No. 51. The contract was extended *vide* notification dated 31.5.2008 for another six months with effect from 26.5.2008. The Petitioner's name is at Sr.No. 21. Again *vide* notification dated 30.6.2009 the contract was extended for another six months with effect from 27.5.2009, expiring on 27.11.2009. The Petitioner requested for extension in her ad-hoc appointment for another six months, however, the Respondents did not respond to the repeated reminders and requests of the Petitioner. Throughout this time the Petitioner kept performing her duties, however, she was not paid any salaries. The Petitioner was also recommended by the Respondent No. 1 for extension in her ad-hoc appointment, however, no heed was paid to this recommendation. The Petitioner filed appeal before the Chancellor which is still pending. Ultimately based on a verbal order dated 15.4.2010 the services of the Petitioner were terminated. The Petitioner has also impugned the act of the Respondents of rejecting the Petitioner and appointing the Respondents No. 4 and 5 as lecturers on regular basis for being in violation of the merit. Hence this petition.

(ii) WP Nos.10882, 15312 and 19178 of 2010. The Petitioner in WP Nos.10882 along with Petitioners in WP Nos.15312 and 19178 of 2010 have all impugned the verbal order of Respondent No. 4 dated 15.4.2010 by virtue of which they were not allowed to take their classes on the grounds that the verbal order is unconstitutional and against the principles of natural justice.

Therefore the common challenge is with respect to a verbal order on the basis of which the Petitioners were not allowed to carry on lecturers at the Respondent University and in WP No. 8640/2010 the Petitioner has also challenged the appointment of the Respondents No. 4 and 5 for being without merit.

3. Learned counsel for the Petitioners argued that the Petitioners have served in the Respondent University for a long time as Lecturers, being paid initially on lecture basis and ultimately being given ad-hoc appointments through different notifications. The Petitioners ad-hoc appointments were extended from time to time and after the expiry of the ad-hoc appointments, the Respondents did not extend the ad-hoc period despite the recommendations made in their favour and despite the long standing service of the Petitioners. The Petitioners have challenged the verbal orders of the Respondent No. 4 on the grounds that there is no sanctity in the verbal orders and that they have no knowledge as to the reasons or the grounds on which they have been denied the right to deliver their lectures at the Respondent University.

4. Learned counsel for the Petitioner in WP No. 8640/2010 argued that the Respondents advertised for three posts of lecturers in BS-18 on regular basis for which the Petitioner applied. She was called for interview, however, she was not selected. The grievance of the Petitioner is that the Respondents No. 4 and 5 were selected as lecturers on regular basis, however, they did not have the requisite merit and that the Petitioner has a far better merit and is a more deserving candidate and it is on account of the *malafide* acts of the Respondent University that the Petitioner was denied regular appointment. In this regard, the learned counsel has relied upon the marks given by the Selection Board to the different candidates to show that the Petitioner was not given the appropriate or deserving marks, given that she satisfied the eligibility criteria set out by the Respondent University in the advertisement dated 12.10.2009. Learned counsel argued that the Respondents No. 4 and 5 were appointed on favouritism. They did not have the requisite experience, qualification and even necessary publication. He argued that this appointment is based on the *malafide*s of the Respondents.

5. The Respondents have filed their report and parawise comments. Learned counsel for the Respondent University argued that so far as the ad-hoc appointment of the Petitioner is concerned and their extensions from time to time, the same is not denied. However, he argued that the extensions granted to the Petitioners in WP No. 8640/2010 expired in November 2009. The extensions granted to the Petitioner in WP No. 10882/2010 expired on 23.3.2010, the extension granted to the Petitioners in WP No. 19178/2010 expired in the year 2009. The Petitioners in WP No. 19178/2010 applied for regular position as lecturer. They were duly considered and interviewed by the Selection Board, however, they were not recommended for regular appointments. He argued that similarly the Petitioner in WP No. 8640/2010 applied for regular position and she was duly considered and interviewed by the Selection Board, however, she was also not recommended by the Selection Board. The Petitioner in WP No. 15312/2010 extension expired in June 2010 after which no further extension was granted. Learned counsel argued that the Petitioners were all appointed as ad-hoc lecturers on contract which were duly extended from time to time and after their contract expired the Petitioners ceased to be employees of the Respondent University. Learned counsel stated that the Petitioners have no vested right on the basis of which they can claim extension in their ad-hoc appointments. He further argued that the Petitioners were aware of the fact that they were granted one last extension and that their contracts had expired. Thereafter the Respondents were not required to issue any notice or give the Petitioners any hearing on this issue. He further stated that the Petitioners have impugned a verbal order stating they are no longer required to deliver lecture with the University, however, he states that after the expiry of the contract period, since the Petitioners ceased to be the contract employees of the University, they were no longer allowed to deliver lectures at the University. Therefore, the question of any verbal order restraining them from delivering lecturers is misconceived and contrary to the record. In this regard, learned counsel has relied upon the case titled *'Federation of Pakistan through Secretary Law, Justice and Parliamentary Affairs vs. Muhammad Azam Chattha'* (2013 SCMR 120) that The contract employees are

governed by the doctrine of master and servant and in the event of arbitrary dismissal or unwarranted termination of employment, the employee can sue for damages equal to wages, allowances and other benefits which would have been otherwise been payable under the contract of employment, in which case the writ petition is not maintainable. He has also relied upon 2013 SCMR 304 in S.M.C. No. 15 of 2010 and C.M.As Nos.2689, 3244 of 2010 and CMAs Nos.5383, 3068 of 2011 that a contract employee does not have a vested right for regular employment. Learned counsel argued with respect to the grievance of the Petitioner in WP No. 8640/2010 that the appointment of the Respondents No. 4 and 5 are contrary to the merit, that the Petitioner had also filed an application before the Hon'ble Supreme Court of Pakistan in which a direction was given to the Respondent No. 1 to decide her application. He argued that the grievance of the Petitioner was duly heard and a comprehensive order was passed by the Vice Chancellor through its order dated 11.5.2010. He argued that all the allegations raised by the Petitioner of favouritism and nepotism were duly considered at this hearing and thereafter the Vice Chancellor passed an order. Therefore, the Petitioner cannot re-agitate the matter again before this Court. He argued that the Petitioner has not raised any ground or challenged this matter specifically in the instant writ petition. He further argued that the Petitioner's case was duly considered by the Selection Board who unanimously approved the selected candidates and as such there is no justification in questioning the decision of the Selection Board. He further argued that due process was followed, the Petitioner was considered and the Selection Board did not recommend her for a regular appointment.

6. I have heard the learned counsel for the parties and reviewed the record available on the file.

7. The first issue before this Court is with respect to the common prayer of the Petitioners that they were restrained from delivering lecturers at the Respondent University through verbal orders. In terms of the record and as per the arguments made by the learned counsel for the Petitioners, it is an admitted position that the Petitioners were all appointed on ad-hoc basis through different notifications whereby their period of ad-hoc appointment was extended from time to time. The expiry of the ad-hoc period is also an admitted position. The grievance of the Petitioners is that after the expiry of the contract period, the Petitioners requested for further extensions, they were denied the same even though they were recommended by their departments for extensions in the ad-hoc appointments. The Petitioners are also aggrieved by the fact that one fine day through a verbal order they were denied the right to deliver their lectures at the Respondent University. The record produced before this Court is not disputed and from this record it is clear that the Petitioners were all appointed on contract for ad-hoc lecturing, which contracts were extended from time to time. The Petitioners were all aware of the expiry of their extension period. After the expiry of the extension period, admittedly no further extension was granted to the Petitioners. There is nothing on the record to show on what basis the Petitioners did deliver the lectures, if at all, at the Respondent University. The Respondent University has categorically denied that

the Petitioners were allowed to continue giving lectures at the Respondent University. I am of the opinion that the Petitioners have no right to continue lecturing after the expiry date of their contract period. There is also no vested right of the Petitioners for seeking extension or regular appointment. Finally there was no reason for the Respondent University to issue any notice or inform them that they are no longer required to continue delivering lectures, as the Petitioners knew that they were appointed as ad-hoc lecturer and that such contract was for a limited period of time. After its expiry, there was no reason for the Respondent University to issue any notice or inform the Petitioners that their contract period had expired. Therefore the very basis upon which these writ petitions have been filed wherein a verbal order has been impugned is totally misconceived and contrary to the record. So far as the arguments raised by the learned counsel for the Petitioner in WP No. 8640/2010 challenging the appointment of the Respondents No. 4 and 5 for being devoid of merit, I am of the opinion that due process was, followed. The Petitioner applied for regular appointment. She was duly considered by the Selection Board and ultimately after considering all the candidates the Selection Board unanimously appointed the Respondents No. 4 and 5. Learned counsel for the Petitioners relied upon the case titled *'Pakistan Defence Officers' Housing Authority and others vs. Lt. Col. Syed Jawaid Ahmad'* (2013 SCMR 1707) that the failure to appoint the Petitioner is in fact a procedural violation and infringement of the Petitioner's rights to natural justice. In the case of this Petitioner there has been no procedural violation and no right of natural justice has been violated as she has been duly heard, interviewed and more importantly pursuant to her own application before the Hon'ble Supreme Court of Pakistan, her matter was heard by the Vice Chancellor who passed a detailed order with respect to her allegations of the appointments being based on favouritism and nepotism. Now she cannot re-agitate the same issue through her writ petition.

9. In view of the aforesaid these petitions are dismissed.

(R.A.) Petitions dismissed.

2015 P T D 267

[Lahore High Court]

Before Mrs. Ayesha A. Malik, J

AKHTAR SAEED MEDICAL AND DENTAL COLLEGE

Versus

FOP and others

Writ Petition No.9866 of 2014, decided on 12th May, 2014.

Income Tax Rules, 2002---

----R. 44(4)---Income Tax Ordinance (XLIX of 2001) Ss. 161 & 205---Constitution of Pakistan, Art. 199---Constitutional petition---Furnishing of annual statement of tax collected or deducted---Petitioner/taxpayer impugned notice under R. 44(4) of the Income Tax Rules, 2002 requiring him to furnish a reconciliation statement---Contention of the petitioner was that said notice was illegal and that the petitioner had already given all necessary record and information along with his tax return, and that the same was tantamount to proceedings under S. 161 of the Income Tax Ordinance 2001---Held, that the petitioner/taxpayer had only been asked to furnish required information and at such stage, contention that the same were proceedings under S. 161 of the Income Tax Ordinance 2001, was incorrect---No determination for the purposes of S. 161 of the Income Tax Ordinance, 2001 had been made and even otherwise, a perusal of the notice showed that petitioner had been asked to submit reconciliation of all payments mentioned in the annual statement along with payments made against trading and profit and loss account mentioned in income tax return and audited accounts; and the Department had clearly stipulated different heads on which information was sought and amounts paid in terms thereof; and as such no illegality was made out----Constitutional petition, being not maintainable, was dismissed.

Muhammad Ajmal Khan for Petitioner.
Kanwar Riaz Ahmad Khan for Respondents.
Date of hearing: 12th May, 2014.

ORDER

MRS. AYESHA A. MALIK, J.---Through this petition, the petitioner has impugned a notice issued under Rule 44(4) of the Income Tax Rules, 2002 (2002 Rules).

2. The case of the petitioner is that the said rule is read with sections 161/205 of the Income Tax Ordinance, 2001 (2001 Ordinance) hence the proceedings are illegal and contrary to law. Learned counsel argued that the petitioner has given all the necessary record and information to the respondents along with his return, therefore, there is no justification in issuance of show-cause notice to the petitioner under Rule 44(4) of the 2002 Rules.

3. Learned counsel for the respondents has raised a preliminary objection and states that the instant petition is not maintainable as no proceedings under section 161 of the 2001 Ordinance have commenced against the petitioner, therefore, it is a misstatement of the petitioner that the matter should be connected with the pending cases under section 161 of the 2001 Ordinance. He further argued that notice under rule 44(4) of the 2002 Rules has been issued for furnishing of information, which is not contrary to the law. He further states that at this stage, the petitioner has only been asked to submit information under Rule 44(4) of the 2002 Rules.

4. I have heard learned counsel for the parties at length on the question of maintainability of this petition. Rule 44(4) of the 2002 Rules provides that:--
"A person required to furnish the statements under sub-rule (1) or (2) shall, wherever required by the commissioner, furnish a reconciliation of the amounts mentioned in the aforesaid annual and monthly statements with the amounts mentioned in the return of income statement, related annexes and other documents submitted from time to time."

In terms of the said rule, the petitioner has only been asked to furnish required information. At this stage, the statement of the petitioner that these are proceedings under section 161 of the 2001 Ordinance is incorrect. There has been no determination for the purposes of section 161 of the 2001 Ordinance. Even otherwise, a review of the notice shows that the petitioner has been asked to submit reconciliation of all payments mentioned in the annual statement along with the payments made against trading and P&L account mentioned in the income tax return and Audited accounts. The respondents have stipulated clearly the different heads in which the information is sought and the amounts paid in terms thereof. As such no illegality is made out. This petition is dismissed being no maintainable.

KMZ/A-196/L Petition dismissed.

2015 P T D 560
[Lahore High Court]
Before Mrs. Ayesha A. Malik, J
Messrs O.S. CORPORATION through Proprietor
Versus
FEDERATION OF PAKISTAN through Secretary Revenue Division 3 and others
Writ Petition No.7972 of 2014, decided on 3rd April, 2014.

Customs Act (IV of 1969)---

----S.186---Constitution of Pakistan, Art.199---Constitutional petition---Detaining of goods---Fine or penalty, non-imposing of---Grievance of importer was that despite payment of all duty and taxes, and release of goods, authorities had illegally detained goods at the exit gate---Validity---As no fine or penalty had been imposed or was even under consideration at the relevant time, therefore, provisions of S. 186 of Customs Act, 1969, were not relevant---Authorities were acting on a hunch and still had to satisfy themselves that goods imported by importer were in fact tin plates and not electrical silicon steel sheets---Authorities also could not show whether any investigation or adjudicatory process was pending under Customs Act, 1969, against importer---Consignments were opened and samples were drawn by authorities to check contents of consignments and two reports were furnished in favour of importer---Allegation of mala fide on the part of testing laboratory had also been inferred by authorities but there was nothing on record to substantiate such claim---Detaining goods at exit gate after having released by them was totally contrary to the provisions of Customs Act, 1969---Authorities had available to them provisions of Customs Act, 1969, and to proceed with the matter where they were unsure of classification or status of goods imported---Due process was followed and goods were cleared---While acting on a hunch, authorities detained goods at exit gate even though taxes and duties were paid and goods had been released---High Court directed the authorities to release goods of importer instantly---Petition was allowed in circumstances.

Mian Abdul Ghaffar for Petitioner.
Ch. Muhammad Zafar Iqbal along with, Aziz-ur-Rehman Principal Appraiser Customs and Nadeem Mahmood Mian, Standing Counsel for Respondents.
Date of hearing: 3rd April, 2014.

JUDGMENT

MRS. AYESHA A. MALIK, J.---Through this petition, the petitioner has impugned the blocking and detaining of its consignments consisting of 13 containers of electrical silicon steel sheets imported by the petitioner.

2. The case of the petitioner is that it has imported 13 containers of electrical silicon steel sheets falling under PCT heading 7225.1900 at unit value of US$ 600.00 per

M.Ton on the basis of its transaction value vide GD-LAPR-HC-9675 dated 3-3-2014. The consignments of the petitioner were examined and found to be in accordance with the declaration. Assessment was made and duty and taxes were paid. After payment of the duties and taxes the consignments should have been released. However, instead samples were drawn from the consignments and sent to the Pakistan Standard and Quality Control Authority, Lahore as well as People Steel Mills, Ltd., Karachi for reconfirmation of the description of the goods. The report of both testing labs stated that the goods imported were electrical silicon steel sheets as per the declaration made by the petitioner. The goods were to be released, however, they were blocked at the exit gate again on the allegation that the department is not satisfied with the testing reports and that fresh samples shall be taken for the purposes of having them tested from another lab. The petitioner is aggrieved by this act of the respondents on the ground that the respondents cannot illegally detain the goods of the petitioner once they have been released and duties and taxes have been paid. Furthermore, learned counsel argued that this entire exercise is being undertaken at the behest of one Principal Appraisal and his so called hunch that the consignments do not contain electrical silicon steel sheets. Learned counsel argued that even his hunch is based on speculation in relation to some other consignment of electrical silicon steel sheets wherein it was found that in fact the consignment contained tin plates and not electrical silicon steel sheets. Learned counsel argued that in the case of the petitioner the consignments have been physically examined and tested twice and it has been found that the consignments contain the goods declared. The duties and taxes were paid and they were released by the respondents.

3. Report and para wise comments have been filed by the respondents. Learned counsel for the respondents argued that the respondents have good cause to believe that the goods imported and described as electrical silicon steel sheets are in fact tin plates. Learned counsel argued that the samples have been sent to yet another lab. Learned counsel argued that the entire department and the testing laboratoris are involved in this fraudulent transaction, hence the goods have been detained for further testing purposes. Learned counsel further argued that the respondents are authorized under section 186 of the Customs Act, 1969 (Act of 1969) to detain the goods as an inquiry is underway on the basis of which the proper categorization of the goods has to be made so as to ensure that the appropriate duties and taxes are paid. Learned counsel argued that there is sufficient evidence with the respondents on the basis of which this act of detaining has been taken and as such no illegality is made out.

4. Heard the learned counsel for the parties and reviewed the record available on the file.

5. The basic issue before this court is whether the 13 containers of the petitioner could be detained after having been released by the respondents. Admittedly, the goods were examined and samples were drawn. One set of sample was tested by Pakistan Standard and Quality Control Authority, Lahore. In terms of the report provided on 10-3-2014 the consignment contained electrical silicon steel sheets.

The consignment was also tested to confirm the findings of Pakistan Standard and Quality Control Authority, Lahore. The samples were sent to the Peoples Steel Mills Ltd, Karachi and the report was issued on 10-3-2014, which also confirmed that the consignment contained electrical silicon steel sheet. The respondents have relied upon a letter issued with respect to another consignment by some other company, which was sent for testing and found that the goods were not electrical silicon steel sheets but were in fact contained tin plates. On the basis of this report, in relation to another consignment, the respondents have detained the consignments of the petitioner for yet another round of testing and re-examination. The samples have been sent to HFJ Lab by the respondents by virtue of their letter dated 25-3-2014. Learned counsel for the respondents was not able to satisfy this court on the question as to what necessitated a third testing of the sample when two independent labs had confirmed that the consignment contained electrical silicon steel sheets. The record shows that the only material available to the respondents is the letter issued on 25-3-2014 in relation to similar consignments. Learned counsel for the respondents has also relied upon the section 186 of the Act of 1969. However, a bare reading of the section shows that it is not relevant to the case at hand because no fine or penalty has been imposed or is even under consideration at the moment. The respondents are acting on a hunch and still have to satisfy themselves that the goods imported by the petitioner are in fact tin plates and not electrical silicon steel sheets. Learned counsel for the respondents was also not able to show whether any investigation or adjudicatory process was pending under the Act of 1969 against the petitioner. Admittedly, the consignments were opened and samples were drawn by the respondents to check the contents of the consignments. Admittedly, two reports have been furnished in favour of the petitioner. Although, allegations of mala fide on the part of the testing labs have also be inferred by the respondents, there is nothing on the record to substantiate this claim. Detaining the goods at the exit gate after having released them is totally contrary to the provision of the Act of 1969. The respondents have available to them the provision of the Act of 1969 and to proceed with the matter where they are unsure of the classification or status of the goods imported. In the instant case, due process was followed and the goods were cleared. However while acting on a hunch, the respondents have detained the goods at the exit gates even though taxes and duties have been paid and the goods have been released.

6. Under the circumstances, this petition is allowed and the respondents are directed to release the goods of the petitioner instantly. It is noted that in the event, the respondents need to investigate into this issue, they have already detained samples of the goods of the petitioner and are free to adopt due process of law and investigate into the matter in accordance with law.

MH/O-2/L Petition allowed.

PLJ 2015 Lahore 314

Present: **MRS. AYESHA A. MALIK, J.**

PIONEER CRICKET CLUB etc.--Petitioners

versus

ELECTION COMMISSIONER, PCB, etc.--Respondents

W.P. No. 30656 of 2013 etc., decided on 18.4.2014.

Constitution of Pakistan, 1973--

----Art. 199--(Dispute Resolutions of Appeals) of PCB Constitution--Scope of--Non speaking orders of independent arbitration PCB--Decision of scrutiny committee--Maintainability of writ petition--Appeal lies before independent arbitrator--Clubs were declared inactive--Scrutiny of clubs was *mala fide* or against mandate of PCB Constitution--Validity--Scrutiny Committee verifies team, its playing facilities and ground available as well as tournaments played from data given by petitioners themselves in Club Scrutiny Form (2013) and (2011)--If petitioners dispute findings of scrutiny committee then remedy of appeal before election commissioner is available and thereafter before independent arbitrator--Petitioners had come directly against order of Scrutiny Committee--Issues raised in these petitions are of factual nature and efficacious remedy is available to them before Election Commissioner and then before independent arbitrator under PCB Constitution, hence these petitions were not maintainable. [Pp. 319 & 320] A,B & C

Mr. Waseem Ahsan, Advocate for Petitioners (in W.P. Nos.30655, 30656, 30657, 30658, 30659, 30660, 30661, 30662, 30663 and 30673 of 2013).

Ms. Farzana Batool, Advocate for Petitioner (in W.P. No. 20103/2013).

Mr. Abdul Razzaq Rajab, Advocate for Petitioners (in W.P. No. 842/2014).

Dr. A. Basit, Advocate for Petitioners (in W.P. Nos.30056 and 30654 of 2013).

Mr. Aftab Gul, Advocate for Petitioners (in W.P. Nos.14127 and 14128 of 2012).

Mr. Ustad Muhammad Iqbal, Advocate for Petitioners (in W.P. No. 16098/2012).

Mr. M. Irfan Khan Ghaznavi, Advocate for Petitioners in W.P. No. 30580/2013.

Mr. Taffazul Haider Rizvi, Advocate for Respondent PCB along with Barrister *Salman Naseer*, Manager Legal, PCB (in W.P. Nos. 14127, 14128, 16098 of 2012, 30654, 30056, 30580 of 2013 and 842/2014).

Mr. Hafeez Saeed Akhtar, Advocate for Respondent PCB (in W.P. Nos.30655, 30656, 30657, 30658, 30659, 30660, 30661, 30662, 30663 and 30673 of 2013).

Syed Hasnain Haider, Advocate for Respondent PCB (in W.P. No. 20103/2013).

Mr. Jehanzaib Khan Bharwana, Advocate for Respondents No. 4, 6 and 7 (in W.P. Nos.20103, 30654 and 30056 of 2013).

WP Nos.30655, 30656, 30657, 30658, 30659, 30660, 30661, 30662, 30663 and 30673 of 2013 against the impugned order dated 10.6.2013 of the Scrutiny Committee, PCB for Annexure-A.

WP Nos.20103, 30056, 30654 and 30580 of 2013 against the impugned order dated 19.7.2013 of the Election Commissioner, PCB for Annexure-B.

WP No. 842/2014 against the impugned order dated 4.1.2012 of the Election Commissioner, PCB for Annexure-B.
WP Nos. 14127 of 2012 against the impugned orders dated 28.9.2011, 11.10.2011 and 22.5.2012 of the Scrutiny Committee, Election Commissioner and the Independent Arbitrator, PCB respectively for Annexure-C.
WP No. 14128 of 2012 against the impugned order dated 4.1.2012 and 21.5.2012 of the Election Commissioner and Independent Arbitrator, PCB respectively for Annexure-C.
WP No. 16098/2012 against the impugned order dated 16.1.2012 and 24.5.2012 of the Election Commissioner and the Independent Arbitrator, PCB respectively for Annexure-C.
Date of hearing: 21.3.2014.

JUDGMENT

This single judgment decides upon the common issues arising in the aforementioned writ petitions. The impugned orders in the petitions are the orders passed by the (i) Scrutiny Committee, PCB (ii) Election Commissioner, PCB as well as the orders of the (iii) Independent Arbitrator, PCB.

2. The grievance of the petitioners in all the petitions is common, however the petitioners have come to this Court at different stages. The petitioners shown in the aforementioned Annexure-A have come against the order of the Scrutiny Committee dated 10.6.2013. The petitioners shown in Annexure-B have come against the order of the Election Commissioner, PCB dated 4.1.2012, 19.7.2013 and the petitioners in Annexure-C have come against the order of the Independent Arbitrator, PCB dated 21.5.2012, 22.5.2012 and 24.5.2012.

3. The petitioners are all cricket clubs which have been declared 'inactive' through the order of the Scrutiny Committee. The ease of the petitioners is that the Scrutiny Committee passed a non-speaking order contrary to the record, without recording any evidence and collecting any information about the status of the petitioner clubs. Learned counsel for the petitioners detailed in Annexure 'A' argued that the order of the Scrutiny Committee dated 10.6.2013 is a non-speaking order. The petitioners were not given an opportunity of hearing nor was any evidence recorded before passing the impugned orders. The Scrutiny Committee in a slipshod manner passed the impugned order without detailing as to why the petitioners have been declared as 'inactive' clubs. Learned counsel further argued that the decision of the Scrutiny Committee is contrary to the record because the petitioner's clubs fulfills the criteria as stipulated in the Constitution of the Pakistan Cricket Board (PCB Constitution) for 'active' clubs.

4. The petitioners who have come against the orders of the Election Commissioner and the Independent Arbitrator are essentially aggrieved by the orders wherein they have upheld the orders of the Scrutiny Committee and maintained the status of the petitioners as an 'inactive' clubs. The grievance of these

petitioners as mentioned in Annexure 'B' and `C' is that the decision of the Scrutiny Committee is contrary to the PCB Constitution. They have also agitated the ground that since the District Cricket Association did not organize any tournament, therefore the petitioners should not have been made responsible for not playing any tournament. They have also argued that the orders of the Election Commissioner and t

he Independent Arbitrator are contrary to the record.

5. Report and parawise comments have been filed by the Respondent PCB. Learned counsels for the Respondent PCB argued that the petitions have been filed on behalf of the cricket clubs, however no resolution has been appended with the instant petitions to show that the president of the cricket club has been authorized to file the instant petitions. He further argued that the Province of Punjab has not been impleaded as necessary party which is a fatal defect and on this ground alone the petitions merit dismissal. Learned counsel argued that the petitioners have impugned the decisions of the Scrutiny Committee, however, the instructions/guidelines and the procedure of the Scrutiny Committee are not statutory in nature, hence these petitions are not maintainable, lie further argued that against the order of the Scrutiny Committee the petitioners have a right to file an appeal under Para 40(2) of Part VIII (Dispute Resolutions or Appeals) of the PCB Constitution which right of appeal has not been availed. He further argued that against the decision of the Election Commissioner, PCB, another appeal lies before the Independent Arbitrator in terms of Para 40(6) of Part VIII (Dispute Resolutions or Appeals) bf the PCB Constitution. The petitioners mentioned in Annexure 'A' have come directly to the Court against the orders of the Scrutiny Committee without availing remedy before the Election Commissioner and the Independent Arbitrator. Both remedies are adequate and efficacious remedies which should have been availed by the petitioners. The petitioners named in Annexure 'B' and 'C' have availed their remedies and cannot re-agitate their case through the instant writ petitions.

6. Learned counsel for the Respondent PCB argued that the criteria and the guidelines of the scrutiny procedure have been set out under the Necessary Instructions/Guidelines for Clubs Appearing in PCB Scrutiny (Scrutiny Guidelines). In terms of the said Scrutiny Guidelines the cricket club provides its information in the Club Scrutiny Form. The Scrutiny Committee visits the site of the cricket club and thereafter physically verifies the information provided by the cricket club in the Club Scrutiny Forms. Learned counsel argued that each of the petitioners have filled the Club Scrutiny Form (2013) and in W.P. Nos.14127, 14128, 16098 of 2012 and W.P. No. 842/2014 Club Scrutiny Form (2011) in which they have provided all the relevant data in relation to their club such as the number of players, cricket field and its playing facilities. The Scrutiny Committee makes a spot inspection to verify whether the playing facilities and the players of the club are in terms of the criteria given in the Scrutiny Guidelines and also are in terms of the information provided by the clubs itself in the Club Scrutiny Forms. He argued that it is necessary to determine whether or not the cricket club is 'active' or 'inactive' for the purposes of election because an 'active' club is eligible to vote in terms of Part V of the PCB

Constitution. Learned counsel argued that if the club does not meet the stipulated criteria it is declared as 'inactive' club, hence it cannot vote. Learned counsel argued that in the cases of the petitioners in W.P. No. 30655, 30656, 30658, 30659, 30660, 30661, 30662, 30663 and 30673 of 2013, the petitioners have availed the remedy of appeal before the Election Commissioner, PCB but this fact has not been disclosed in the Petition. Learned counsel further argued that the issues raised in the instant petitions are of a factual nature and as such cannot be decided in a constitutional petition.

7. Report and parawise comments have been filed on behalf of the Respondents No. 4, 6 and 7 in W.P. Nos.20103, 30654 and 30056 of 2013. Learned counsel for the stated Respondents have provided the complete record of the tournaments held and the clubs that have played those tournaments.

8. Heard the learned counsels for the parties and reviewed the record available on the file.

9. The petitioners in Annexures A, B, C claim that the Scrutiny Committee passed its order dated 10.6.2013 hastily without recording evidence and collecting information and totally contrary to the PCB Constitution. The PCB Constitution defines an 'active' club in Paragraph 2(ii). An 'active' club has to be scrutinized in order to be declared eligible for the elections of the Regional District Associations. An 'active' club has the right to vote in terms of Paragraph 5 of Part-V of the PCB Constitution which is reproduced below:

> "The BOG shall appoint the scrutiny committees to scrutinize eligible clubs and associations for holding elections".

The PCB Constitution does not set out the procedure in relation to the process of scrutiny. However the respondents have framed the Scrutiny Guidelines which provides for the criteria that the club has to be meet in order to be declared an 'active' club. It is an internal document made for the benefit of the clubs. A review of the Scrutiny Guidelines shows that it essentially requires the cricket club to verify the information provided for by the clubs with respect to its players data, its playing facilities and its playing activities. In terms of the record produced by the learned counsel for the Respondent PCB, the petitioners all filled in their Club Scrutiny Form (2013) and Club Scrutiny Form (2011) in which they have provided their data. The Scrutiny Committee visited the club at its playing site to ensure that the information so provided is correct. Again the data provided on the Club Scrutiny Forms (2013) and (2011) was verified. On the basis of the information provided a decision was taken whether the petitioner's club satisfied the criteria for being declared an 'active club'. After the inspection at site, the Scrutiny Committee found that the petitioners did not satisfy the requirements. Hence the clubs were declared 'inactive'. Nothing has been brought on the record to show that the process conducted in the year 2013 or 2011 with respect to the scrutiny of the petitioners clubs was *mala fide* or against the mandate of the PCB Constitution. The petitioners have impugned the scrutiny process on the ground that no recording of evidence

took place and that information was not collected. Furthermore the order was passed in a slipshod manner. However to the mind of this Court these grounds also do not merit any consideration because the scrutiny process does not require recording of evidence. The purpose of scrutiny is to verify whether the club meets the criteria of an `active club'. The Scrutiny Committee verifies the team, its playing facilities and ground available as well as tournaments played from the data given by the petitioners themselves in the Club Scrutiny Form (2013) and (2011). Hence the information is provided by the petitioners and the Scrutiny Committee verifies its correctness. If the petitioners dispute the findings of the Scrutiny Committee then remedy of appeal before the Election Commissioner is available and thereafter before the Independent Arbitrator. The petitioners detailed in Annexure 'A' have come directly against the order of the Scrutiny Committee. The issues raised in these petitions are of factual nature and efficacious remedy is available to them before the Election Commissioner and then before the Independent Arbitrator under the PCB Constitution, hence these petitions are not maintainable. So far as the petitioners detailed in Annexures 'B' and 'C are concerned, they have also come against the order of the Scrutiny Committee which they challenged before the Election Commissioner and the Independent Arbitrator. Again the issues raised are factual in nature and these petitioners have availed the remedy provided under the PCB Constitution. Therefore these petitioners cannot re-agitate the same issue through these Writ Petitions.

10. Even otherwise several preliminary objections have been raised by the learned counsel for the Respondent PCB which require adjudication. In the first instance they argued that the petitions have been filed by the cricket clubs through their presidents without due authorization. Review of the record of each of the instant petitions except W.P. No. 30580/2013 shows that the petitioners are all cricket clubs who have filed the petitions through their presidents, without any authorization in favour of the president. There is merit in this objection as the club had to have authorized the president before he could have instituted the instant petitions.

11. The second objection raised is that the Province of Punjab has not been made a party in any of the petitions and this is fatal to the petitions. This objection also has merit in view of the dicta laid down in the case titled *'Government of Balochistan, CWPP&H Department and others vs. Nawabzada Mir Tariq Husain Khan Magsi and others'* (2010 SCMR 115) and *'The State through Prosecutor General, Punjab vs. Hafiz Ikram Saeed and others'* (2013 SCMR 1045) the Province or the Federation must be impleaded as a party while invoking constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pak

istan, 1973.

12. It is further noted that the petitioners in W.P. No. 842/2014 have impugned the scrutiny process conducted in the year 2011. After the order of the Scrutiny Committee they filed an appeal before the Election Commissioner, which was decided on 4.1.2012. It is noted that the petition is hit by the laches and further

that alter the 2011 scrutiny, the scrutiny of 2013 has also taken place. Therefore, there is no merit in these petitions.

13. It is also noted that the petitioners in W.P. Nos.14127 and 14128 of 2012 have impugned the scrutiny process of 2011. Thereafter they filed the appeals before the Election Commissioner who dismissed their appeals. Thereafter they availed the remedy before the Independent Arbitrator. These petitioners seek the benefit of order passed in W.P. No. 262/2014. However the said order cannot be applied to the case of the petitioners because they have availed their remedy against the order of the Scrutiny Committee in 2011. Both the Election Commissioner and the Independent Arbitrator have dismissed their appeals and found that they are 'inactive' clubs. Therefore the process of scrutiny and the availing of remedy against the same has been completed and no illegality has been made out in the said orders.

14. Under the circumstances, no case for interference is made out. Petitions are dismissed.

(R.A.) Petitions dismissed

2015 C L C 680
[Lahore]
Before Mrs. Ayesha A. Malik, J
SHAHIDA ILAHI----Petitioner
Versus
PROVINCE OF PUNJAB and others----Respondents
Writ Petitions Nos.6990 and 9234 of 2011, decided on 11th July, 2014.

(a) Pakistan (Administration of Evacuee Property) Act (XII of 1957)---

----Ss. 25(2)(s), 26 & 42---Displaced Persons (Compensation and Rehabilitation) Act (XXVIII of 1958), Ss.3 & 4---Constitution of Pakistan, Art.199---Constitutional petition---Sale of Evacuee property by Custodian---Grievance of petitioner was that her mother was lawful owner of property in question and authorities had illegally dispossessed her and demolished structure built over it---Contention of authorities that property in question was part of compensation pool and therefore, Custodian had no right to sell the property---Validity---Custodian obtained permission on 18-2-1959, to transfer property in question to mother of petitioner and thereafter received consideration for the property---Deed of conveyance was executed on 12-12-1959 in favour of mother of petitioner finalizing transfer of ownership rights in her favour---Valid and legal transfer of proprietary rights in the property was made by Custodian in favour of mother of petitioner---Contention of authorities that property in question was part of compensation pool and therefore, Custodian had no right to sell the property was not substantiated by any document---Authorities failed to show any notification on the basis of which property in question was acquired by Federal Government under Ss.3 & 4 of Displaced Persons (Compensation and Rehabilitation) Act, 1958---Merely based on any entry in revenue record, authorities could not claim to be owner of property in question---Authorities had taken illegal possession of petitioner's property under the garb of its anti-encroachment drive---Provincial Government acted without considering rights of ownership and possession, due process and principles of natural justice---Government with the help of its officers forcibly took possession of property from petitioner without any consideration of law through show of force which was unjustified and without sanction of law---High Court directed the authorities to hand over possession of property in question to petitioner---Petition was allowed in circumstances.
Mrs. Sultana Ahmed v. Sindh Industrial Trading Estate Ltd. through Managing Director and 2 others 2003 YLR 1760; Mst. Fazeelat Tahira v. Aftab Ahmad etc. 2000 UC 91; Ussama Tariq v. Administrator (Residual Properties)/Additional Commissioner (Revenue), Lahore Division, Lahore and 3 others 2003 SCMR 616; Mst. Badshah Begum and others v. The Additional Commissioner (R) Lahore Division and others 2003 SCMR 629; Sher Afzal Khan and others v. Haji Razi Abdullah and others 1984 SCMR 228; Aitzaz Ahsan and 2 others v. Municipal Committee, Gujrat 1994 CLC 255; Ijaz Ahmad and others v. The State and others PLD 2001 Lah. 94; Mussarrat Afza v. Shaukat Iqbal, Deputy Commissioner, District Mandi Bahauddin and 4 others 1998 CLC 733; Muhammad Aslam v.

Assistant Commissioner/Collector, Khanpur, District Rahim Yar Khan and 4 others 1998 CLC 1596; 'Muhammad Aslam v. Station House Officer and others 1993 MLD 152; Sher Muhammad and others v. Azmat Ali PLD 1968 Lah. 1171; Mehra v. Zahur Ahmad PLD 1971 Lah. 834; Maj. Mehtab Khan v. The Rehabilitation Authority and another PLD 1973 SC 451 and Talib Hussain v. Secretary, Evacuee Property and 7 others 1986 CLC 2536 ref.

(b) West Pakistan Land Revenue Act (XVII of 1967)---

----S. 45---Mutation---Status---Mutation simply records ownership but it is not a title document in itself and is for fiscal purposes---No one can claim ownership on the basis of mutation.

Uzair Karamat Bhandari for Petitioner (in W.P. No.6990 of 2011).
Rashid Mehmood Gill and Barrister Qadir Shah for Petitioners (in W.P. No.9324 of 2011).
Syed Nayyar Abbas Rizvi, Addl. A.-G., Mehmood A. Sheikh and Ghazanfar Khalid Saeed for Respondent Settlement Department.
Iftikhar Ahmad Mian for T.M.A.
Uzair Karamat Bhandri for Pro forma Respondents Nos.6 to 12 (in W.P. No.9234 of 2011).
Date of hearing: 28th April, 2014.

JUDGMENT

MRS. AYESHA A. MALIK, J.--- This single judgment decides upon the common issues arising in the W.Ps. Nos.6990 and 9234 of 2011.

2. Through these petitions, the petitioners have impugned the action of the respondents of trespassing on to the property of the petitioners measuring 29 Kanals, 19 Marlas and 187 Sq.ft. known as 34 Lawrence Road, Lahore (Property) and demolishing the superstructure built thereon and taking possession of the same.

3. The facts of this case are that the petitioner in W.P. No.6990 of 2011 and the pro forma respondents are the children of Col. (R) Dr. Ilahi Bakhsh and Begum Usman Abida Sultan. The dispute relates to the property measuring 29 Kanals, 19 Marlas and 187 sq.ft. known as 34 Lawrence Road, Lahore. The property was purchased from the Custodian by Begum Usman Abida Sultan. The sale was approved by the Ministry of Rehabilitation, Government of Pakistan under section 25(2)(s) of the Pakistan (Administration of Evacuee Property) Act, 1957 (Act of 1957) on 18-2-1959. The value of the property was assessed at Rs.144,000 which amount was duly paid by Col. .(R) Dr. Ilahi Bakhsh and his wife Begum Usman Abida Sultan through two cheques dated 17-8-1959..The Deed of Conveyance was executed by the Custodian of Evacuee Property, West Pakistan, Lahore (Custodian) in favour of Begum Usman Abida Sultan. This Deed of Conveyance dated 12-12-1959 was registered on 15-12-1959. The property was used for the purposes of Ilahi Clinic

which provided free medical treatment. The hospital was run by Dr. Ilahi Bakhsh for many years. However after his death, his children moved away and sometime later the hospital became disfunctional, but the property continued to be used in connection with medical services and facilities, such as Zeenat Laboratory and other Medical Laboratories.

4. On 28-3-2011, the respondents Nos.1-5 under the garb of an anti-encroachment drive trespassed into the property of the petitioners and demolished the superstructure built there and took possession of the property. No notice or prior warning was given to the petitioner or the pro forma respondents or the occupants of the medical facilities on the property. This act of the respondents has been impugned in the instant writ petition. Learned counsel for the petitioner also argued that Col.(R) Dr. Ilahi Bakhsh is buried on this property and his shrine (mazaar) is standing there and has not been damaged by the respondents.

5. W.P. No.9324 of 2011 has been filed by The Medical Laboratories (Pvt.) Ltd. on the ground that they are tenants of the petitioner in W.P. No.6990 of 2011 and the pro forma respondents 6-12. They have challenged the Impugned Action as tenants of the petitioner in W.P. No.6990 of 2011.

6. Learned counsel for the petitioners argued that the Impugned Action is illegal and in violation of the principles of natural justice. No notice or opportunity of hearing was given. Learned counsel argued that there was no reason or justification for demolishing the property of the petitioner and the pro forma respondents. The petitioners and the pro forma respondents have been deprived of their property in violation of the law. The Petitioners and the pro forma respondents in W.P. No.6990 of 2011 are not encroachers of the property as they are the owners in possession of the property and the petitioner in WP No.9324 of 2011 is their tenant and the respondent No.1 have illegally demolished their property and claim to be the owners of the said property. Learned counsel for the petitioner has relied upon the Deed of Conveyance of the property which shows that Begum Usman Abida Sultan was the absolute owner of the Property along with building and vacant property being 34 Lawrence Road, Lahore. He argued that the transfer in favour of Begum Usman Abida Sultan was approved on 18-2-1959 under section 25(2)(s) of the Act of 1957. He argued that a valid Deed of Conveyance was executed in favour of Begum Usman Abida Sultan which cannot be cancelled without a proper decree from the competent court. The respondent No.1 through the Impugned Action simply grabbed possession of the property of the petitioner and the pro forma respondents and claim it to be their own property. Learned counsel for the petitioner argued that the registered Deed of Conveyance in favour of Begum Usman Abida Sultan is still an effective legal document on the basis of which the petitioner and the pro forma respondents are the owners of the property. In this regard, he has placed reliance on the cases titled `Mrs. Sultana Ahmed v. Sindh Industrial Trading Estate Ltd. through Managing Director and 2 others' (2003 YLR 1760) and Mst. Fazeelat Tahira v. Aftab Ahmad etc.' (2000 UC 91). Learned counsel for the petitioner also argued that the registered Deed of Conveyance prevails over the

revenue record and the same cannot be cancelled or nullified through the Revenue Record. Learned counsel argued that after the Impugned Action the respondent, Government of Punjab had the property mutated in its favour which in itself is an illegal act. Learned counsel for the petitioner argued that the property was transferred to Begum Usman Abida Sultan and is a past and closed transaction which cannot be reopened and transferred by a notified officer. Learned counsel places reliance on the cases titled 'Ussama Tariq v. Administrator (Residual Properties)/Additional Commissioner (Revenue), Lahore Division, Lahore and 3 others' (2003 SCMR 616), Mst. Badshah Begum and others v. The Additional Commissioner (R) Lahore Division and others' (2003 SCMR 629) and 'Sher Afzal Khan and others v. Haji Razi Abdullah and others' (1984 SCMR 228). Learned counsel further argued that this is a complete transfer in favour of the petitioner and the pro forma respondents and the respondent No.1 could not have taken the possession and mutated the property in its favour. He further argued that due process was never followed hence the Impugned Action is illegal. Learned counsel further argued that the proprietary rights of the petitioner and the pro forma respondents are protected under the Constitution of Islamic Republic of Pakistan, 1973 and under the law. He further argued that the Petitioner and the pro forma respondents are entitled to restoration of their possession through the instant writ petition. In this regard he has placed reliance on the cases 'Aitzaz Ahsan and 2 others v. Municipal Committee, Gujrat' (1994 CLC 255), `Ijaz Ahmad and others v. The State and others' (PLD 2001 Lahore 94), `Mussarrat Afza v. Shaukat Iqbal, Deputy Commissioner, District Mandi Bahauddin and 4 others' (1998 CLC 733), 'Muhammad Aslam v. Assistant Commissioner/Collector, Khanpur, District Rahim Yar Khan and 4 others' (1998 CLC 1596) and 'Muhammad Aslam v. Station House Officer and others' (1993 MLD 152).

7. Learned counsel on behalf of the petitioner in W.P. No.9324 of 2011 adopts the arguments of the learned counsel for the petitioner and states that the petitioner being tenant has been paying the rent regularly and that the respondent No.1 has unlawfully dispossessed the petitioner from the property.

8. Report and parawise comments have been filed by the respondents Nos.3 and 4. In terms of the report and parawise comments filed, this property has been transferred in the name of the Provincial Government and now belongs to the Provincial Government vide mutation No.7661 dated 14-4-2011. The Provincial Government intends to build a Kidney Transparent and Dialysis Center. The Deed of Conveyance dated 15-12-1959 is a void document as the Federal Government acquired the property on 17-3-1959 after which the Custodian had no authority to transfer the property and execute the Deed of Conveyance. The Property was mutated in favour of the Federal Government on 15-6-1963 through mutation No.3581, hence there was no transfer ever made in favour of the petitioner or the pro forma respondents. The approval letter being relied upon by the petitioner dated 18-2-1959 is a bogus document as it is totally in contravention to section 3 of the Displaced-Persons (Compensation and Rehabilitation) Act, 1958 (Act of 1958). Learned Law Officer argued that even otherwise the Property was given to the

petitioner for a specific purpose. Hence it was a conditional sale. Since the purpose for which the sale took place was not being carried out, the Government of Punjab took the property from the Petitioners and the pro forma respondents.

9. Report and parawise comments have been filed by the respondent Administrator (Residual Properties), Board of Revenue, Punjab who is respondent No.14 in W.P. No.9324 of 2011. The report and parawise comments have been signed by the Chief Settlement Commissioner, Board of Revenue, Punjab, Lahore who is represented through two counsel Mr. Ghazanfar Khalid Saeed and Mr. Mehmood A. Sheikh, Advocates. The case of the respondent No.14 is that the Property became part of the compensation pool through notification issued under section 3 of Act of 1958. Therefore it is their case that the Custodian had no jurisdiction with respect to the property and could not have sold the same. Learned senior counsel has relied upon the cases titled 'Sher Muhammad and others v. Azmat Ali' (PLD 1968 Lahore 1171), 'Mehra v. Zahur Ahmad' (PLD 1971 Lahore 834), 'Maj. Mehtab Khan v. The Rehabilitation Authority and another' (PLD 1973 SC 451) and 'Talib Hussain v. Secretary, Evacuee Property and 7 others' (1986 CLC 2536) to urge the point that the Custodian could not have sold the property to the Begum Usman Abida Sultan. The case of the respondent Chief Settlement Commissioner is that the property was notified and formed part of the compensation pool. Thereafter mutation No.3581 was issued in favour of the Federal Government on 15-6-1963. The Federal Government thereafter transferred the property in favour of the Provincial Government vide mutation No.7661 dated 14-4-2011. The petitioners are therefore trespassers and encroachers upon the government property and the Impugned Action was strictly in accordance with law.

10. Report and parawise comments have also been filed on behalf of the respondents Nos.6-12 who are the legal heirs of Lt. Col. Dr. Illahi Buksh and they have essentially reiterated the case as argued on behalf of the petitioners.

11. Heard the learned counsel for the parties and have gone through the record available on the file.

12. The petitioner along with respondents Nos.6-12 rely upon Deed of Conveyance dated 12-12-1959 registered on 15-12-1959 bearing Khasra Nos.309, 310, 311 and 312 of Khasra Imrati of Mozang, Lahore as their title document on the basis of which they are owners of the Property. This Deed of Conveyance is between the Custodian and Begum Usman Abida Sultan wife of Lt. Col. Illahi Buksh. The recital in the Deed of Conveyance provides that this was Lala Haveli Shah and Sardari Lal sons of Rai Bahadur Sundardas, caste Khatri Hindu who became evacuees from Pakistan as they migrated from Pakistan and settled in India. The property became evacuee property under the provisions of the Act of 1957. Consequently the property vested in the custody of the Custodian. The Government of Pakistan through its letter dated 18-2-1959 addressed to the Custodian granted approval under section 25(2)(s) of the Act of 1957 to sell and transfer the said property to Begum Usman Abida Sultan as per the price assessed by the Custodian

under section 26 of the Act of 1957 and upon cash payment. Two other conditions were imposed, that the property will be utilized for building a hospital and that it should be constructed and completed within two years' time. The value of the property was fixed at Rs.144,000 which was paid through cheque No.006953 dated 17-8-1959 and cheque No.008982 dated 17-8-1959. Thereafter the property was transferred to Begum Usman Abida Sultan through the Deed of Conveyance dated 12-12-1959.

13. The basic issue before this Court is whether the Custodian had the power to sell the property under the Act of 1958. The Act of 1958 came into force on 26-3-1958 whereas in terms of the Deed of Conveyance, the approval was granted by the Federal Government in favour of the Custodian under section 25(2)(s) on 18-2-1959. It is the case of the respondents that this property became part of the compensation pool and could not have been sold by the Custodian. The respondents have relied upon SRO No.392 dated 17-3-1959 in their parawise comments to urge the point that the property was acquired-under section 3 of the Act of 1958 and therefore could not be sold by the Custodian. However, they have not placed a copy of the said notification on the record nor was it produced during arguments. The petitioners have placed a copy of SRO No.392 dated 17-8-1959 on the record to show that SRO No.392 is not relevant as it essentially notifies the Displaced Persons (Land Settlement) Rules, 1959. Therefore it appears that there is no specific notification issued under section 3 of the Act of 1958 with respect to this property. Under the Act of 1957, the Custodian is vested with all Evacuee property with effect from 1-3-1947. The Custodian has the power under section 25(2)(s) of the Act of 1957 to transfer any evacuee property, notwithstanding anything contained in any law or agreement to the contrary relating thereto section 26 of the Act of 1957 provides that the Custodian may determine the value of the property vesting in him and section 42 of the Act of 1957 provides that Every order purporting to be made or signed by the Custodian under this Act shall be presumed to have been made or signed by the Custodian until the contrary is proved. Therefore in terms of the Act of 1957, the property vested in the Custodian. The Custodian obtained permission to transfer the Evacuee Property to Begum Usman Abida Sultan on 18-2-1959 and thereafter received the consideration for the property. The Deed of Conveyance was executed on 12-12-1959 in favour of Begum Usman Abida Sultan finalizing the transfer of ownership rights in her favour. To the mind of this Court a valid and legal transfer of proprietary rights in the property was made by the Custodian in favour of Begum Usman Abida Sultan (the petitioner and respondents Nos.6-12 being her legal heirs). The argument raised by the respondents that the property was part of the compensation pool and therefore the Custodian had no right to transfer the property is not substantiated by any document. They have not been able to show any notification on the basis of which this property was acquired by the Federal Government under sections 3 and 4 of the Act of 1958. The petitioners have relied upon a gazette Notification No.U-8-79/3113 dated 21-8-1959 which provides that any notification issued under section 3 of the Act of 1958 will not be applicable to property for the acquisition or sale of which sanction of the Federal Government under the Act of 1957 has already been given. Therefore in order for the property to

be transferred under the Act of 1958 into the compensation pool, it was necessary that it was acquired under section 3 of the Act of 1958. It appears that the property was never acquired under section 3 of the Act of 1958, hence never formed part of the compensation pool and the Custodian who had already taken permission for selling the property from the Federal Government executed the Deed of Conveyance, being the competent authority. Furthermore Notification No.U-8-79/3113 dated 21-8-1959 read with the permission accorded on 18-2-1959 shows that the Property was never acquired under section 3 of the Act of 1958 and it did not form part of the compensation pool.

14. Even otherwise to the mind of this Court, the Federal Government as the owner of the property, gave permission to sell the property to Begum Usman Abida Sultan on 18-2-1959. The respondents Nos.1-4 have not challenged or questioned the permission given on 18-2-1959 or the Deed of Conveyance dated 12-12-1959 to date before any forum. The property has been in the possession of Begum Usman Abida Sultan and then her legal heirs since 12-12-1959 being more than 52 years. In all this time the ownership and possession of the property remained in favour of Begum Usman Abida Sultan and her legal heirs which was never questioned or challenged by the respondents Nos.1-4 before any forum. However suddenly on 28-3-2011 the respondent No.1 on an anti-encroachment drive demolished the building and superstructure on the property of the petitioners on the understanding that they became owners of the property vide mutation No.7661 dated 14-4-2011. There is nothing on the record which explains this mutation or why the Federal Government effected mutation No.7661 in favour of respondent No.1. The Federal Government ceased to be the owner of the property on 12-12-1959 when it executed the Deed of Conveyance through the Custodian in favour of Begum Usman Abida Sultan. Effectively the Federal Government entered into an agreement to sell with Begum Usman Abida Sultan through the Custodian on 18-2-1959 when they approved transfer of the property in favour of Begum Usman Abida Sultan. The subsequent mutation in favour of the Federal Government on 15-6-1963 is of no legal consequence because the Property had already been transferred and sold in favour of Begum Usman Abida Sultan. Even otherwise mutation dated 14-4-2011 relied upon by the Provincial Government merely shows that property has been registered in the revenue record as being in the ownership of the Government of Punjab. However it does not show or prove title to the said property. It is settled law that mutation simply records ownership but it is not a title document in itself. It is maintained for fiscal purposes and on the basis of mutation No.7661, the Government of Punjab cannot claim to be the owner of the Property. Furthermore there is a registered Deed of Conveyance in favour of Begum Usman Abida Sultan which cannot be cancelled by a mere entry in the revenue record.

15. The respondents Nos.1-4 have raised several arguments to justify the Impugned Action. Learned Law Officer argued that this was at best a conditional sale where the property in question had to be used for the purposes stipulated in the Deed of Transfer. Since the hospital was never built, the condition was violated, hence the Provincial Government had every right to demolish the buildings on the Property

and take over its possession. This argument has no merit because in the first instance the Government of Punjab should have issued notices prior to any act of demolition explaining the reasons for demolition. Secondly they claim to be owners since 14-4-2011 yet the Impugned Action took place on 28-3-2011 prior in time to their own claim. Further they are not party to the Deed of Conveyance in which they alleged breach of conditions. For 52 years the property has been in the ownership and possession of the petitioners. The Federal Government has never objected to the sale, transfer or possession in their favour nor have they claimed any breach under the Deed of Conveyance. The Provincial Government has no right whatsoever in the property and the mutation in its favour dated 14-4-2011 does not create any right in their favour. If at all the Government of Punjab lay any claim to the property, due process should have been followed before any demolition or taking possession. The Impugned Action was taken without following due process and without any justifiable reasons. If the respondents dispute title in favour of the petitioners or even the documents in their favour then such a dispute should have been raised before the competent forum. Merely based on an entry in the revenue record, the respondent No.1 cannot claim to be the owner of the property. Therefore, respondent No.1 has taken illegal possession of the petitioners' property under the garb of its anti-encroachment drive. After hearing all the parties at length, it appears that the Government of Punjab acted without considering the rights of ownership and possession, due process and the principles of natural justice. The respondent No.1 with the help of its officers forcibly took possession of the property from the petitioners without any consideration of the law through a show of force which was totally unjustified and without the sanction of law.

16. Therefore, for the aforementioned reasons, this writ petition is allowed. The respondent No.1 is directed to hand over the possession of the entire property to the petitioners within 24 hours. The petitioners are at liberty to proceed against the respondent No.1 to seek damages for the loss that they have suffered on account of the illegal acts of the Provincial Government.

MH/S-123/L Petition allowed.

PLJ 2015 Lahore 421
Present: **MRS. AYESHA A. MALIK, J.**
MUZAFFAR ALI ANJUM, etc.--Petitioners
versus
GOVERNMENT OF PUNJAB, etc.--Respondents
W.P. No. 19330 of 2014, decided on 28.11.2014.

Punjab Criminal Prosecution Service (Constitution, Power & Service) Act, 2001--

----Ss. 5 (1) & (3)--Sindh Civil Servants Act, 1973--S. 26--Promotion and transfer--Prosecution department--Appointments by transfer competent authority--Superintendence and administration of service--Issue of competent authority for purpose of transfer and posting--Validity--Government of Sindh has power to order transfer and posting of members of service under Section 5 (1) and (3) of Act, 2009--Power of transfer and posting vests with Sindh Government, to be exercised by secretary law who has been notified by prosecution department. [P. 425] A & B

Mr. Muhammad Umer Riaz and Mr. Saqib Haroon Chishti, Advocates for Petitioners (in W.P. No. 19330, 19613, 19614, 19615 and 19616 of 2014).
Mr. Zubair Afzal Rana, Advocate for Petitioner (in W.P. No. 20545/2014).
Sheikh Muhammad Siddiq-II, Advocate for Petitioner (in W.P. No. 33302/2014).
Syed Nayyar Abbas Rizvi, Addl. AG along with *Syed Ehtesham Qadir,* Prosecutor General, *Mr. Abdul Samad,* Addl. Prosecutor General, *Muhammad Mumtaz Dogar,* Additional Secretary and Rana Shaukat Ali, Law Officer for Respondents.
Date of hearing: 28.11.2014.

JUDGMENT

This common judgment decides upon the issues raised in the Writ Petitions detailed in Schedule 'A', appended with this judgment.

2. The Petitioners are all working with the Prosecutor General Punjab. They are aggrieved by the transfer orders issued by the Secretary Government of Punjab, Public Prosecution Department in this case dated 30.06.2014. The main grievance of the Petitioners is that the Respondent No. 2, Secretary Prosecution Department is not competent to issue the transfer orders because under the Punjab Criminal Prosecution Service (Constitution, Power & Service) Act, 2006 (2006 Act), the competent authority is the Prosecutor General Punjab, being the Respondent No. 3.

3. The Petitioner in W.P. No. 19330/2014 is Assistant District Public Prosecutor (ADPP) (BS-17) who was transferred *vide* order dated 30.6.2014 from District Sheikhupura to District Rahim Yar Khan. The Petitioner in W.P. No. 19613/2014 is ADPP who was transferred *vide* order dated 30.6.2014 from District Sheikhupura to District Nankana Sahib. The Petitioner in W.P. No. 19614/2014 is ADPP who was transferred *vide* order dated 30.6.2014 from District Sheikhupura to District Attock.

The Petitioner in W.P. No. 19615/2014 is ADPP who was transferred *vide* order dated 30.6.2014 from District Sheikhupura to District Rahim Yar Khan. The Petitioner in W.P. No. 19616/2014 is ADPP who was transferred *vide* order dated 30.6.2014 from District Sheikhupura to District Gujranwala. The Petitioner in W.P. No. 20545/2014 is ADPP who was transferred *vide* order dated 30.6.2014 from District Lahore to District Gujranwala. The Petitioner in W.P. No. 33302/2014 is ADPP who was transferred *vide* order dated 9.12.2014 from District Lahore to District Kasur.

4. Learned counsel for the Petitioners argued that the Petitioners are public servants by virtue of Section 18 of the 2006 Act. The Prosecutor General is the head of the Service in terms of Section 5(2) of the Act, 2006. The Prosecutor General is the competent authority to pass all orders of transfer and posting as has been laid down by the Hon'ble Supreme Court of Pakistan in the case titled *Province of Sindh through Chief Secretary, Sindh, Sindh Secretariat and another v. Prosecutor General Sindh, Criminal Prosecution Department and Others* (2012 SCMR 307). Learned counsel argued that in terms of the dicta laid down by the Hon'ble Supreme Court of Pakistan, the Prosecutor General is the competent authority to order the transfer and posting of his subordinates because he is the head of the Service. He is responsible for the superintendence of the working of all Prosecutor General, Deputy Prosecutor Generals and Additional Prosecutor Generals. The Prosecutor General is in a better position to make decisions vis-a-vis transfer of members of the Service because he is the administrative head. Learned counsel further argued that transfer and posting falls within the administrative control and supervision of the Prosecutor General. He argued that the terms and conditions of the Service are subject to the 2006 Act. Learned counsel further argued that the Petitioners are public servants. Hence this Court has jurisdiction.

5. Report and parawise comments have been filed by the Respondents. Learned Additional Advocate General (AAG) argued that the judgment of the Hon'ble Supreme Court of Pakistan cited at 2012 SCMR 307 (supra) is not applicable to the case of the Petitioners. He further argued that the said judgment was rendered in relation to the Sindh Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2009 (2009 Act). He argued that there are two distinguishing features. The first distinguishing feature is that under the 2009 Act, no rules have been framed whereas under the 2006 Act, Punjab Criminal Prosecution Service (Conditions of Service) Service Rules, 2007 (2007 Rules) have been made in exercise of the powers conferred under Section 15 of the 2006 Act. The second distinguishing feature is that the prosecution service in Sindh is headed by the Prosecutor General because the relevant Secretary there is the Special Secretary Law & Parliamentary Affairs. In the Punjab, he argued that there is a Secretary, Prosecution Department who is the head of the prosecution department and all the transfer and posting are ordered by the Secretary Prosecution Department. This is in line with all departments in the Government of Punjab, where for BPS-17 and above the Secretary is the appointing authority. Under the 2006 Act and 2007 Rules, the Secretary Prosecution Department is the appointing authority for BPS-17 and

above. Since these are appointments by transfer the competent authority is the Secretary Prosecution Department. He further argued that the Petitioners are bound by the orders of the competent authority and their reliance on the judgment of the Hon'ble Supreme Court of Pakistan is misplaced. He stated that under the Punjab Criminal Prosecution Service (Conditions of Service) Rules, 2007 and the Prosecutor General (Miscellaneous Posts) Service Rules, 2011 the following are the Appointing Authorities in the Prosecution Department:--

1.	Director Human Resource	:	BS-1 to BS-4
2.	Prosecutor General	:	BS-5 to BS-15
3.	Secretary Prosecution	:	BS-16 to BS-18
4.	Chief Minister	:	BS-19 and above.

The Appointing Authorities are competent to initiate disciplinary proceedings/suspend or dismiss an officer under Section 2 of the Punjab Employees Efficiency, Discipline and Accountability Act, 2006 read with Notification No. SORI (S&GAD) 1-30/2003 dated 13.02.2013 issued under Section 2 of the Act ibid.

6. Heard the learned counsel for the parties and gone through the record.

7. The Petitioners are all ADPPs in BPS-17, who have been transferred from their existing postings by the Secretary Prosecution Department. The 2006 Act establishes the prosecution department which includes the Punjab Criminal Prosecution Service. Under Section 4 of the 2006 Act, the Service shall consist of the Prosecutor General, Additional Prosecutors General, Deputy Prosecutors General, District Public Prosecutors, Deputy District Public Prosecutors and Assistant District Public Prosecutors. Under Section 5 of the 2006 Act, the superintendence and administration of the Service shall vest in the Prosecutor General. Under Section 8(3) of the 2006 Act, all the appointments, except that of the Prosecutor General, to various posts in the Service, shall be made through initial recruitment in the manner as may be prescribed. Section 8(5) of the 2006 Act provides that the promotion or transfer in the Service shall be made in the manner as may be prescribed. By virtue of the rule making power under Section 15 of the 2006 Act, the 2007 Rules have been framed. Rule 4(1) of the 2007 Rules provides for the manner of appointment such that appointment to a post in the Service may be through initial recruitment, promotion and transfer. Rule 7 of the 2007 Rules provides that appointment through transfer may be made from amongst the eligible officers in accordance with the provisions with the schedule. The schedule appended with the 2007 Rules provides that for the post of ADPP the appointing authority is the Administrative Secretary. Therefore the 2006 Act and 2007 Rules when read together the competent authority for the purposes of appointment through transfer is the Secretary Prosecution Department.

8. The Petitioners have relied upon 2012 SCMR 307(supra) to urge the point that the competent authority is the Prosecutor General because he is the Administrative Head of the Service, he supervises the Service and all members of the Service report to him. In the said judgment when considering the issue of the competent authority for he purposes of transfer and posting, the relevant law was the 2009 Act. In that

case it was argued that the Government of Sindh has the power to order the transfer and posting of members of the Service under Section 5 (1) and (3) of the 2009 Act. The argument relied upon the Sindh Government Rules of Business, 1986, read with Sindh Civil Servants (Appointment, Promotion and Transfer) Rules, 1974 which rules are framed under Section 26 of the Sindh Civil Servants Act, 1973. The argument there was that the power of transfer and posting vests with the Sindh Government, to be exercised by the Secretary Law who has been notified by the prosecution department. The distinction drawn by the learned AAG is that in the instant case the 2006 Act have to be read with the 2007 Rules in order to settle this controversy whereas before the Hon'ble Supreme Court of Pakistan under the 2009 Act no rules have been framed. To the mind of this Court, this distinction draws the instant cases out of the ambit of 2012 SCMR 307 (supra). In the instant case the 2007 Rules categorically provide for the competent authority with regard to appointment by transfer whereas in the matter before the Hon'ble Supreme Court of Pakistan no such rules were available. Therefore reliance on the dicta of the Hon'ble Supreme Court of Pakistan with respect to the administration head and supervisory head would not be relevant to the case of the Petitioners.

9. In view of the aforesaid, all these Petitions are dismissed.

(R.A.) Petitions dismissed.

2015 P L C (C.S.) 547
[Lahore High Court]
Before Mrs. Ayesha A. Malik, J
ATHAR HUSSAIN KHAN and others
Versus
FEDERATION OF PAKISTAN through Principal Secretary and others
Writ Petition No.11192 of 2014, decided on 22nd December, 2014.

Constitution of Pakistan---

----Arts. 199 & 212---Federal Service Tribunals Act (LXX of 1973), S.4---Constitutional petition--- Civil service--- Promotion--- Objective criteria---Attributes of integrity, general reputation and perception---Scope---Discrimination---Petitioners were recommended for promotion by Central Selection Board but Competent Authority referred their cases back for reconsideration on the attributes of integrity, general reputation and perception---Plea of petitioners was that they had been discriminated against and that the attributes of integrity, general reputation and perception were not an objective criteria on the basis of which promotion could be denied---Validity---Petitioners were considered for promotion by the Central Selection Board and were recommended for the same having fulfilled the objective criteria---Names of the petitioners were provided in the list of employees recommended for promotion---Attributes of integrity, general reputation and perception were out of five marks---If an employee under consideration had earned less than three marks, he might be deferred or superseded by the Central Selection Board with reasons to be recorded in writing---If an employee had earned three marks then he/she should be awarded five marks---Summary placed before the Competent Authority had provided for the marks as per the objective criteria---Marks for petitioners on attributes of integrity, general reputation and perception were five as they had earned three marks---No specific information was available before the Competent Authority on the basis of which it could have concluded that Central Selection Board did not give due consideration to the attributes of integrity, general reputation and perception in the case of petitioners---Authority could not have singled out the cases of petitioners on the ground that Central Selection Board had decided upon the attributes of integrity, general reputation and perception in a mechanical manner without due consideration--- Competent Authority had recorded that the recommendations being confirmed were for those employees who had the public reputation and perception of being honest and not corrupt---Nothing was before the Competent Authority on the basis of which it could have come to such conclusion---Competent Authority had promoted some and referred others for reconsideration without just cause which was discrimination---Decision of Competent Authority was not fair and transparent as no reason had been given for such decision---Authority was required to give basis for its decision so as to ensure transparency, fairness and good governance---Petitioners had a right to be considered for promotion which would include the right to know as to why their cases had been singled out---Subjective attributes with regard to integrity and reputation would not play a dominant role in the promotion of senior civil servants--

-Authority should give due consideration to the collective wisdom of Central Selection Board on the attributes of integrity, general reputation and perception as same were not objective in nature---Authority should rely on the collective wisdom of Central Selection Board which had objectified the assessment---Civil servants should be promoted on the basis of an objective criteria which could be assessed and graded in a fair manner to ensure transparency and good governance---No justification existed to require the Central Selection Board to deliberate further on integrity, general reputation and perception---Such attributes had been factored into the objective assessment criteria and were subject to collective wisdom and a formula for assessment---No re-assessment on such attributes could be ordered unless concrete material was provided which would justify rethinking integrity, general reputation and perception---Decision of Authority was discriminatory which would amount to abuse of discretion---Said decision of re-assessment on attributes of integrity, general reputation and perception was not based on any cogent reason which was set aside---Attributes of integrity, general reputation and perception would relate to the fitness of employee---Assessment of employees for fitness had been excluded from the ambit of S.4 of Federal Service Tribunals Act, 1973---Bar of Art.212 of the Constitution was not attracted to the present case---Authorities were directed to promote the petitioners forthwith from the same date when other recommendations were approved and notified---Constitutional petitions were accepted in circumstances.

Orya Maqbool Abbasi v. Federation of Pakistan through Secretary Establishment and others 2014 SCMR 817; Syed Mahmood Akhtar Naqvi and others v. Federation of Pakistan and others PLD 2013 SC 195; Liaqat Ali Chughtai v. Federation of Pakistan through Secretary Railways and 6 others PLD 2013 Lah. 413; Abdul Wahab and another v. Secretary, Government of Balochistan and another 2009 SCMR 1354; Habibullah Energy Limited and another v. WAPDA through Chairman and others PLD 2014 SC 47; Dr. Habibur Rahman v. The West Pakistan Public Service Commission, Lahore and 4 others PLD 1973 SC 144; Government of Pakistan through Establishment Division, Islamabad and 7 others v. Hameed Akhtar Niazi, Academy of Administrative, Walton Training, Lahore and others PLD 2003 SC 110 and Asdullah Mangi and others v. Pakistan International Airlines Corporation and others 2005 SCMR 445 ref.
Orya Maqbool Abbasi v. Federation of Pakistan through Secretary Establishment and others 2014 SCMR 817 rel.

Ms. Asma Jehangir and Haris Azmat for Petitioners (in W.P. No.11192 of 2014).
Haris Azmat and Ali Saleem for Petitioners (in W.P. No.28201 of 2014).
Saad Rasul for Petitioners (in W.P. No.14612 of 2014).
Dr. Ikram ul Haq and Mansoor Beg for Petitioners (in W.Ps. Nos.12094 and 3340 of 2014).
Riaz Ahmad Tahir for Petitioners (in W.Ps. Nos.17924 and 17944 of 2014).
Said Ijaz Hotiana for Petitioners (in W.P. No.19657 of 2014).
Ch. Amir Rehman, D.A.-G. along with Shams-ud-Din, Section Officer, Establishment Division, Islamabad for Respondents.

Ibrar Ahmad for Respondent FRB (in W.P. No.14612 of 2014).
Izhar ul Haq for Respondent FRB (in W.P. No.12094 of 2014).
Date of hearing: 11th December, 2014.

JUDGMENT

MRS. AYESHA A. MALIK J.--- This common judgment decides upon the issues raised in the Writ Petitions detailed in Schedule 'A', appended with this judgment.

2. The petitioners are civil servants in BS-20. The petitioners were recommended for promotion by the Central Selection Board (CSB), however the Competent Authority, being the Prime Minister referred their cases back to the CSB for reconsideration on the attributes of integrity, general reputation and perception. The grievance of the petitioners is that they have been discriminated against and that the attributes of integrity, general reputation and perception are not an objective criteria on the basis of which promotion can be denied.

3. The petitioners in W.Ps. Nos.12094, 3340 and 14612 of 2014 belong to the Inland Revenue Service. The petitioner in W.P. No.17924 of 2014 belongs to Railways (Commercial and Transportation) Group. The petitioner in W.P. No.17944 of 2014 belongs to the Railways (Civil Engineering Department). The petitioners in W.P. No.19657 of 2014 belong to the Income Tax Group. The petitioner in W.P. No.28201 of 2014 belongs to Pakistan Administrative Service Group. The grievance of all the petitioners in the stated Writ Petitions is identical to that of the petitioners in W.P. No.11192 of 2014.

4. Mr. Haris Azmat and Mr. Ali Saleem, Advocates for the petitioners (in W.P. No.28201 of 2014), Mr. Riaz Ahmad Tahir, Advocate for the petitioners. (In W.Ps. Nos.14612 and 17944 of 2014) and Mr. Sajid Ijaz Hotiana, Advocate for the Petitioners (in W.P. No.19657 of 2014) adopted the arguments made by the learned counsel for the Petitioners in W.P. No.11192 of 2014).

5. The facts of the case are that the petitioners are all civil servants in the Pakistan Administrative Service Group (PASG) in BS-20. The promotion of the petitioners from BS-20 to BS-21 is through selection and recommendation by the CSB. As per Promotion Policy 2007, 70% marks are allocated to the quantification of Personal Evaluation Reports (PER) in the previous and present grades while 15% of the marks are allocated to the quantification of the Training Evaluation Reports (TER) and the remaining 15% marks are allocated for evaluation by the CSB. The minimum marks required are 75%. The recommendations of the CSB are then forwarded to the Competent Authority, being the Prime Minister, for appointment. The grievance of the petitioners is that they were recommended by the CSB, however the Competent Authority did not confirm the recommendations of the petitioners and instead sent the matter back to the CSB for reconsideration with respect to attributes of integrity, general reputation and perception. In terms of the summary issued by the Prime Minister's Office dated 3-4-2014, the Competent

Authority observed that CSB failed to apply its mind and exercise its discretion in an objective manner in evaluating the attributes of general reputation and perception with reference to the petitioners. The CSB was required to be mindful of these attributes which were inserted in the objective assessment form in order for the CSB to evaluate officers not only on the basis of integrity as reported in the ACRs and PERs but also to form a collective opinion as to the general reputation and perception of the officers for consideration in a reasonable, fair and equitable manner. The Competent Authority was of the opinion that the CSB had made its recommendations in a mechanical manner without application of mind. He therefore, required the CSB to reassess the general reputation and perception related to the petitioners.

6. Learned counsel for the petitioners argued that the petitioners were promoted in February 2013, however on account of the case titled Orya Maqbool Abbasi v. Federation of Pakistan through Secretary Establishment and others (2014 SCMR 817) before the Hon'ble Supreme Court of Pakistan, their promotions/appointments were withdrawn. Subsequently the petitioners were again considered by the CSB and were recommended for promotion. Out of 124 officers in BS-20, 45 were recommended for promotion. The Competent Authority promoted 37 officers and deferred the promotion of 18 officers which included the petitioners. Learned counsel argued that the deferment of promotion of the petitioners on the ground that the CSB had not applied its mind and did not give due weightage to attributes of integrity, general reputation and perception is contrary to the dicta laid down in 2014 SCMR 817 (supra). Further argued that the selection of some officers from those recommended and deferment of others, tantamounts to abuse of discretion. She argued that there is no basis or objective criteria which compelled the Competent Authority to promote some and defer others. She further argued that it was an exercise of pick and choose because the CSB was told to rethink the attributes of integrity, general reputation and perception with respect to the petitioners whereas the recommendations of the other officers on these attributes were not questioned. This amounts to abuse of discretion and discrimination.

7. She further argued that in terms of the dicta laid down by the Hon'ble Supreme Court of Pakistan, the discretion to award marks on the basis of integrity, general reputation and perception cannot be exercised subjectively or on the basis of personal information, opinion and perceptions. The decision must be based on information which is based on the record. She argued that the Competent Authority was not justified to pick out certain officers for promotion and require the re-assessment of others on their general reputation and perception. She argued that good governance is based upon a transparent decision making process. The service record of the petitioners was before the CSB and the Competent Authority, in which there is no room for perceptions. She further argued that the case of the petitioners was sent back to the CSB by the Competent Authority without assigning any reason, without any explanation as to why their cases were singled out. Learned counsel for the petitioners places reliance on the cases titled Syed Mahmood Akhtar Naqvi and others v. Federation of Pakistan and others (PLD 2013 SC 195), Liaqat

Ali Chughtai v. Federation of Pakistan through Secretary Railways and 6 others (PLD 2013 Lahore 413), 2014 SCMR 817 (supra) and Abdul Wahab and another v. Secretary, Government of Balochistan and another (2009 SCMR 1354). She further argued that discretion wherever and by whomever exercised must be structured and is never absolute. It is also subject to judicial review. Reliance has been placed on the case titled Habibullah Energy Limited and another v. WAPDA through Chairman and others (PLD 2014 SC 47).

8. Mr. Saad Rasul, Advocate for the petitioner (In W.P. No.14612 of 2014) argued that in his case the petitioner is a civil servant of the Internal Revenue Service, posted as Commissioner Inland Revenue Service (BS-20), Regional Tax Office, Lahore. He has an unblemished service record, of over 35 years which includes about 30 years of service in the Federal Board of Revenue. As a testament to his unblemished career, the petitioner has been appreciated by the Full Bench of the Hon'ble Supreme Appellate Court of Gilgit Baltistan vide its order dated 12-10-2009 and judgment dated 5-10-2010 in SMC No.13/2009. He further argued that no disciplinary or departmental proceedings are pending against the officer. The petitioner secured the highest marks in his evaluation made by his parent department being the FBR as well as in the PER, TER and yet he was not approved by the Competent Authority. Learned counsel argued that by sending the petitioner's recommendation for reconsideration by the CSB, the Competent Authority ignored the dicta laid down in the case cited at 2014 SCMR 817 (supra). No cogent reason has been given for reconsideration and there is nothing on the service record which justifies such a decision.

9. Dr. Ikram ul Haq and Mr. Mansoor Beg, Advocates for the petitioners (In W.Ps. Nos.12094 and 3340 of 2014) argued that the petitioners belong to Inland Revenue Service. In the cases of the petitioners, the Prime Minister only confirmed 11 officers out of 16 in W.P. No.12094 of 2014, and 17 in W.P. No.3340 of 2014, recommended by the CSB. No reasons have been conveyed for this decision. Learned counsel stated that under section 9(3) of the Civil Servants Act, 1973, (1973 Act) promotion to posts in basic pay scales 20 and 21 and equivalent shall be made on the recommendations of a Selection Board which shall be headed by the Chairman Federal Public Service Commission. Further argued that Rule 7 of the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973 (1973 Rules) also requires the Competent Authority to act on the recommendation of the CSB as it says Promotions and transfer to posts in basic pay scales 2 to 13 and equivalent shall be made on the recommendation of the appropriate Departmental Promotion Committee and promotions and transfer to posts in basic pay scales 19 to 21 and equivalent shall be made on the recommendation of the Selection Board. Learned counsel further argued that section 9(3) of the 1973 Act and Rule 7 of the 1973 Rules contain the word 'shall' confirming that these provisions are mandatory and not mere directory. The deliberate use of the word 'shall' in the statute and corresponding rules make it clear that the recommendations of the CSB are mandatory in nature and the Prime Minister has to act on the same. Learned counsel further argued that the decision of the Competent Authority to send the

recommendations back to the CSB for reconsideration is not based on any record nor is there any reason available. Learned counsel argued that promotion cannot be decided on the basis of personal information, opinion or perception as held in the case cited at PLD 2013 Lahore 413 (supra).

10. Report and parawise comments have been filed by the respondents. Learned D.A.-G. raised an objection with respect to the maintainability of these petitions on the ground that the bar of Article 212 of the Constitution of Islamic Republic of Pakistan, 1973 (Constitution) is applicable. However this ground was over-ruled by this Court, given that the attributes of integrity, general reputation and perception relate to the fitness of officers for the post in question and it is settled law that assessment of officers for fitness is excluded from the ambit of the Service Tribunal under section 4 of the Federal Service Tribunals Act, 1973 (Act of 1973). Therefore the bar of Article 212 of the Constitution is not attracted to the present cases.

11. The next objection raised by the learned D.A.-G. was that the order of the Competent Authority was not justiciable because it is an interim order and on the ground that the order itself protects the rights of the petitioners by keeping their seats vacant until the matter is reconsidered by the CSB. Learned D.A.-G. argued that this Court cannot interfere with an interim order. Furthermore given that the seats have been kept vacant, the petitioners have no grievance and no cause of action against the respondents. Learned D.A.-G. placed reliance on the case titled Dr. Habibur Rahman v. The West Pakistan Public Service Commission, Lahore and 4 others (PLD 1973 SC 144). Learned D.A.-G. argued that the petitioners have no vested right on the basis of which these petitions have been filed. A civil servant cannot ask for promotion as of right and the refusing of promotion falls within the exclusive domain of the executive authority. In the event that a promotion has been denied it cannot be termed as a denial of any fundamental right and therefore the petitions are not maintainable. Reliance has been placed on the case titled Government of Pakistan through Establishment Division, Islamabad and 7 others v. Hameed Akhtar Niazi, Academy of Administrative, Walton Training, Lahore and others (PLD 2003 SC 110). Learned D.A.-G. further argued that no case of discrimination is made out. The executive is required to provide similarity of treatment but is not required to give identical treatment. Due process was followed and the Competent Authority has not deferred the cases of the petitioners nor any adverse remarks have been issued against the petitioners. Simply reconsideration has been called for while ensuring that the seats remain vacant so as not to prejudice the rights of the petitioners. Reliance has been placed on the case titled Asdullah Mangi and others v. Pakistan International Airlines Corporation and others (2005 SCMR 445). Learned D.A.-G. further argued that the recommendations of the CSB are advisory in nature and are not binding on the Competent Authority. Reliance has been placed on the case titled Dr. Habibur Rahman v. The West Pakistan Public Service Commission, Lahore and 4 others (PLD 1973 SC 114).

12. With respect to the issue raised against the criteria of integrity, general reputation and perception, learned D.A.-G. stated that these are objective in nature

and have been made a part of the Promotion Policy, 2007 after the case cited at 2014 SCMR 817 (supra) giving full consideration to the dicta of the Hon'ble Supreme Court of Pakistan. Learned D.A.-G. further argued that the recommendations of the CSB are to be given weightage by the Competent Authority, however ultimately it is his prerogative. In these cases as per the summary, he required a clear decision on the attributes of integrity, general reputation and perception, hence he asked the CSB to reconsider the cases of the petitioners with specific reference to the said attributes.

13. Heard the learned counsel for the parties and gone through the record available on the file.

14. All the petitioners have challenged the decision of the Competent Authority wherein he has referred their cases back to the CSB for reconsideration on attributes of integrity, general reputation and perception. The learned D.A.-G. raised an objection with respect to the maintainability of these petitions on the ground that the decision of the Competent Authority being an interim order could not be interfered with because it fell within the domain of the executive authority and that it protects the rights of the petitioners by keeping their seats vacant until the matter is finally decided. In the cases before the Court, the petitioners were all duly considered for promotion by the CSB and were recommended for promotion having fulfilled the objective criteria set out in the Promotion Policy, 2007. The Competent Authority approved the promotion of some candidates while in the case of the petitioners, he was of the opinion that the CSB did not apply its mind to the attributes of integrity, general reputation and perception. So far as the petitioners are concerned, he required a comprehensive and objective decision from the CSB as per the dicta laid down in the case cited at 2014 SCMR 817 (supra). The learned D.A.-G. was asked to show the documents and the record on the basis of which the Competent Authority came to the conclusion that the CSB did not apply its mind to the case of the petitioners. The learned D.A.-G. placed a summary prepared for the Competent Authority with reference to the recommendations of the CSB. The CSB recommended 45 candidates out of 124. Table No.1 in the summary provides for the Total Score of PER and Training of the officers recommended for promotion and the marks awarded to them by the CSB. For the purposes of the dispute before this Court, marks awarded by the CSB are relevant. The names of the petitioners are provided in the list of 45 officers recommended for promotion. The learned D.A.-G. has placed before this Court the objective assessment criteria for the CSB. The objective assessment criteria before the CSB is as follows:---

S.No.	Parameters/Attributes	Total Marks	Marks Assigned
1.	Output of Work and Quality of Work		
2.	Variety and Relevance of Experience Secretariat/Field Postings; Federal/Provincial Government Posting; Leadership/Routine Postings; Deputation/Foreign Postings.		

3.	Professional Expertise.	
4.	Personality Profile (As known to the Board Members)	
5.	Conduct, Discipline and Behaviour [Observation by RO/CO during last 05 years OR as known to the Board Members]	
6.	Functional Ability and Leadership	10
7.	Estimated Potential for Middle/ Higher Management Based on PERs and Training Evaluation Reports: Management Skills, Ability to take decisions, Strategic Thinking, Leadership Qualities, Drive for Results and Accomplishments in BPS-19 and 20 in policy formulation and implementation.	
8.	Integrity/General Reputation/ Perception On the basis of PERs/TERs/Opinion of the Board	5
9.	Total Marks by CSB	15
10.	Overall Category Cat A Cat B Cat-C (11-15) (06-10) (0-05)	

The attributes of integrity, general reputation and perception are out of five marks and if an officer under consideration gets less than three marks, he may be deferred or superseded by the CSB at their discretion with reasons to be recorded in writing. If the officer gets 3 marks, he is awarded 5 marks. The summary placed before the Competent Authority provided for the marks awarded by the CSB as per the Objective Assessment Criteria. The marks shown are out of 30. The marks for all petitioners on attributes of integrity, general reputation and perception are 5 because they got the required 3 marks. There is no specific information before the Competent Authority on the basis of which he could have concluded that the CSB did not give due consideration to the attributes of integrity, general reputation and perception in the case of the petitioners. The learned D.A.-G. also confirmed that no other material or information was placed before the Competent Authority. Therefore based on summary, the Competent Authority could not have singled out the cases of the petitioners on the ground that the CSB decided upon the attributes of integrity, general reputation and perception in a mechanical manner without due consideration. The Competent Authority as per the minutes has recorded that the recommendations being confirmed are for those officers who unquestionably have the public reputation and perception of being honest and not corrupt. To the mind of this Court, there is nothing before the Competent Authority on the basis of which he could have come to this conclusion. The Competent Authority also concluded that with reference to the cases of the petitioners, the CSB should assess the general reputation and perception regarding these officers particularly since they had been in the service for 25 years. He required that a collective opinion on their general reputation and perception be made by the CSB in a fair and equitable manner. This decision of the Competent Authority is clearly discriminatory as he has promoted some and referred others for reconsideration without just cause. There was no information available to him on the basis of which he concluded that the CSB

applied its mind in some cases and did not apply its mind in other cases with respect to the attributes of integrity, general reputation and perception. The objective assessment form shows that the CSB awards at least three marks out of five for integrity, general reputation and perception based on the PER/TER opinion of the CSB and if a candidate has obtained three marks he will be given the full marks. With such a formula in place there is no rationale to conclude that the CSB did not apply its mind and that the CSB did not give due consideration to these attributes of integrity, general reputation and perception. It also means that the decision of the Competent Authority was not fair or transparent because no reasons have been given for this decision. The Competent Authority is required to give basis for his decision so as to ensure transparency, fairness and good governance. The petitioners have a right to be considered for promotion which includes the right to know why their cases have been singled out when the CSB awarded them five marks for the attributes of integrity, general reputation and perception.

15. The other issue argued in these Petitions is the requirement of the Competent Authority for information with reference to the opinions and perceptions regarding the petitioners. In the case cited at 2014 SCMR 817 (supra) the Hon'ble Supreme Court of Pakistan held that Government as well as the CSB had to adhere strictly to the law and the rules as well as instructions on the subject and if any action is taken against an officer denying him promotion then such action should be unlawful and no leg to stand. The Hon'ble Supreme Court of Pakistan has also stated in its decision that the credibility of civil servants can be judged while examining concrete matters such as his family assets at the time when he joined service, his life style, his expenses on children's education, on marriage, foreign tours and political affiliation. However, the judgment does not provide for attributes such as integrity, general reputation and perception to be given special consideration by the CSB. The Promotion Policy, 2007 provides for the eligibility criteria to be considered at the time of promotion:---

(i) Fulfillment of prescribed minimum length of service in BPS 17 and above for promotion to various scales.

(ii) Satisfactory completion of mandatory training.

(iii) Should possess qualification/experience and other conditions as prescribed in the relevant Recruitment Rules.

(iv) An officer superseded earlier shall be considered after earning Performance Evaluation Report (PER) for one full year. For example, an officer superseded on the basis of his PER's upto 2004, will become eligible for consideration after earning PER for 2005.

It also provides for the quantification of PERs, Training Evaluation and CSB Evaluation as follows:---

S.No.	Factor	Marks
1.	Quantification of PERs relating to present grade and previous grade (s) @ 60%:40%.	70%
2.	Training Evaluations reports in ratio of 60% : 40%.	15%
3.	Evaluation by CSB	15%

Total 100%

The office memorandum dated 12-10-2012 make changes in the policy guidelines stating the following to be relevant for the purposes of promotion:---

(a) (1) Quality and Output of Work (2) Variety and Relevance of Experience (3) Top Management Potential.

(b) (1) Integrity/General Reputation/Perception (2) Conduct, discipline and Behaviour.

(c) A new Objective Assessment Form (Annexure-A) for assessment of each officer on the panel by CSB against the attributes namely (1) Quality and Output of Work; (2) Integrity/General Reputation/Perception; (3) Variety and Relevance of Experience; (4) Top Management Potential; (5) Personality Profile; and (6) Conduct, discipline and Behaviour is hereby introduced.

(d) The said Objective Assessment Form shall be placed before the CSB along with panel pro forma of every officer for his/her objective evaluation by the CSB. The Board shall assess each officer on the panel on the basis of said parameters/attributes. After assessment/evaluation, the CSB shall place the officer in any of the following categories and assign appropriate marks accordingly.

By virtue of the stated letter of 12-10-2012, the following was decided:---

Sr. No.	Category	Range of Marks
1.	Category-A =	11 to 15
2.	Category-B =	6 to 10
3.	Category-C =	00 to 5

The dossiers of the petitioners provided for all the information regarding the PER Training which were placed before the CSB. The CSB considered the cases of all candidates and admittedly recommended 40. Even though the criteria of perception has been made a part of the objective assessment on the basis of case cited at 2014 SCMR 817 (supra), it is subject to the collective wisdom of the CSB as well as to the formula of getting at least three marks out of five. This may ensure that subjective attributes regarding integrity and reputation will not play a dominant role in the promotion of senior civil servants. However for the Competent Authority to require the CSB to reconsider the attributes of integrity, general reputation and perception suggest that he is acting on personal information or on his personal opinion which totally defies the collective wisdom of the CSB and the requirements of due process, fairness and transparency. The Competent Authority must give due consideration to the collective wisdom of the CSB on the attributes of integrity, general reputation and perception because these attributes are not objective in nature and there is no way to assess them objectively, therefore he must rely on the collective wisdom of the CSB which has objectified the assessment. It also means that the respondents have totally misunderstood the dicta laid down in the cases cited at 2014 SCMR 817 (supra) and PLD 2013 Lahore 413 (supra) which makes it clear that the civil servants should be promoted on the basis of an objective criteria which can be assessed and graded in a fair manner to ensure transparency and good governance. In the light of this judgment there is no justification to require the CSB to deliberate further on integrity, general reputation and perception. These attributes

have been factored into the objective assessment criteria and are subject to collective wisdom and a formula for assessment. Hence there can be no re-assessment on these attributes unless concrete material is provided which justifies rethinking integrity, general reputation and perception. Hence to the mind of this Court, the Competent Authority has made a decision which is discriminatory and which amounts to abuse of discretion. It is also found that the decision of re-assessment on attributes of integrity, general reputation and perception was not based on any cogent reason. Hence the decision is set aside and the respondents are directed to promote the petitioners forthwith from the same date when the other recommendations were approved and notified.

16. In view of the aforesaid, all these petitions are allowed.

AG/A-10/L Petition allowed.

P L D 2015 Lahore 384
Before Mrs. Ayesha A. Malik, J
Mst. FEROZA BEGUM---Petitioner
versus
ADDITIONAL DISTRICT COLLECTOR and others---Respondents
Writ Petition No.14623 of 2012, decided on 9th December, 2013.

Registration Act (XVI of 1908)

----Ss. 34 & 35---Registration Rules, 1929, R.135---Constitution of Pakistan, Art. 199---Constitutional petition---Scope of enquiry before registration by Registering Officer---Procedure on admission and denial of execution---Scope of powers of Registering Officers in relation to determination of whether the documents sought to be registered had been executed by those purported to have executed them---Scope---Petitioner had executed a gift deed and presented the same before Registering Officer for registration; who refused to register the document on the ground that the document had been presented by the local commission for registration on basis of "Fard Jamabandi" issued by patwari instead of for sale of the property (Fard Bay) and did not contain a note in red ink with regards to the nature of the property---Contention of the petitioner was that under Rule 135 of the Registration Rules, 1929; the Registering Officer was bound to register the gift deed and could not demand the Fard Bay or the note in red ink---Validity---Registration Officer under Ss.34 & 35 of the Registration Act, 1908 could examine any person in his office to determine whether a document had been executed by the persons it was purported to have been executed by---In the present case, the Registering Officer in order to satisfy himself with respect to the identity of the executants required the local commission to produce the latest Fard Bay---Registering Officer objected to the Fard Jamabandi as it did not satisfy him with regards to whether the deed was executed by its purported executants as the Fard Jamabadni was issued for record purposes and not for transfer purposes---Requiring the local commission to produce Fard Bay to ensure that the executants of the gift deed had executed the said gift deed did not in any way amounted to questioning the validity of the document and R.135 of the Registration Rules, 1929 did not prevent the Registering Officer from fulfilling his statutory duty under Ss.34 & 35 of the Registration Act, 1908---Requirement of satisfaction of the Registering Officer may be more stringent in cases where the document was presented by the local commission to protect the interests of the public---Requiring the red note to be affixed on the Fard did not amount to questioning the validity of the title but was only related to the question of valuation of the property for the transfer by a document that had to be registered and hence the same did not fall within the ambit of R.135 of the Registration Rules, 1929---No illegality was therefore committed by the Registering Officer---Constitutional petition was dismissed, in circumstances.

Roshan Din v. Tehsildar and others 2010 YLR 5 distinguished.
Fida Hussain and others v. Abdul Aziz 2005 CLC 180 and Muhammad Hameed v. District Officer (Revenue), Lahore and another PLD 2007 Lah. 490 ref.

Nasir Nazir Butt and Nizam ud Din Khan for Petitioner.
Muhammad Siraj ul Islam Khan, Addl. A.G. along with Naveed ul Islam, Sub-Registrar Samanabad Town, Lahore and Tasawwar Hussain Patwari Halqa for Respondents.
Date of hearing: 19th November, 2013.

JUDGMENT

MRS. AYESHA A. MALIK, J.---Through this petition, the petitioner has impugned orders dated 13-12-2011 and 25-4-2012 passed by the respondent No.2 and respondent No.1 respectively.

2. The petitioner and three other persons executed a gift deed in favour of Ghulam Rasool, donee, and duly presented the gift deed for registration before the respondent No.2. The respondent No.2 refused to register the gift deed through its order dated 13-12-2011 on the ground that the document has been presented by the local commission for registration on the basis of Fard Jamabandi issued by the Patwari for record instead of for sale of the house. He further ordered that the Fard Jamabandi did not contain a note in red ink about the nature of the land and the status of the property i.e. whether it is commercial or residential as required by letter No.NTO/3725 dated 12-11-2011. The petitioner filed an appeal against this order before the respondent No.1 which appeal was dismissed and the order of the Sub-Registrar was upheld.

3. The grievance of the petitioner, as argued by the learned counsel is that the respondent No.2 was obligated to register the gift deed and in terms of Rule 135 of the Registration Rules, 1929 (The Rules) he could not demand the Fard Bay or the note in red ink. The learned counsel argued that these documents relate to the title and ownership of the property and cannot be looked into by the respondent No.2. Learned counsel further argued that if the document is presented in a proper manner by a competent person at the right time before the respondent No.2, he is then required to register the document without any inquiry into its possible effects. Learned counsel further argued that the revenue record is maintained for fiscal purposes and not for the purposes of validating ownership and title, therefore the respondent No.2 could not call for the Fard Bay or the note in red ink on the Fard Jamabandi. He further argued that there is no provision in the law for issuance of Fard Bay, hence the respondent No.2 could not have asked for the said document. In this regard, learned counsel has placed reliance on the case titled 'Roshan Din v. Tehsildar and others' (2010 YLR 5) wherein it was held that the Sub-Registrars and Patwaris have developed a strange practice of demand of certified copy of the Fard Bay and this demand of the Sub-Registrar before registering a document is not in accordance with law. As per the findings of this judgment, the learned counsel argued that there is no law, instruction or order on the basis of which the Registering Officer can call for the Fard Bay or for any note on the Fard Jamabandi, so the same is against the law. Learned counsel has also relied upon the cases titled 'Fida Hussain and others v. Abdul Aziz' (2005 CLC 180), 'Muhammad Hameed v.

District Officer (Revenue), Lahore and another' (PLD 2007 Lahore 490) and 'Aurangzeb through L.Rs. and others v. Muhammad Jaffar and another' (2007 SCMR 236). However, with respect to the specific question raised in the instant writ petition, learned counsel has placed emphasis on 2010 YLR 5 (supra).

4. The respondents have filed their report and para wise comments. In terms of the comments filed, the learned Law Officer argued that a note in red ink on the Fard Jamabandi is necessary as it reveals the value of the property that is whether it is commercial or residential. In terms of letter dated 12-11-2011 it is necessary that this note in red ink be enclosed on the Fard Jamabandi. So far as the requirement by the respondent No.2 for the Fard Bay, the learned Law Officer argued that the same was necessary to ascertain the execution of the gift deed as the executants were not before the respondent No.2. He argued that the document was presented before the respondent No.2 through a local commission and that the respondent No.2 in order to ensure that the executants executed the gift deed, required that the local commission provide the Fard Bay. He argued that the Fard Bay is issued by the Patwari on the request of the owners of the property to indicate the transfer of property in the form of sale or gift, as the case may be. He further argued that no illegality has been made out by the respondents where the Registering Officer required the document to be produced before him. Since the local commission refused to produce the document, hence the order was issued by the Sub-Registrar declining to register the document.

5. I have heard the learned counsel for the parties and reviewed the record available on the file.

6. The question that needs to be answered is whether the Registering Officer by virtue of Rule 135 of the Rules is required to execute the document presented before him without calling for any further documentation. Learned counsel for the petitioner has relied upon Rule 135 of the Rules which is reproduced below:--
'Registering officers should bear in mind that they are in no way concerned with the validity of documents brought to them for registration, and that it would be wrong for them to refuse to register on any such grounds as the following e.g. that the executant was dealing with property not belonging to him, or that the instrument infringed the rights of third persons not parties to the transaction, or that the transaction was fraudulent or opposed to public policy. These and similar matters are for decision, if necessary, by competent courts of law and registering officers, as such, have nothing to do with them. If the document is presented in a proper manner by a competent person at the proper office within the time allowed by law and if the registering officer is satisfied that the alleged executant is the person he represents himself to be, and if such person admits execution, the registering officer is bound to register the document without regard to its possible effects'.
The answer to this question lies in sections 34 and 35 of the Registration Act, 1908 (Act of 1908). Section 34 provides for an inquiry by the Registering Officer that no document shall be registered under the Act unless the persons executing the documents or its representative, assign or agent appear before the Registering

Officer within the time allowed for presentation of document. The Registering Officer shall inquire whether or not such document was executed by a person by whom it purports to have been executed and satisfy himself as to the identity of the person appearing before him alleging that they have executed the document. He will also satisfy himself with respect to the right of the representative to appear on behalf of any person. Section 35 of the Act of 1908 provides for the procedure on admission and denial of execution respectively. Section 34 of the Act of 1908 requires the Registering Officer to satisfy himself on the identity of the persons who have executed the document presented before him. Section 35 of the Act of 1908 requires the Registering Officer to satisfy himself that such persons have executed the document. Therefore the Registering Officer can examine any person in his office to determine whether the document has been executed by the persons it purports to have been executed by. Under section 35 of the Act of 1908, any person appearing through a representative, assign or agent then such representative, assign or agent can admit the execution. However, section 35(2) of the Act of 1908 provides that the Registering Officer in order to satisfy himself that the persons appearing before him are the persons they represent themselves to be, may examine such person in his office. The question before this Court falls within the scope of the inquiry that the Registering Officer may make under section 35 of the Act of 1908 in order to satisfy himself that the document placed before him for registration purports to be executed by the persons stating to have executed the document. In the instant case the gift deed was presented by the local commission before the Registering Officer. The Registering Officer first had to satisfy himself with respect to the identity of the persons presenting the document. Then in order to satisfy himself that the document was executed by the executants, he required that the local commission produce the latest Fard Bay. This document can be issued by the Patwari at the behest of the owners of the property for the purposes of transfer of the property by virtue of the gift deed. The Registering Officer objected to the Fard Jamabandi presented before it as it did not satisfy him that the gift deed was executed by its executants as the Fard Jamabandi was issued for record purposes and not for transfer purposes. The learned counsel have argued that the requirement of Fard Bay is in violation of Rule 135 of the Rules as the Registering Officer cannot question the validity of the document produced before it. To my mind requiring the local commission to produce Fard Bay to ensure that the executants of the gift deed have executed the gift deed does not in any way amount to questioning the validity of the document. Rules 135 of the Rules does not prevent the respondent No.2 from fulfilling his statutory duty under sections 34 and 35 of the Act of 1908. The said Sections require the Registering Officer to ensure that the document presented before it has been executed by the persons appearing before it and that the persons who claim to have executed the document admit the execution of the document. The requirement of satisfying himself means that the Registering Officer has to apply his mind to the case before it and determine whether or not the execution of the document is admitted. In the instant case the gift deed was presented by the local commission. Although the local commission could admit to the execution of the document, the Registering Officer still had to satisfy him under section 35(3)(a) of the Act of 1908 that the gift deed was executed by its executants.

The executants were not present before the Registering Officer, hence he called for latest Fard Bay which would have satisfied him that the executants have executed the gift deed. Learned counsel have stressed mainly on 2010 YLR 5 (supra) with respect to the demand for a Fard Bay. However, this case is distinguishable on a fundamental fact. In that case the executant of the document appeared before the Registering Officer himself and therefore the court found that it was unnecessary to ask for a Fard Bay. In this case the executants of the document were not before the Registering Officer, hence he required the additional document to satisfy himself that the executants of the gift deed admit to the execution of the said document. To my mind, the requirement of satisfying the Registering Officer may be more stringent in cases where the document is presented by the local commission, to protect the interest of the public. Therefore, no illegality has been made out by the respondent No.2 while asking for the Fard Bay for the purposes of registering the gift deed as presented by the local commission.

7. The duty of the Registering Officer under sections 34 and 35 of the Act of 1908 should not be entangled with the restriction under Rule 135 of the Rules. The Registering Officer should not concern himself with the validity of the document sought to be registered that is he should not be concerned whether the registration is opposed to public policy or whether the document sought to be registered will infringe upon the rights of a third person. The Registering Officer, however, is required to satisfy himself that the document presented before it for registration is admitted by its executants, in that they have executed the document. This inquiry entails more than simply checking that the document has been signed. The Registering Officer must satisfy himself that the executants own the document presented before him. The Registering Officer under section 35 of the Act of 1908 must satisfy himself on the execution of the document presented before it and should not rely merely on a signature.

8. The next objection of the learned counsel for the petitioner is that the Registering Officer could not ask for a specific note in red ink with respect to the status of the property as the same is evident from the document presented before it. The respondents have relied upon a letter dated 12-11-2011 which is reproduced below:-
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The letter provides that the Registering Officer to ensure that a note in red ink has been affixed on the Fard presented to him which states the status of the property i.e. whether it is commercial or residential. On the basis of this document, the Registering Officer is able to ascertain the valuation of the document to ensure that the applicable stamp duty has been paid. Again to my mind requiring the red note to be affixed on the Fard does not amount to questioning the validity of title but is only related to the question of valuation of the property for the transfer by a document that has to be registered. Hence it does not fall in the ambit of Rule 135 of the Rules.

9. Therefore in view of the aforesaid the petition is dismissed.
KMZ/F-2/L Petition dismissed.

2015 C L C 907
[Lahore]
Before Mrs. Ayesha A. Malik, J
Miss ASMA JAVAID and another----Petitioners
versus
GOVERNMENT OF PUNJAB through Secretary, Health Department and 2 others----Respondents
Writ Petition No.28142 of 2014, heard on 29th October, 2014.

Constitution of Pakistan---

----Arts. 199 & 25---Constitutional petition---Educational institution---Admission policy---Quota system---Petitioners assailed policy of Pakistan Medical and Dental Council (PM&DC) regarding admission to medical colleges fixing number of seats for male and female students at 50% each---Validity---Pakistan Medical and Dental Council compromised on merit for entry into medical and dental profession impacting overall merit of the profession---Policy of the Council accepted male candidates with a lesser merit with no guarantee that other 50% would continue in the profession---Policy, in question, also prevented 12% high merit candidates from pursuing a medical education simply on the basis of their gender---Policy of PM&DC, in fact, did not ensure that the best of the candidates would enter into medical profession to produce the best doctors and dentists but instead allowed candidate who previously could not possibly have entered into medical and dental college to study medicine and become doctor or dentist---Entry, into medical and dental colleges, was very competitive and as per study produced before High Court, 62% of candidates who succeed into medical and dental colleges were females---High Court, in exercise of Constitutional jurisdiction, declared policy of fixation of quota to be unconstitutional, against Art.25 of the Constitution---Petition was allowed, in circumstances.

Shrin Munir and others v. Government of Punjab through Secretary Health, Lahore and another PLD 1990 SC 295 fol.
Miss Farhat Jaleel and others v. Province of Sindh and others PLD 1990 Kar. 342 and Nazar Elahi v. Government of Punjab and others 2013 CLC 1457 ref.
Malik Ghulam Rasul for Petitioners.
Ch. Muhammad Umar and Mian Haris Yasin for Respondent No.3 PM&DC.
Imran Muhammad Sarwar for Respondent No.2 University of Health Sciences.
Mrs. Samia Khalid, A.A.-G. along with Aamir Rasheed, Law Officer, Health Department and Syed Usman Munir Bukhari, S.O. (ME), Health Department.
Date of hearing: 29th October, 2014.

JUDGMENT

MRS. AYESHA A. MALIK, J.--- Through this petition, the petitioners challenge the notification issued on 18-9-2014 by the Pakistan Medical and Dental Council, Islamabad (PM&DC) wherein the number of seats for male and female medical and

dental students was fixed at 50% each, for the admissions in the academic year commencing 2014-15.

2. Notices were first issued on 23-10-2014. On 28-10-2014, learned counsel for the respondent PM&DC appeared before this Court and informed the Court that the final merit list was to be issued on 30-10-2014. Therefore, keeping in mind the urgency of the matter, all the learned counsel agreed that the case should be argued on 29-10-2014.

3. Learned counsel for the petitioners argued that the entrance test for the candidates for medical and dental colleges was held on 31-8-2014. As per the prospectus issued to the petitioners and other candidates, admission to medical and dental colleges was to be on open merit basis in the public sector medical and dental colleges of Punjab. It was announced that all candidates having domicile of Punjab or Federal Capital Area, who secured 82% or above aggregate marks will be eligible to apply for admissions to the medical and dental colleges. The respondent PM&DC held a meeting on 4-2-2014 being its 137th session wherein it made a decision to abolish admission on open merit and instead fixed a quota so that 50% seats were reserved for male candidates and 50% seats were reserved for female candidates. The decision taken by the Respondent PM&DC in this meeting was essentially on the ground that there was a growing trend of females in medical education however their sustainability in the medical field was decreasing. Learned counsel argued that essentially as per the Respondents this means that the number of female candidates qualifying on merit was increasing year by year, however since female candidates did not continue with the medical profession open merit was done away with and a quota was imposed. The learned counsel argued that the fixation of 50% quota for female candidates is totally presumptive and there is no data whatsoever on the basis of which the respondents have concluded that female candidates do not continue their careers in the medical or dental profession after obtaining their professional education. Further argued that admittedly the respondents accept that female candidates show better merit in the entrance exam as more than 68% of the candidates admitted to medical and dental colleges are females. Learned counsel argued that this means that male candidates are not at par with their counterparts and have a lesser merit. However, the Respondent PM&DC is promoting male candidates despite their low merit and giving a wrong message to the aspiring male candidates that even if they do not meet the merit they will still get admission in medical and dental colleges on account of the 50% quota reserved for them. Learned counsel argued that this decision of the respondent PM&DC is discriminatory and a gross violation of Article 25 of the Constitution of Islamic Republic of Pakistan, 1973 (Constitution). Learned counsel further argued that the mala fides of the Respondent PM&DC is evident from the fact that this decision was taken on 4-2-2014 yet made public on 18-9-2014, just five days before the commencement of the admission process. Learned counsel further argued that the prospectus and other documents show that admission has to be on open merit yet the Respondent PM&DC notified its policy on 18-9-2014 creating panic amongst the female candidates. He argued that the policy prevented female candidates from

entering into the medical and dental profession, even though they had the required merit. Learned counsel argued that the formula prescribed by the respondent PM&DC is not a guaranteed formula on the basis of which it will ensure that female candidates will continue in the medical profession or that the issues, if any, which prevent female candidates from continuing with the medical profession will be addressed. Learned counsel stated that there are remedial measures that can be adopted by the Respondents to encourage female candidates and facilitate them to continue in the medical profession, however a clog on their right to enter into the medical and dental colleges not only violates Article 25 of the Constitution but is also violative of the dicta laid down by the Hon'ble Supreme Court of Pakistan in the case titled Shrin Munir and others v. Government of Punjab through Secretary Health, Lahore and another (PLD 1990 SC 295). Further argued that in terms of this judgment, the Hon'ble Supreme Court of Pakistan declared that the fixation of number of seats on the ground of sex is violative of Article 25(2) of the Constitution unless it is justified as a protective measure for women and children under Article 25(3) of the Constitution. Learned counsel argued that the said policy offends the right of all candidates who deserve admission on the basis of open merit. Learned counsel stated that a similar issue was also decided by the Hon'ble Sindh High Court in a case titled Miss Farhat Jaleel and others v. Province of Sindh and others (PLD 1990 Karachi 342).

4. Learned counsel on behalf of respondent University of Health. Services (UHS) produced a copy of letter dated 24-10-2014 issued by it to the Secretary Health, Government of Punjab wherein they have stated that they will proceed with admission in the current session on the basis of open merit and do not support the policy of the respondent PM&DC. Learned counsel stated that the policy is under discussion with the Respondents for consideration. Learned counsel on behalf of the Respondent PM&DC explained that the 137th session of the Council was held on 4-2-2014 and the decision was taken regarding fixation of quota for entry of female candidates in medical and dental colleges. Learned counsel argued that the delay in publicizing this decision was not mala fide but on account of the various different disputes pertaining to the existence of the respondent No.3 and its council. Learned counsel for the respondent PM&DC argued that the respondent No.3 as a regulator is highly concerned with the fact that qualified female students from medical and dental institutions do not go on to become specialist and do not carry on with their profession. The problem therefore is that there are lesser doctors whereas there is a dire need of more doctors. The PM&DC thought that one way to control this problem is to create a level playing field such that entry into medical and dental colleges be based on 50% quota for male and female candidates each, which ensures that 50% of the candidates who study medicine will continue in the profession. Learned counsel argued that the respondent PM&DC has relied upon a study made by Dr. Shaista Faisal, Deputy Registrar-Tech, a copy of which has been placed before this Court, to show the growing trend of female candidates in the medical and dental colleges. In terms of the study learned counsel stated that female Doctors and Dentists have increased since the year 2000 and the number of female students in Medical and Dental Colleges has also increased. However, the number

of medical specialist registered with PM&DC since 2005 show that there is a far greater number of male specialists compared to female specialist. States that this shows that even though the number of female candidates in medical and dental colleges has increased multifold over the years, female doctors do not go on to practice nor do they go on for specialization in the profession. Learned counsel stated that the study further shows that the number of doctors registered with the PM&DC in 2011 shows a larger number of male doctors than female doctors. This shows that even though female candidates study medicine they do not necessarily practice in the profession. Learned counsel further stated that the research provides certain recommendations to keep female doctors in their profession such that the number of seats for male and female students should be 50% each. This is as per National male and female ratio i.e. 1.07 male(s)/female (2011 est). Learned counsel stated the PM&DC decided to approve these recommendations to control the problem. Twenty five participants under the Chairmanship of Professor Dr. Masood Hameed Khan, President PM&DC considered all aspects of the research and the problem of female candidates not continuing in the medical profession and ultimately decided to fix a quota of 50% each for entry into medical and dental colleges. Learned counsel argued that no mala fide was intended by the Respondents by the delay and the objective of the policy was to improve the conditions in the profession. Learned counsel further argued that the decision of the Hon'ble Supreme Court of Pakistan relied upon by the learned counsel for the petitioners in para 21 specifically mentioned that at the time no scientific study had been carried out on the basis of which the seats for female and male candidates were fixed. Further argued that the judgment relied upon by the learned counsel for the petitioners was the need of the hour at that time, as it addressed the issues relevant at the time and the judgment specifically states that this has been made on the basis of the issues faced by educational and professional institutions at the time. Hence the learned counsel argued that the present scenario is different and this Court should look into the issues faced by the profession and the decline of doctors/dentists which should increase. Learned counsel further stated that it was necessary to increase the number of doctors and the fact that female candidates out did male candidates in the medical examination yet did not continue with the medical profession meant that the medical profession was losing on specialists and practitioners. Learned counsel emphasized that no bias was intended by this decision and it was made simply to address a growing concern in the medical profession.

5. I have heard learned counsel for the parties and gone through the record available on the file.

6. The issue at hand is the fixation of quota for female candidates entering into medical and dental colleges. The petitioners question the policy on the ground that it restricts their right to compete on open merit for entry into medical and dental colleges which right is not only guaranteed by the Constitution but also in terms of the dicta laid down by the Hon'ble Supreme Court of Pakistan. I have heard all the learned counsel at length and find that the policy of fixing of quota offends Article

25 of the Constitution as well as the dicta laid down in PLD 1990 SC 295 (supra). Article 25 of the Constitution being the equal protection article reads as follows:---

"Equality of citizens.--- (1) All citizens are equal before law and are entitled to equal protection of law.

(2) There shall be no discrimination on the basis of sex.

(3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children."

Article 25 of the Constitution provides for the equality of citizens such that all citizens are equal before the law and are entitled to equal protection of the law. This is a fundamental right guaranteed to all citizens of this country irrespective of their gender. Article 25(2) of the Constitution specifically provides that there shall be no discrimination on the basis of sex. This Article specifically prohibits any kind of discrimination on the basis of gender, meaning thereby that gender cannot be made the basis to cause an inequality between men and women. The Constitution specifically provides for equality of all citizens making men and women equal before the law and entitled to equal protection of the law. Article 25(3) of the Constitution provides that the State can make special provisions for the protection of women and children, meaning that if required the state can make policies which facilitate and enable women and children to progress. This Court has already held in a similar case titled Nazar Elahi v. Government of Punjab and others (2013 CLC 1457) as follows:---

"7. The point that needs consideration in this case is whether the age relaxation of three years provided for in the proclamation, for the benefit of female candidates W.P.20018 of 2012 violates Article 27(1) of the Constitution. Article 27 of the Constitution reads as follows:---

"No citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex residence or place of birth... ...

Article 25 of the Constitution being the equal protection Article reads as follows:---

"(1) All citizens are equal before law and are entitled to equal protection of law.

(2) There shall be no discrimination on the basis of sex.

(3) Nothing in this Article shall prevent the state from making any special provision for the protection of women and children.

8. It is clear from reading both the Articles that there shall be no gender based discrimination. Article 25 ensures equal treatment under the law however Article 25(3) provides that nothing in this Article shall prohibit the State from making special provisions for the protection of women and children. This means that the Constitution has given the State a remedial power to protect women and children notwithstanding the fact that everyone is to be treated equally under the law. Article 25 of the Constitution guarantees equal protection to every citizen and also requires that the State undertake affirmative action for the protection of women and children. Therefore the Constitution has itself recognized and created a classification which needs special protection. Hence an act of the Government which aims to protect women and children will be an affirmative action which does not offend Article 25(1) and equal treatment. The next question is whether Article 27 is offended by the age relaxation offered to female candidates. Article 27(1) provides that no

citizen shall be discriminated against in respect of any appointment he is otherwise qualified for only on the ground of race, religion, caste, sex or place of birth. Article 27 provides for a safeguard against discrimination in service. The safeguard ensures that the State will not commit gender based discrimination. However this Article does not prohibit affirmative action to protect the female gender. The age relaxation offered to females under PWEP does not discriminate against the petitioner but in fact is part of an affirmative action to protect women by creating opportunities for women professionally so that they can apply for jobs keeping in view the time spent for responsibilities such as marriage and children. Affirmative action for women and children is the remedial power given to the Government to equalize opportunities by creating special dispensation or special standards for them so as to equalize their opportunities."

7. The essence of Article 25 has been clearly declared in the judgment cited as PLD 1990 SC 295 (supra). Para 20 of the same reads as follows:---
"There being no repugnance between Article 25 and Article 22, the two have to be read harmoniously. No discrimination on the ground of sex alone can be permitted except on the ground of reasonable and intelligible classification. Such classification in our Society permits for the present establishment of educational and professional institutions exclusively for the females or exclusively for the males. However, where co-education is permitted and the institution is not reserved for one sex alone, the fixation of number on the ground of sex will directly be opposed to the requirement of Article 25(2) unless it is justified as a protective measure for women and children under Article 25(3). In other words the number of girl students can be fixed as the minimum but not as the maximum particularly so where on merit they are likely to get more than the fixed number of seats. The Constitution assumes that the women and children in our Society need protection and not the males and as long as the Constitution mentions that assumption and basis, we cannot reverse it by affording protection to male and adults at the cost of women and children. That would be opposed to the very fundamental mandate of the Constitution."
A bare reading of the said judgment shows that, if at all there is to be fixation of seats, the minimum number of seats can be fixed and not the maximum number. The Hon'ble Supreme Court of Pakistan has also held that the fixation of the number of seats reserved exclusively for female offends Article 25(2) of the Constitution unless it is a protective measure for women and children under Article 25(3) of the Constitution. Learned counsel for Respondent PM&DC when confronted with the provisions of the Constitution and the dicta laid down in PLD 1990 SC 295 (supra) was unable to justify the policy especially on the touchstone of a protective measure. Therefore this writ petition stands decided on the basis of the provisions of the Constitution and the dicta laid down in PLD 1990 SC 295 (supra).

8. This case was argued at length by the learned counsel for respondent PM&DC. Given the arguments made and the data placed before this Court, it is necessary to look into the aspects of this case urged by the respondent PM&DC. Learned counsel for the respondent PM&DC stated that a scientific research was consulted by the respondent PM&DC before arriving at its decision on 4-2-2014. He also explained

that the study was by a "female" doctor. I have gone through the documents placed before this Court and it appears that the respondents have relied upon a research done by Dr. Shaista Faisal, Deputy Registrar (Tech) during her MPH studies 2011-12 in which the objective of her study was to determine the growing number of females in medical education, to ascertain the number of female doctors who carry on with the profession and to identify the reasons that female doctors were unable to continue with their profession. The study was relied upon by the Respondent PM&DC primarily on the fact that it was made by a female doctor, hence possibly rendering more credibility to their decision. The study finds that female candidates out number male candidates in medical colleges. However they are less likely to take part in post graduate training and research. The study also finds that there are few females in specialties and in position of leadership even though they perform better in the entrance exam. At the time 62% of the medical students were stated to be females. The study concludes that there is a need to adopt measures to keep female doctors in the profession. Learned counsel for the respondent PM&DC was asked that whilst considering the research why did'nt the respondent consider and adopt positive steps making it easier for the female doctors to continue with their profession. Learned counsel for the respondent stated that these measures have yet to be considered but will be implemented at some point. From the arguments raised the major issues identified by the research is that female doctors do not specialize and do not continue with the medical profession. The respondent No.3 while making its decision on 4-2-2014 relied upon a study made in the year 2011-12 without considering all the recommendations, without first requiring a solution to save the merit and without ascertaining whether the quota will ensure that female doctors will continue in the profession or continue to specialize in the profession.

9. What transpires from the decision is that the respondent PM&DC compromised on the merit for entry into the medical and dental profession thus impacting the overall merit of this profession. The policy of the Respondent PM&DC accepts male candidates with a lesser merit with no guarantee that the other 50% will continue in the profession. It also prevents the 12% high merit candidates from pursuing a medical education simply on the basis of their gender. The policy of the respondent PM&DC in fact does not ensure that the best of the candidates enter into the medical profession to produce the best of doctors and dentists, but instead allows a candidate who previously could not possibly have entered into a medical and dental college, now to study medicine and become a doctor or dentist. It has been seen over the years that entry into medical and dental colleges is very competitive and as per the study produced before this Court, 62% of the candidates who succeed into medical and dental colleges are females. This was the figure given in the year 2011-12 whereas in terms of the arguments made before this Court, the figure has increased to 68%. Hence to the mind of this Court it is alarming that merit has been wasted and compromised, which ultimately means that the quality of doctors in the medical and dental profession has also been compromised. This affects the public at large. Furthermore it goes against the very spirit and purpose of the mandate of the regulator PM&DC whose job is to ensure optimum results from medical and dental colleges as well as the medical profession. In the very least they

should have conducted a study to ascertain the problems and their reasons and then worked on solutions and improvements.

10. Another glaring reality of the impugned policy is that the decision taken on 4-2-2014 was never made public for discussion by the respondent PM&DC. Stakeholders were admittedly not consulted and an old study which existed since 2011-12 was relied upon. No measures were adopted to control the problem, even in terms of the recommendations made in the Report of 2011-12. The respondent PM&DC should have considered all the recommendations made in the study relied upon so as to retain the female doctors in their profession and involved the stakeholders, find a more acceptable solution which would ultimately increase the number of doctors and save the merit. The minutes of the meeting produced before this Court show that twenty five members of the PM&DC deliberated on the issue that there was a growing trend of females in the medical education but they did not continue in the profession. They decided to impose a quota for female candidates who excelled on merit. Interestingly all twenty five members of the PM&DC were men.

11. In view of the aforesaid, this petition is allowed. The policy of fixation of quota is declared to be unconstitutional, against Article 25 of the Constitution and the dicta laid down in PLD 1990 SC 295 (supra).

MH/A-189/L Petition allowed

2015 C L C 978
[Lahore]
Before Mrs. Ayesha A. Malik, J
NAYYER KHAN----Petitioner
versus
GOVERNMENT OF PAKISTAN through Secretary Ministry of Defence, Rawalpindi Cantt. and others----Respondents
Writ Petition No.5000 of 2014, decided on 17th July, 2014.

(a) Constitution of Pakistan---

----Art. 199---Constitutional petition---Public interest litigation---"Aggrieved person"---Scope---To satisfy the requirements of an "aggrieved person" in public interest litigation under Art.199 of the Constitution, the petitioner needed to disclose a personal interest in the performance of legal duty owed to him which if not performed would result in the loss of some personal benefit or advantage or curtailment of a privilege in liberty or franchise.
Ardeshir Cowasjee and 10 others v. Karachi Building Control Authority (KMC), Karachi and 4 others 1999 SCMR 2883 rel.

(b) Constitution of Pakistan---

----Art. 199---Constitutional petition---Public interest litigation---Locus standi---Scope---To establish locus standi in the context of public interest litigation, the petitioner would have to show that he belonged to class of affected persons who were unable to access the Court for the protection of their rights.
Dr. Akhtar Hassan Khan and others v. Federation of Pakistan and others 2012 SCMR 455 rel.

(c) Constitution of Pakistan---

----Art. 199---Constitutional petition---Public interest litigation---Locus standi of petitioner---Aggrieved person having "sufficient interest"---"Sufficient interest"---Meaning---Sufficient interest meant any legal interest which could include civic, environmental, cultural interests etc.---Gravity of the issue should be taken into consideration, such that more serious the issue at stake the less significance would be attached to arguments based on the petitioner's alleged lack of standing.
Ardeshir Cowasjee and 10 others v. Karachi Building Control Authority (KMC), Karachi and 4 others 1999 SCMR 2883 rel.

(d) Constitution of Pakistan---

----Art. 199---Constitutional petition---Public interest litigation---"Aggrieved person" having "sufficient interest"---Scope---No right or interest of petitioner infringed---No harm or wrong caused to the public at large---Effect---Construction of shopping mall on Government land managed by military authorities---Federal

Government had given the land in question to military authorities, who in turn leased it out to the respondent-company for construction of a shopping mall---Plea of petitioner that the long term lease agreement in favour of company tantamount to sale of Government land that major portion of lease amount was going to the concerned management of military authorities and a meager amount of the same was going to the Federal Government, and it was the respondent-company which was making huge profits at the expense of the Government---Validity---Present case was not a case of public money or public resource---Federal Government, which was the owner of the land, handed over the same to the military authorities to use as they deemed appropriate---Land in question was never allocated for any public purpose or for any public use, but was given to the military authorities---Military authorities through the concerned management had been managing the property where different commercial activities had been undertaken and existed even today---In fact the public at large had benefited from such commercial activities and there had been no objection to any of the commercial activities or its management by the petitioner---Long term lease in favour of the company developing the shopping mall was not a sale ---Federal Government had no objection to the shopping mall being constructed on the land and also to the Project Agreement or the Lease Agreement---Hence no right or interest of the petitioner or the public at large was involved or had been infringed---Public had not been denied access to the land and no harm or wrong was being caused to the public at large by the construction of the shopping mall---Petitioner was not an 'aggrieved party' and had no 'sufficient interest' because the Federal Government owed no duty to the petitioner on present issue nor was there any obligation on the Federal Government under any law that it had to receive all the rental/lease income from its property---Federal Government had the discretion to decide what portion of the lease amount it wanted to retain---Hence the petitioner could not claim a right or interest that he was not entitled to---Larger public interest was not adversely affected---Under the circumstances, the petitioner had failed to establish that he was an aggrieved person for the purpose of public interest litigation---Constitutional petition was dismissed accordingly.

(e) Constitution of Pakistan---

---Art. 199--- Constitutional petition--- Laches--- Bona fides of petitioner---Public interest litigation---Agreement for construction of shopping mall with a company on Government land managed by military authorities---Delay of seven years in challenging legality of such agreement---Effect---Period of seven years had gone by since the signing of the agreement for construction of shopping mall, but during such period the petitioner did nothing---Construction of the shopping mall was now almost complete---Delay of seven years to bring the case to the Court without any explanation for the delay made the question of laches relevant as it was directly related to the public interest pleaded by the petitioner---Question of laches was thus relevant because it did go to the bona fides of the petitioner---Land around the shopping mall had been used and managed by the concerned management of military authorities for a very long time, but the petitioner at no point objected to or questioned the use of land by the management---Entire area, where the shopping

mall was located was busy with different commercial activities, which had been going on for a long time and the petitioner had never objected to the manner in which the land was allowed to be used---Constitutional petition did not involve any bona fide public interest and was hit by laches---Constitutional petition was dismissed accordingly.

Saad Rasool, Ms. Anum Azhar, Haseeb Ahsan Javed, Dadwar Sharif Malik, Arizaz A. Chaudhary and Waqar Asghar for Petitioner.
Nasar Ahmad, D.A.-G. and Syed Mehmood-ul-Hassan Gillani, Standing Counsel for Respondent No.1.
Syed Shahab Qutab, Sameer Khosa, Mian Tariq Hassan and Ali Zahid Rahim for Respondents Nos.5, 11 and 13.
Tehseen Butt for Respondents Nos.7-10.
Hasham Hayat Wathar for Respondent No.14.
Date of hearing: 4th July, 2014.

JUDGMENT

MRS. AYESHA A. MALIK J.--- Through this petition, the Petitioner seeks a declaration that the construction of a shopping mall, in fortress stadium called Fortress Square Shopping Mall (FSSM) on the basis of Project Agreement dated 27-10-2007 and Lease Agreement dated 27-10-2007 is illegal and in violation of the law (Impugned Transaction).

2. The petitioner is a journalist. The respondents Nos.5, 11 and 13 are the company and its Directors, who are developing the FSSM. The respondent No.4 is the Fortress Stadium Management, who has executed the Project Agreement and the Lease Agreement with the respondent No.5. The respondent No.12 is a consulting agent engaged by the respondent No.5. Report and parawise comments have been filed, by all the respondents.

3 The petitioner has instituted this writ petition in public interest. It is his case that he resides in Lahore, Cantt. and that he is an investigative reporter and a well-known journalist. The petitioner came across information with respect to the construction of a shopping mall under the name of FSSM. The construction is taking place on land owned by the Government of Pakistan for which the respondent No.4, Fortress Stadium Management has entered into a long term lease agreement with the respondent No.5, which tantamounts to sale of government land. Learned counsel for the petitioner has argued that the land of the FSSM is Class A-I land which can only be used for specific purposes as stipulated in the Cantonment Land Administration Rules, 1937. A shopping mall is not contemplated as the permissive use of the land, therefore, the Impugned Transaction is illegal and against the mandate of the law. Learned counsel also argued that the Government respondent No.1 gets no revenue in this transaction as the respondent No.4 has without lawful authority sold government land without an approval. Learned counsel argued that the petitioner having a legitimate interest relating to the national

exchequer wrote several letters to the respondent No.4 to question the authority on the basis of which they had sold government land through the Impugned Transaction, however no response was forthcoming.

4. Learned D.A.-G. on behalf of the respondent No.1 raised an objection on the maintainability of this petition and stated that the land belongs to the Government of Pakistan. The Government of Pakistan has allowed this land to be used and managed by the military authority and the petitioner has no cause of action. Learned D.A.-G. stated that the Government in terms of its policies has allowed the military authority to utilize the land of the fortress stadium, as they deemed appropriate. In this regard, he referred to two polices dated 2-4-2008 and 29-11-2009. He stated that in terms of these policies, no illegality has been made out and the utilization of the Class A-I land is not in contravention of any law or policy.

5. Syed Shahab Qutab and Mr. Sameer Khosa, learned counsel for the respondents Nos.5, 11 and 13 raised objections on the maintainability of the instant writ petition. It is their case that the instant petition has been filed in public interest, however, it does not meet with the standards laid down by the Superior Courts with respect to public interest litigation. The learned counsel argued that the petitioner is not an aggrieved party and the petitioner has not been deprived of any of his fundamental rights with the construction of the shopping mall. Learned counsel argued that no public wrong has been committed and the petitioner has failed to make out a case of public importance. Learned counsel argued that the instant petition is hit by laches because as per the petitioner's own contention the Project Agreement and the Lease Agreement were executed in the years 2007 yet the instant petition is being instituted in the year 2014, after seven years. Learned counsel further argued that the petitioner has not come to this Court with clean hands and has not been able to show his bona fide as the construction of the shopping mall has been under way over the last several years and this fact has not been hidden from the public-at-large. However, the petitioner has come to this Court at this late stage, right before the completion of the project and its opening, simply to harass the respondents. He stated that this is the mala fide of the petitioner. Learned counsel further argued that the mala fide of the petitioner is also evident from the fact that this is not the only commercial venture in the fortress stadium as there are many other commercial ventures, which have been carrying on their business in the fortress stadium for a long time and the petitioner never objected against any of them but has targeted the instant respondents and the FSSM through this petition. Learned counsel argued that the petitioner claims to be an investigative reporter and a journalist but he cannot use this Court or public interest litigation for the purposes of a fishing expedition where he is trying to dig out information for no useful purpose. Learned counsel have stated that the petitioner has not been able to explain what interest or right of the public at large is affected by the construction of FSSM and how it is detrimental to the general public. Learned counsel argued that in order for this Court to entertain this petition, in public interest a genuine public wrong or public injury must be involved. The petitioner must be an aggrieved person such that he has suffered a legal wrong or his right has been infringed on the basis of which he

seeks indulgence of this Court. Leaned counsel argued that it is important for the petitioner to explain the delay in approaching this Court and in such cases the principle of laches plays a vital role and has to be considered by this Court because it goes to the bona fide of the public interest pleaded before the Court. Learned counsel argued that in fact this is a self-serving petition, which the petitioner has instituted and there is no public interest or public wrong involved. Furthermore, they have argued that the land belongs to the Government of Pakistan, who has no objection to the manner in which the land is being used and the management exercised by the respondent No.4. Hence they stated that the instant petition is liable to be dismissed being not maintainable. Reliance is placed upon the cases titled "Dr. Muhammad Tahir-ul-Qadri v. Federation of Pakistan through Secretary M/o Law, Islamabad and others" (PLD 2013 SC 413), "Dr. Akhtar Hassan Khan and others v. Federation of Pakistan and others" (2012 SCMR 455), "Dossani Travels (Pvt.) Ltd. and others v. Messrs Travels Shop (Pvt.) Ltd. and others" (PLD 2014 SC 1), "Nawab Syed Raunaq Ali and others v. Chief Settlement Commissioner and others" (PLD 1973 SC 236) and "Messrs Airport Support Services v. The Airport Manager, Quaid-e-Azam. International Airport, Karachi and others" (1998 SCMR 2268).

6. In rebuttal, learned counsel, for the petitioner on the question of maintainability has stated that the instant petition is maintainable because the petitioner is a resident of Cantt. and therefore, he is affected by any construction undertaken within the Fortress Stadium. Learned counsel argued that the petitioner has not targeted FSSM specifically but has drawn attention to the fact that this building where the FSSM is being constructed was the headquarters of the 114 Brigade hence it cannot be converted into some commercial project. It was a functional military building whereas the other projects within the Fortress Stadium have been built on land/open space and therefore do not have the same significance. Learned counsel argued that the matter is of public importance because the land belongs to Government of Pakistan and if the land is to be leased out or used by the respondents Nos.5, 11 and 13 then the benefit of such lease, that is the rental amount, should be deposited in the Government treasury. In this case, the rent amount is going to the respondent No.4 and a meager amount is going to the Government of Pakistan and it is the private respondents, who are making a huge profit at the expense of the Government. Learned counsel argued that public outrage is, also not a requirement for public interest cases. In this case it is public property and the petitioner is aggrieved if the national exchequer is deprived of amounts due to it. Learned counsel argued that this is a case of a continuing wrong, hence the issue of laches does not arise and the petitioner in his capacity as a citizen of Pakistan has uncovered this illegal deal for which he has impugned the transaction being contrary to the law. He has placed reliance on the cases titled "Mian Ansar Abbas Bhatti v. Muneeb Hayat Bhatti and 5 others" (2004 YLR 979), "Jani and others v. Abdul Haq and others" (1989 MLD 141), "Khurram Khan, Advocate v. Government of Punjab through Chief Secretary and 6 others" (PLD 2009 Lahore 22), "Ardeshir Cowasjee and 10 others v. Karachi Building Control Authority (KMC), Karachi and 4 others" (1999 SCMR 2883) and re: Suo Motu Case No.10 of 2009 decided on 26th October, 2009" (2010 SCMR 885).

7. Mr. Ahmer Bilal Sufi Advocate on behalf of respondent No.4 argued that the land in question is in the ownership of Government of Pakistan. However, it is managed by the Quarter Master General. The said land is not administered under the Cantonment Act but through a legitimate chain of command and control of military authorities. The Fortress Stadium Management was constituted to manage the land entrusted to it by the Quarter Master General. Learned counsel stated that the Impugned Transaction comprising of the Project Agreement and Lease Agreement have been executed by the Fortress Stadium Management and countersigned by Chairman Fortress Stadium, who also is a serving Brigadier of the Armed Forces, therefore, the Impugned Transaction is strictly in accordance with law. He further argued that the land in question has been put to use as per the policy of the Ministry of Defence and the respondent No.1 and as such its use cannot be questioned by this Court. He further stated that the land has not been sold out but has been leased out to the respondent No.5 with the approval, of HQ 4 Corps.

8. Heard the learned counsel for the parties and have gone through the record available on the file.

9. The basic issue before this Court is the maintainability of this petition. The petitioner requires this Court to declare the Impugned Transaction as being illegal, unlawful and discriminatory. The Impugned Transaction comprises of a Project Agreement dated 27-10-2007 and Lease Agreement a dated 27-10-2007. These Agreements have been executed between the respondents Nos.4 and 5. Pursuant to these Agreements, the respondent No.5 commenced the FSSM Project. It is primarily a large shopping mall which has been under construction for some time and now complete. The grievance of the petitioner is that the land on which the mall is built is Class A-I land which cannot be used for the purposes of commercial shops and a mall of this kind. The petitioner is also aggrieved by the fact that the land has been leased out by the respondent No.4 which is not the competent authority and instead the respondent No.1 being the Federal Government was competent to lease out this land as they are owners of the land and any revenue generated on the basis of the lease amount should go to the national exchequer. The petitioner is aggrieved by the fact that a very small amount is going to the national exchequer and instead a major portion of the rental income and profit is going to the respondent No.5.

10. Learned counsel for the respondent No.5 have objected to the locus standi of the petitioner on the ground that he is not an aggrieved person. Article 199 or the Constitution of Islamic Republic of Pakistan, 1973 (Constitution) requires that a petition be instituted by an aggrieved person. The basic objection here is that this is litigation in public interest where the petitioner has to meet the criteria for instituting his case in public interest. To satisfy the requirements of an "aggrieved person" in public interest litigation under Article 199 of the Constitution, the petitioner needs to disclose a personal interest in the performance of legal duty owed to him which if not performed would result in the loss of some personal benefit or advantage or curtailment of a privilege in liberty or franchise. Reliance is

placed on 1999 SCMR 2883 (supra). It has also been stated that to establish locus standi in the context of public interest litigation, the petitioner would have to show that he belongs to class of affected persons who are unable to access the Court for the protection of their rights. Reliance is placed on 2012 SCMR 455 (supra). In this case, the petitioner claims that he is an aggrieved because he is. resident of Cantt. and he has sufficient interest in the matter, hence he falls within the definition of an aggrieved person. Sufficient interest as per the judgment cited at 1999 SCMR 2883 (supra) means any legal interest which can include civic, environment, cultural interests and it is the gravity of the issue which should be taken into consideration, such that the more serious the issue at stake the less significance will be attached to arguments based on the applicant's alleged lack of standing. The basic contention of the petitioner is that even though the property has been stated to be leased out, the long term lease means and suggests that the land has been sold by the respondent No.4. This ground and claim based on 'sufficient interest' has been dispelled and objected to by the respondent No.1 and the respondent No.4, who have categorically stated that the land belongs to the respondent No.1 and the land has not been sold to the respondent No.5 or any other person. The land has been given on lease to the respondent No.5 vide the Lease Agreement. Therefore, I find that there is no force in the argument that this Court should consider along term lease as a sale in favour of the respondent No.5. The petitioner also claims 'sufficient interest' on the ground that he is a resident of Cantt. and is concerned by the manner in which the land is used. The respondent No.1 has shown that it is their discretion to hand over the land to the respondent No.4 and further it is their discretion to decide what portion of the lease amount they want to retain. The respondent No.1 has also stated that it has no objection to the FSSM being constructed on the land and that it had no objection to the Project Agreement or the Lease Agreement. The record shows that the land in question was never allocated for any public purpose or for any public use. It was given to the military authorities. Hence no right or interest of the petitioner or the public-at-large is involved or has been infringed. The public has not been denied access to the land and no harm is being caused to the public at large by the construction of the FSSM. There is no wrong, being caused to the public. The petitioner states that his claim is in public interest to ensure that the public money is paid to the government exchequer. The petitioner has relied upon the case titled "Raja Mujahid Muzaffar and others v. Federation of Pakistan and others" (2012 SCMR 1651) to urge the point that since it is a matter of public money and public resource, hence every citizen is an aggrieved person. However, I am of the opinion that this is not a case of public money or public resource. In this case, the owner of the land being the respondent No.1 handed over the land of the Fortress Stadium to the military authorities to use as they deemed appropriate. The military authorities through the Fortress Stadium Management have been managing the property within the fortress stadium where different commercial activities have been undertaken and exist even today. In fact the public-at-large has benefited from these commercial activities and there has been no objection to any of the commercial activities or its management by the respondent No.4 by the petitioner. Furthermore, during the course of arguments, the learned counsel for the petitioner stated that the petitioner does not seek demolition of the FSSM but prays that public money i.e. the lease

amounts be deposited with the respondent No.1. I am of the opinion that the petitioner is not an 'aggrieved party' and has no `sufficient interest' because the respondent No.1 owes no duty to the petitioner on this issue nor is there any obligation on the respondent No.1 under any law that it has to receive all the rental income from its property. The respondent No.1 as owner of the land has categorically stated that they have given the land to the military for its use and that they have no objection to the Project Agreement or the Lease Agreement on the FSSM. Hence the petitioner cannot claim a right or interest that he was not entitled to. The larger public interest is not adversely affected. Under the circumstances, the petitioner has failed to establish that he is all aggrieved person for the purpose of public interest litigation.

11. It is also seen that as per the petitioner's own contention, the Agreements were signed in the year 2007 and today the FSSM is almost at completion. A period of seven years has gone by in which the petitioner did nothing. Now the petitioner has questioned the use of the land through the instant petition. I am of the opinion that the question of laches is relevant in this case because it does go to the bona fides of the petitioner. The land has been in the use of the respondent No.5 since 2007. The construction is almost complete yet at no point did the petitioner approach this Court. This delay of seven years to bring the case to the Court without any explanation of the delay makes the question of laches relevant as it is directly related to the public interest pleaded by the petitioner. The land around the Fortress Stadium has been used and managed by the respondent No.4 for a very long time. The decision of the respondent No.4 for use of land around the Fortress Stadium has never been questioned or objected to by the petitioner. Similarly, the entire area, around the Fortress Stadium is busy with different commercial activities. These have been going on for a long time and the petitioner has never objected to the manner in which the land has been used or authority which has allowed the land to be used in this manner. He has also never objected the loss of revenue being caused by the respondent No.1 for the land around the Fortress Stadium. Hence his specific objection levied against the FSSM after seven years shows that there is no bona fide public interest involved in this petition. The issue raised before this Court cannot be seen in isolation to one specific project and the fact that the petitioner has no objection with any other activity within the Fortress Stadium or to the management and the authority of the respondent No.4 leads me to the conclusion that the petitioner is not an aggrieved person for the purpose of the instant petition and that the petition is hit by laches for which no explanation has been rendered by the petitioner.

12. Under the circumstances, this petition is dismissed.

MWA/N-57/L Petition dismissed.

PLJ 2015 Lahore 756

Present: **MRS. AYESHA A. MALIK, J.**

MUHAMMAD AKHTAR--Petitioner

versus

DEPUTY DIRECTOR CUSTOMS (INTELLIGENCE & INVESTIGATION) FEDERAL BOARD OF REVENUE, GUJRANWALA and 2 others -- Respondents

W.P. No. 9403 of 2013, decided on 19.2.2015.

Customs Act, 1969--

----Ss. 160 & 206--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Seizure of vehicle--Order in original was amended through a corrigendum--Validity--Clerical or arithmetical errors in any decision or any officer of customs under Act, 1969, or errors arising therein from accidental slip or omission may at any time be corrected by Federal Government--Petition was accepted.
[P. 758] A

Mr. Muhammad Akram Nizami, Advocate for Petitioner.
Mr. Muhammad Zikria Sheikh, DAG with *Syed Majid Raja* Intelligence Officer, I&I FBR.
Mr. Nadeem Mahmood Mian, Standing Counsel for Respondents.
Date of hearing: 19.2.2015.

ORDER

Through this petition, the petitioner has impugned seizure of vehicle bearing Registration No. LEB-07-2858 and implementation of Order-in-Original No. 131/2012 dated 18.10.2012 passed by the Additional Collector Customs (Adjudication), Customs House, Sambrial.

2. The case of the petitioner is that he is driver of aforesaid vehicle. On 15.3.2012 the staff of Respondent No. 1 intercepted the said vehicle and seized the same under Section 160 of the Customs Act, 1969 (Act of 1969). The petitioner was issued a show-cause notice where-after a detailed order was passed on 18.10.2012. The said order required 166 bottles of foreign origin liquor to be confiscated. It did not require the vehicle of the petitioner to be confiscated. The petitioner moved an application for the return of the vehicle however no positive action was taken by the stated respondent. Hence this petition.

3. Report and parawise comments have been filed by the Respondents. Learned counsel for the respondents stated that subsequent to the Order-in-Original dated 18.10.2012, a corrigendum was issued by the Government of Pakistan on 20.10.2012 correcting the fourth row of Para 19 of the Order-in-Original such that *"I, therefore, order its outright confiscation" may be read as "I, therefore, order its outright confiscation alongwith with the seized vehicle".* Learned counsel stated that

in view of this corrigendum the vehicle has been sized being illegal and is subject matter of FIR No. 02/2012 dated 14.3.2012 registered under Section 156(1), (89) read with Section 2 (S), 157, 169 of the Act of 1969.

4. Heard. Record perused.

5. The basic issue before this Court is that Order-in-Original was amended through a corrigendum issued under Section 206 of the Act of 1969. Section 206 of the Act of 1969 provides that *clerical or arithmetical errors in any decision or order passed by the Federal Government, the Board or any officer of customs under this Act, or errors arising therein from accidental slip or omission may, at any time, be corrected by the Federal Government, the Board or such officer of customs or his successor-in-office, as the case may be.* In the instant case, the correction is neither clerical nor arithmetical. In this case a substantive change has been brought about by ordering for the confiscation of the Petitioner's vehicle. This is a patent illegality, which has been committed by the Respondents.

6. Therefore, this petition is accepted and the substantive change made by the Respondent through corrigendum dated 20.10.2012 is set-aside. So far as any other proceedings pending pursuant to FIR No. 2/2012 is concerned, the same is a separate issue which shall be dealt with in accordance with law by the competent authority.

(R.A.) Petition accepted.

2015 P L C (C.S.) 980
[Lahore High Court]
Before Mrs. Ayesha A. Malik, J
KASHIF MUSTAFA
versus
SECRETARY INTERIOR, MINISTRY OF INTERIOR, GOVERNMENT OF PAKISTAN, ISLAMABAD and 3 others
Writ Petition No.18525 and C.M. 3377 of 2011, heard on 5th December, 2014.

(a) Federal Public Service Commission Ordinance (XLV of 1977)---

----S. 7---General Instructions for Concealing the Material Information, Instruction No.23---Constitution of Pakistan, Art.199---Constitutional petition---Civil service---Withdrawal of recommendations by the Public Service Commission---Scope---Petitioner was appointed as Assistant Director Investigation (BS-17) in the Federal Investigation Agency (FIA) on the recommendations of Public Service Commission and he submitted his acceptance---Public Service Commission withdrew its recommendation and government withdrew appointment of petitioner---Contention of petitioner was that Public Service Commission was not competent to withdrew its recommendations---Validity---Role of Public Service Commission after nominating a candidate for appointment in the service of Pakistan would come to an end once its recommendations had been acted upon and a candidate had been notified at his position---Public Service Commission could not withdraw its recommendation as same had been acted upon---If any omission or error in the application had been discovered then Public Service Commission could bring the same to the notice of competent authority being appointing authority of the candidate---Public Service Commission could not issue a notice to an appointed candidate as to why action should not be taken against him with regard to concealment of information---Only competent authority could take notice of the fact and take action as per law---Appointing authority had no problem with the petitioner and appointment order could not be withdrawn without looking into merits of the case---Petitioner had not concealed anything at the time of his appointment---Error was on the part of Public Service Commission who did not consider his documents properly and subsequently had blamed the petitioner for concealment---Petitioner was not at fault in the present case---Impugned letter issued by the department was set aside and government was directed to adjust the petitioner retaining his original position as Assistant Director Investigation (BS-17) against a seat he had applied for---Constitutional petition was allowed in circumstances.

(b) Federal Public Service Commission Ordinance (XLV of 1977)---

----S. 7---Functions of Federal Public Service Commission---Scope---Functions of Public Service Commission were limited to conduct tests and take examination for recruitment of civil service in basic pay scales 16 and above and advise the President on matters with regard to qualifications and method of recruitment.

Imtiaz Rasheed Siddiqui and Shehryar Kasuri for Petitioners.
Hafiz Tariq Naseem for Applicant (in C.M. No.3277 of 2011).
Muhammad Zikria Sheikh, D.A.G. along with Syed Imran Hassan, Representative for Respondent FPSC and Hamad-ur-Rehman, Deputy Director/FIA for Respondents.
Date of hearing: 5th December, 2014.

JUDGMENT

MRS. AYESHA A. MALIK, J.--- Through this Petition, the petitioner has impugned the letter dated 30-7-2011 issued by the respondent No.1.

2. The case of the petitioner is that he qualified for the post of Assistant Director Investigation (BS-17) in the Federal Investigation Agency (FIA) on the recommendation of the respondent No.4, Federal Public Service Commission (FPSC), Islamabad. He was issued appointment letter on 27-4-2011 by the respondent No.1. He submitted his acceptance on 4-5-2011. The grievance of the petitioner is that the FPSC withdrew its recommendation on 25-5-2011 and consequently the respondent No.1 withdrew the appointment of the petitioner on 30-7-2011 with immediate effect. In the same letter, the respondent No.1 requested for nomination of the candidate, in the place of the petitioner. Learned counsel for the petitioner argued that the petitioner's appointment was withdrawn pursuant to the recommendation of the FPSC. The FPSC had become functus officio because its recommendation had been acted upon and therefore it was no longer competent to withdraw its recommendation. Learned counsel further argued that once the petitioner was appointed, his services could not be terminated without issuance of a show-cause notice and hearing, given by the respondent No.1. Learned counsel argued that Show-Cause Notice (Notice) dated 25-5-2011 was issued by the FPSC who had no authority under the law to issue the said Notice. Learned counsel further argued that the withdrawal letter dated 30-7-2011 is in pursuance of the Notice. Learned counsel explained that in terms of the application form he applied against his Domicile of Punjab whereas his appointment is against a seat of Azad Jammu and Kashmir (AJK). Learned counsel explained that the petitioner has a Subject State Certificate (SSC) of AJK and that he never concealed this fact from the FPSC. Further submitted that the petitioner submitted his SSC along with his Certificate of Domicile issued in the month of October, 1994. The petitioner was initially considered against his Domicile of Punjab which is evident from letter dated 20-5-2010, however the respondent No.1 placed him at Sr.No.4 of the merit and showed his domicile as AJK on 12-4-2011. Learned counsel argued that the petitioner was recommended by the FPSC against an AJK seat whereas he had fully disclosed that he has a Domicile of Punjab and SSC of AJK. The Chairman of the FPSC considered this issue as per documents filed by the respondent No.4 and noted that the petitioner was not at fault because he did not conceal any fact from the FPSC. Learned counsel further argued that even otherwise the function of the FPSC is to conduct tests and take examinations and to advise the President. Once these functions are completed, the FPSC becomes functus officio and has no role in the

matter. The petitioner was appointed on the recommendation of the FPSC. The recommendation stood acted upon and the FPSC could not subsequently withdraw that recommendation. Learned counsel argued that any grievance in this regard, if at all, was for the respondent No.1 who had to follow due process. Learned counsel further argued that the law governing issuance of SSC and Domicile in AJK is under the Azad Jammu and Kashmir State Subjects Act, 1980 (Act of 1980) and Azad Jammu and Kashmir State Subject Rules, 1980 (Rules of 1980) whereas the issuance of Certificate of Domicile is governed under section 7 of the Succession Act, 1925 (Act of 1925). In this regard, learned counsel argued that the petitioner does not have a domicile of AJK. His Certificate of Domicile has been issued in the month of October, 1994 by the District Magistrate, Lahore. Learned counsel argued that any mistake on the part of the respondent No.4 in the appointment of the petitioner against a seat of AJK is the fault of the stated respondent and the petitioner should not be penalized.

3. Learned counsel for Iftikhar Ahmad Khan filed C.M. No.3277 of 2011 under Order I Rule 10 read with section 151, C.P.C. for impleading him as respondent No.5 on 17-9-2011. The grievance of the applicant is that he was recommended by the FPSC for the post of Assistant Director Investigation (BS-17) against the seat of the petitioner. The petitioner filed the instant petition and obtained interim order on 16-8-2011 which continues to date and as a result of which, the applicant has not been able to work at the post he was appointed.

4. Report and parawise comments have been filed on behalf of the respondents Nos.1-4. Learned D.A.-G. argued that the petitioner was appointed by concealment of facts. Further argued that the very appointment of the petitioner is illegal and contrary to the rules as he has been appointed on the basis of his domicile being AJK. The status of the petitioner's domicile is that of the Punjab and therefore he is not entitled to occupy the present seat given to him on the basis of AJK domicile.

5. I have heard the learned counsel for the parties and gone through the record available on the file.

6. Two legal questions arise from this petition. The first question is whether the FPSC can withdraw its recommendation once it has been acted upon. In this case the FPSC recommended the petitioner for appointment as Assistant Director Investigation (BS-17) on 12-4-2011 which recommendation was acted upon. The petitioner was appointed vide letter dated 27-4-2011 and submitted his acceptance on 4-5-2011. He started to work when on 25-5-2011 the respondent No.4 issued the Notice on the allegation that the petitioner was a domicile of Punjab but was appointed against a seat of AJK and that he had concealed this fact from the FPSC. The FPSC then withdrew its recommendation on 25-5-2011.

7. The FPSC was established under section 3 of the Federal Public Service Commission Ordinance, 1977 (Ordinance of 1977). The functions of the FPSC are given in section 7 of the Ordinance of 1977 which are as under:---

(a) To conduct tests and examinations for recruitment of persons to All Pakistan Service, the civil services of the Federation and civil posts in connection with the affairs of the Federation in basic pay scales 16 and above or equivalent.
(1a) The recruitment to the posts in basic scales 11 to 15 made by any authority or person on or after the 28th May, 2003, other than through the Commission, shall, notwithstanding any provision of this Ordinance or any other law, rule, notification or any order, decision or judgment of any Court or forum, be deemed to be, and always to have been, validly made taken or done and shall not be called in question in any Court or forum on any ground whatsoever.
(b) to advise the President
(i) on matters relating to qualifications for and method of recruitment to, services and posts referred to in clause (a);
(ii) on the principles to be followed in making initial appointments to the services and posts referred to in clause (a) and in making appointments by promotion to posts in BS-18 and above and transfer from one service or occupational group to another; and
(iii) on any other matter which the President may refer to the Commission.
From the above provisions, it is clear that the functions of the FPSC are limited to conduct tests and take examinations for recruitment of civil service in basic pay scales 16 and above and for advising the President on matters relating to qualifications and method of recruitment. After nominating a candidate for appointment in the service of Pakistan, the role of the FPSC comes to an end. Once the recommendation of the FPSC has been acted upon and a candidate has been notified at his position, the role of the FPSC has concluded. Thereafter the FPSC cannot withdraw its recommendation because the same has been acted upon. At best if it discovers any omission or error in the application, it can bring it to the notice of the competent authority being the appointing authority of that candidate. The FPSC also cannot issue a Notice to an appointed candidate, as to why action should not be taken against him in terms of instruction No.23 of General Instructions for concealing the material information. It is for the competent authority to take notice of the fact and take action as per law. In the instant case, pursuant to the Notice issued by the FPSC and withdrawal of its recommendation in favour of the petitioner, the respondent No.1 recalled the appointment of the petitioner through the impugned letter dated 30-7-2011. There is nothing on the record nor has anything been argued before this Court to show that the respondent No.1 had any problem with the petitioner. The only reason for withdrawing his appointment is on account of the allegations raised by the FPSC. Since the FPSC could not issue the Notice or withdraw its recommendation, therefore the respondent No.1 could not have recalled its appointment order without looking into the merits of the case.

8. This case has been argued at length and therefore it is necessary to look into the merit of the allegation raised by the FPSC. The petitioner applied for the post of Assistant Director as per application form in which against district of domicile he has written Jammu and in his educational qualification it shows Lahore Board and University of Punjab. Similarly against his experience qualification, it shows all experience in Punjab. His home address is also shown in Lahore. The petitioner

appended along with this application form, Certificate of Domicile which was issued in the month of October, 1994 of Punjab and his SSC of Jammu and Kashmir dated 19-10-1994. Thirteen Assistant Directors were called for interview on 20-5-2010 and the petitioner is at Sr.No.7 of the list where his domicile is shown as Punjab. Subsequently he qualified the interview for the post of Assistant Director (Investigation) and his name is found at Sr.No.4 of the list dated 12-4-2011. Against his name it says AJK, meaning that he is appointed against AJK seat. The petitioner accepted the position on 4-5-2011 and joined on 10-5-2011. He started work and the Notice is issued by the FPSC on 25-5-2011. It is alleged in the Notice that he claimed to be a Domicile of AJK and he was appointed against a vacancy reserved for the AJK. However, subsequently it transpired that he joined the service on his Punjab Domicile, hence he was concealing material information. The petitioner rendered his explanation, however the FPSC withdrew its recommendation and hence the impugned order was issued on 30-7-2011. Admittedly the petitioner submitted both the domicile certificates and the SSC to the FPSC. Both documents are distinct and have their separate functions. Evidently the FPSC was not aware of the distinction. Furthermore the Chairman also found that the petitioner did not conceal anything at the time of his appointment. The error is totally on the part of the FPSC, who did not consider his documents properly and subsequently blamed the petitioner for concealment. Interestingly, their own internal documents appended with the petition show that they considered him on his Punjab Domicile and ultimately recommended him against an AJK seat. Therefore, the petitioner was not at fault.

9. Applicant Iftikhar Ahmad Khan was appointed on 30-8-2011 due to the erroneous acts of the FPSC. He gave his joining and on account of order of this Court he has not been able to join his position.

10. In view of the aforesaid, this petition is allowed. The impugned letter dated 30-7-2011 issued by the respondent No.1 is set aside. The respondent No.1 is directed to adjust the petitioner retaining his original position as Assistant Director Investigation BS-17 against a seat for Punjab.

AG/K-1/L Petition allowed.

2015 P T D 1520
[Lahore High Court]
Before Mrs. Ayesha A. Malik, J
PAKISTAN CHIPBOARD (PVT.) LTD. through Chief Executive Officer
versus
FEDERATION OF PAKISTAN through Revenue Division and 5 others
Writ Petition No.4532 of 2009, decided on 14th April, 2015.

Sales Tax Act (VII of 1990)---

----S.40---Constitution of Pakistan, Art.199---Constitutional petition---Search and seizure conducted by Sales Tax Authorities under S.40 of the Sales Tax Act, 1990---Non-compliance with requirements of S.40 of the Act---Effect---Petitioner impugned warrant for the search of its premises as well as the subsequent confiscation of material from its premises on the ground that such search and seizure was conducted without a proper warrant and without fulfilling requirements of S.40 of the Sales Tax Act, 1990---Held, that basic requirement of S.40 of the Sales Tax Act, 1990 was that an officer of Inland Revenue must have reasons to believe that a search was necessary to obtain document or things relevant in pending proceedings---Department, in the present case, relied upon letters issued by Collector of Sales Tax to show that department had reason to believe that search was necessary and the letter relied upon by the Department did not satisfy conditions of S.40 of the Sales Tax Act, 1990 and admittedly at that time there were no proceedings pending against the petitioner---No order was on record, explaining and detailing as to what documents were required from the petitioner for which a search under S.40 was necessary---Letters on basis of which search warrant was obtained suggested that the Department was still in the inquiry phase trying to ascertain whether or not the petitioner was an evader of sales tax---Section 40 of the Sales Tax Act, 1990 could only be invoked when there were proceedings pending under the Sales Tax Act, 1990 for which a document or other material was necessary---Search warrant was set aside and the Department was directed to return all records, documents and computers to the petitioner---Constitutional petition was allowed, accordingly.

Chairman Central Board of Revenue and others v. Messrs Haq Cotton Mills (Pvt.) Ltd. Burewala 2007 SCMR 1039 and Collector of Sales Tax and others v. Messrs Food Consultants (Pvt.) Ltd. and another 2007 PTD 2356 rel.
Hasham Ahmad Khan for Petitioner.
Ms. Amna Warsi for Respondents.
Date of hearing: 24th February, 2015.

JUDGMENT

MRS. AYESHA A. MALIK, J.---The petitioner seeks a declaration that search and seizure conducted by respondent No. 3 on 2-12-2008 is illegal and all actions taken are contrary to the mandate of the law.

2. The case of the petitioner is that a search was carried out on 2-12-2008 by respondent No.4 on the business premises of the petitioner and during the process of search, business records, documents and computers were removed from its premises. Learned counsel for the petitioner argued that the petitioner has challenged this search and seizure as it was done without a proper warrant and without fulfilling the requirements of section 40 of the Sales Tax Act, 1990 ("Act"). Learned counsel argued that the search warrant relied upon was issued under section 40 of the Act read with section 84 of the Criminal Procedure Code, 1898 ("Cr.P.C.") for searching the business premises of the petitioner. Learned counsel further stated that it was issued in the name of Jawad Zafar Malik, Assistant Collector, Sales Tax and Federal Excise, Gujranwala. The SHO Police Station Saddar, Jhelum endorsed the warrant which was issued by the Magistrate Ist Class, Sheikhupura. Learned counsel argued that the search warrant was issued in favour of respondent No.4, however, the search was conducted by respondent No.3. Learned counsel argued that respondent No.3 was given permission to conduct the search by respondent No.4 which is not permissible under the law. Learned counsel further argued that respondent No.3 does not fulfil the criteria of being an officer of sales tax for the purposes of the search warrant as he belongs to the Sialkot Region whereas the petitioner's premises are located in Jhelum. Learned counsel argued that respondent No.3 was competent for the purposes of Sheikhupura, Gujranwala, Faisalabad and Sialkot in terms of S.R.O. 547/2008 dated 11-6-2008 but he was not competent for the purposes of conducting search on the premises of the petitioner which premises fell within the jurisdiction of Regional Sales Tax Office, Rawalpindi. Learned counsel further argued that the search warrant was issued by Magistrate Ist Class, Sheikhupura without complying with the requirement of Section 84 of the Cr.P.C and further that he is not the relevant Illaqa Magistrate. In this regard, learned counsel for the petitioner placed reliance on the case titled Chairman, Central Board of Revenue and others v. Messrs Haq Cotton Mills (Pvt.) Ltd. Burewala (2007 SCMR 1039). Learned counsel further argued that there are no proceedings pending against the petitioner before the respondents. Learned counsel further argued that the business record and documents seized by the respondents was also done contrary to the procedure provided under section 40 of the Act. He stated no seizure report was prepared nor any reasons were provided for conducting the search under section 40 of the Act.

3. Report and parawise comments have been filed on behalf of respondent No.3. Learned counsel for the respondents argued that a case of massive fraud involving units located in Districts Sheikhupura, Jhelum and Lahore were involved, therefore, the Department sought permission for issuance of one search warrant from the Magistrate at Sheikhupura. In this regard, the Department made a written request to the learned Sessions Judge, Sheikhupura who was pleased to direct the concerned Magistrate through his orders in writing to do the needful as required under the law. The warrant was issued as per law under Section 84 of the Cr.PC read with Section 4(1)(i) and (2) of the Federal Board of Revenue Act, 2007. She argued that on 2-10-2007 and then on 11-10-2007 a letter was issued by Aftab Ahmad Bhatti, Second Secretary (STM), Government of Pakistan, Revenue Division, Central Board of

Revenue, Islamabad for investigation into tax fraud, search warrant was issued on 11-12-2007 and the search was conducted on 2-12-2008. The material which was retrieved during the search was documented in an inventory which was duly signed and acknowledged by Mirza Bashir Ahmed, Director Pakistan Chip Board Jhelum. Learned counsel argued that from the retrieved data, it was revealed that the petitioner has not been filing correct sales tax returns for making due payments of sales tax nor has it been paying the due tax on the basis of its end products and the petitioner is involved in evasion of sales tax. Learned counsel argued that the petitioner's unit has suppressed its sales to the tune of Rs.791.94 million involving evasion of sales tax in the amount of Rs.119.43 million for the period from July 2004 to October 2008.

4. Heard and record perused.

5. The basic issue is the issuance of search warrant under section 40 of the Act read with section 84 of the Cr.P.C. and the search conducted on 2-12-2008. The relevant facts are that search warrant was issued by the Civil Judge/Magistrate 1st Class, Sheikhupura in favour of Jawad Zafar Malik, respondent No.4. There is no date on the search warrant, however on 26-11-2008, respondent No.4 endorsed the search warrant in favour of respondent No.3. During the process of the search, admittedly business record, documents including accounts ledger and invoice books were seized by the respondents. Section 40 of the Act provides as follows:--

Searches under warrant (1) Where any officer of [Inland Revenue] has reason to believe that any documents or things which in his opinion, may be useful for, or relevant to, any proceedings under this Act are kept in any place, he may after obtaining a warrant from the magistrate, enter that place and cause a search to be made at any time.

(2) The search made [in his presence] under subsection (1) shall be carried out in accordance with the relevant provisions of the Code of Criminal Procedure, 1898 (V of 1898).

The basic requirement of section 40 of the Act is that an officer of Inland Revenue must have reasons to believe that a search is necessary to obtain document or things relevant in a pending proceeding. The respondents have relied upon letters dated 2-10-2007 issued by the Collector, Sales Tax and Federal Excise, Gujranwala and letter dated 11-10-2007 issued by Aftab Ahmad Bhatti, Second Secretary (STM), Government of Pakistan, Revenue Division, Central Board of Revenue, Islamabad to show that the respondents had reason to believe that the search was necessary. After going through the record, it appears that earlier the record of Arshad Traders, Sialkot was taken into custody under section 38 of the Act and from that record the respondents claim that they suspected tax fraud has been committed by other registered suppliers in the same business, including the petitioner. Subsequent thereof a letter was issued on 11-10-2007 granting approval on behalf of the board to conduct an investigation against suppliers located outside the jurisdiction of the Sialkot Collectorate. Subsequently the respondents went to the Magistrate at Sheikhupura, on 3-12-2007 who then issued the search warrant under section 84 of the Cr.P.C. on 11-12-2007. The letters relied upon by the respondents do not satisfy

the specific conditions of section 40 of the Act. Admittedly at the time there were no proceedings pending under the Act against the petitioner. Admittedly there is no order explaining and detailing what documents or things were required from the petitioner for which a search under section 40 of the Act was necessary. In the case titled as Collector of Sales Tax and others v. Messrs Food Consultants (Pvt.) Ltd. and another (2007 PTD 2356), the Hon'ble Supreme Court of Pakistan has held that where an officer of sales tax has reason to believe that any document or things, which, in his opinion, may be relevant to any proceedings under the Act, are concealed or kept in any place and there is a danger of removal of such documents or records, he may, after obtaining a warrant rom the Magistrate, enter that place and cause a search to be made at any time. The respondents have not complied with the requirements of section 40 of the Act because firstly there are no proceedings pending against the petitioner and the letters on the basis of which search warrant was obtained suggest that the respondents are still at an inquiry phase, trying to ascertain whether or not the petitioner is an evader of sales tax. Section 40 of the Act can only be invoked when there are proceedings pending under the Act for which a document or other material is necessary. Secondly it has been held in 2007 PTD 2356 (supra) that the mandate of law as enunciated in subsection (2) seems to be that search authorized under the above provision of law shall be carried out strictly in accordance with relevant provisions of the Code of Criminal Procedure, 1898. Such provisions are contained in sections 96 to 105 of the Code and need not be dilated upon as admittedly the petitioner did not invoke these important provisions of law while seizing the records of the respondent company. In this case, even the requirements of the Cr.P.C. for issuance of search warrant have not been complied with. The search warrant was issued by Civil Judge/Magistrate 1st Class, Sheikhupura on 11-12-2007 whereas the search was carried out one year later on 2-12-2008 and more importantly the search warrant was issued in favour of respondent No.4 who on his own endorsed the search warrant in favour of respondent No.3. The procedure regarding issuance of search warrant is provided for in sections 96, 98 and 103 of the Cr.P.C. whereby firstly the search warrant is to be obtained from Illaqa Magistrate where search of the premises is to be made. Under section 103 of the Cr.P.C. before making a search, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search, which are taken into possession.

6. In view of the aforesaid, this petition is allowed. The search warrant dated 11-12-2007 issued by Civil Judge/Magistrate 1st Class, Sheikhupura is set aside. The respondents are directed to return all the records, documents and computers confiscated by the respondents during search on 2-12-2008 to the petitioner immediately.

KMZ/P-19/L Petition allowed.

2015 P T D 1653
[Lahore]
Before Mrs. Ayesha A. Malik, J
NOOR SUGAR MILLS LTD.
versus
FEDERATION OF PAKISTAN and others
W.P. No.28035 of 2014, decided on 2nd April, 2015.

Income Tax Ordinance (XLIX of 2001)---

----S. 161---Income Tax Rules, 2002, R.44(4)---Constitution of Pakistan, Art.199---Constitutional petition---Notice, issuance of---Authorities issued notices to assessees calling upon them to furnish reconciliation statements along with evidence of deduction and payment of tax whenever such deductions or collections were made---Validity---Notices issued under Rule 44(4) of Income Tax Rules, 2002, simply called for certain information---No finding or ruling was rendered against assessees meaning that there was no adverse order issued against them---For the cases pursued under S. 161 of Income Tax Ordinance, 2001, read with Rule 44(4) of Income Tax Rules, 2002, no determination was made and matter was still pending---All accounting objections or otherwise could be made at the time when case would be heard---Notices in question were issued in accordance with law under Rule 44(4) of Income Tax Rules, 2002---Mere filing of monthly statements did not absolve assessees from their obligation to reconcile their statements with respect to withholding tax deducted or collected---Assessees were performing their duties as withholding agents of government and authorities were well within their statutory right to reconcile information provided by assessees for the purposes of withholding tax---Petition was dismissed in circumstances.

Deputy Commissioner of Income Tax/Wealth Tax, Faisalabad and others v. Messrs Punjab Beverage Company (Pvt.) Ltd., 2007 PTD 1347 rel.
Presence of Petitioners' counsels as in Schedule-A appended with this judgment.
Muhammad Zikria Sheikh, DAG for Respondent.
Nasar Ahmad, DAG along with Dr. Ishtiaq Ahmad, Additional Commissioner (Inland Revenue) for Respondent.

Muhammad Ilyas Khan, for Respondents (in W.Ps. Nos.30264, 34450, 34515, 34530, 30665, 32697, 33084, 33170, 33337, 33874 and 8815 of 2014, W.Ps. Nos. 88, 115, 180, 182, 302, 322, 419, 499, 1406, 2578, 2653, 3282, 3304, 3305, 3510, 4852 and 5622 of 2015).

Liaquat Ali Chaudhry for Respondent, CIR (in W.Ps. Nos.32214, 32404 of 2014 and W.P. No.1406/2015)

Sarfraz Ahmad Cheema for the Respondents (in W.Ps. Nos.34474, 31079, 31223, 31608, 31900, 32821, 33338, 33532 and 33569 of 2014 and W.P. No. 2648/2015).
Muhammad Yahya Johar for Respondent FBR (In W.P. No.31786/14).

Ibrar Ahmad for Respondent FBR (in W.P. No.28035/2014).
Shahid Sarwar Chahil for Respondent CIR, FBR (in W.Ps. Nos.33570, 33571, 33617 and 33874 of 2014 and W.Ps. Nos.114, 321 and 322 of 2015).

Date of hearing: 5th March, 2015.

JUDGMENT

AYESHA A. MALIK J.---This common judgment decides upon the issues raised in the Writ Petitions detailed in Schedule 'A', appended with this judgment. The petitioners have impugned the Notices ("Notices") issued by the Deputy Commissioner Inland Revenue under Section 161 of the Income Tax Ordinance, 2002 ("Ordinance") read with Rule 44(4) of the Income Tax Rules, 2002 ("Rules").

2. The case of the petitioners is that the Notices have been issued by the Deputy Commissioner (IR) who is not authorized under Rule 44(4). It is their case that the Rules specifically provide that the Commissioner (IR) has to issue notice, so only he can issue notice under the Rules. The petitioners are also aggrieved by the fact that proceedings under Rule 44(4) are actually an audit of the income tax affairs of the petitioners which cannot be carried out by a notice simplicitor.

3. Mr. Shahid Pervez Jami, learned counsel for the petitioners argued that the Notices issued by the Deputy Commissioner (IR) calling for reconciliation under Rule 44(4) are illegal and unlawful because the power to issue notice is vested with the Commissioner (IR) yet the Notices have been issued by the Deputy Commissioner (IR). Learned counsel argued that there is no delegation of power with respect to Rule 44(4) and only the Commissioner (IR) can issue notices under the stated Rules as the law specifically empowers him to do so. He argued that Section 210 of the Ordinance is not applicable to the Rules because if the law contemplated delegation of powers under the Rules, it would have specifically mentioned when the power could be delegated. The fact that there is no provision for delegation of power under the Rules means that the notices were issued without jurisdiction, hence liable to be declared illegal.

4. Learned counsel further argued that calling for reconciliation of statement under Rule 44(4) amounts to an audit of the income tax affairs of the petitioners and that the proceedings initiated under the Notices cannot be carried out without prior selection for audit under Section 214(C) of the Ordinance. Learned counsel argued that the substantive power to call for books of accounts and the record is under Section 177(1) of the Ordinance for which it is necessary to first select the petitioners for audit of their income tax affairs. Learned counsel also argued that even in this respect the petitioners accounts are audited every year by the Federal Board of Revenue and as such the respondents cannot continuously under the garb of Rule 44(4) audit the accounts of the petitioners. Learned counsel argued that the power under Rule 44(4) of the Rules is unguided and the taxpayer is subjected to an inquiry into its tax affairs which is against the mandate of the law. Learned counsel

argued that there are many accounting issues such as entries which are on accrual basis, which are totally discounted by the respondents. He explained that withholding tax can only be collected/ deducted when the payment is made and it cannot be claimed against accrued payments which are yet to be made. He argued that the respondents do not give consideration to this fact and discount it totally which in turn prejudices the rights of the petitioners.

5. Mr. Khurram Shahbaz Butt, learned counsel for the petitioner in W.P. Nos.5189/2015 stated that in addition to the arguments already made, the case of the petitioner in this writ petition is that he has been subjected to an audit even though his accounts have not closed for that particular year. The Notice was issued for the months of July 2014 to September, 2014, however, he argued that the Notice was issued during the financial year without waiting for the financial year to close. He stated that this is against the spirit of an audit and the respondents cannot initiate audit proceedings in the middle of the tax year.

6. Mr. Sarfraz Ahmad Cheema, learned counsel for the respondents first addressed the issue of jurisdiction. Learned counsel argued that the Commissioner (IR) can delegate his authority under Section 210 of the Ordinance by an order in writing to any officer of the Inland Revenue subordinate to him. He argued that the Commissioner can delegate all or any of his powers and functions subject to the provisions of Section 210(1A) of the Ordinance. He argued that in this case the relevant Commissioners (IRs) delegated their powers under Section 210 of the Ordinance. Learned counsel argued that so far as the issues raised against the Notice under Rule 161 read with Rule 44(4), the same have already been decided by this Court in W.P. No.9866/2014 on 12-5-2014 and W.P. No.9015/2011 on 5-6-2014. He said that as such no adverse order has been passed against the petitioners and they have simply been called upon to provide documents in order to ascertain whether they have deducted the tax on payments received by them in accordance with law. He argued that every petitioner is a withholding agent for the Government of Pakistan and is liable to file statements of withholding tax in the prescribed format within the statutory time as given under Section 165 of the Ordinance. The tax as collected or deducted by the petitioners belongs to the Government of Pakistan and it must be deposited in the government treasury. Therefore Rule 44(4) of the Rules simply calls for reconciliation of the information provided in the statement submitted under Section 165 of the Ordinance.

7. Mr. Muhammad Yahya Johar, learned counsel for the respondents argued that under the Ordinance, there are two types of taxable liabilities, one a taxpayer must declare his own taxable income and pay the required tax and secondly the taxpayer acts as a withholding agent of the Government of Pakistan which requires him to deduct or collect tax against payments received in terms of Section 161 of the Ordinance. The taxpayer is required to file monthly statements as well as a yearly statement under Section 165 of the Ordinance to show the total withholding tax deducted under Division III of Chapter 12 of the Ordinance and the total amount of tax collected under Division II of Chapter 12 of the Ordinance. Rule 44(4) of the

Rules provides for the forms in which statements under Section 165 have to be filed and for the statutory period within which they have to be filed. Sub-Rule 4 of Rule 44 provides that a Commissioner can call for a reconciliation statement by a taxpayer with respect to all amounts mentioned in the monthly or yearly statement filed under Section 165. Therefore, he argued that it is not an audit of the income tax affairs of the petitioners but is a reconciliation statement to ensure that the petitioners, as withholding agents of the Government, have deposited all amounts that they were required to collect or deduct of withholding tax in the government treasury.

8. Mr. Muhammad Ilyas Khan, Senior Counsel for the respondents argued that under Rule 43 of the Rules, the petitioners are required to make payment into the Government treasury of the taxes withheld by them within seven days. Further argued that the petitioners are also required to e-file monthly statements of tax deduction for salary payments as well as for non-salary payments made by them, even if no tax is collected or deducted under Section 165 of the Ordinance. Further argued that the tax deducted or collected pertains to the receipt of payment and there is no impact on the taxpayer. Further argued that the petitioners are required to disclose the names, NTN, address, particulars of payments made and reasons of non-deduction of tax in case no tax is deducted as required in columns 15 to 18 of the statement under Section 165 of the Ordinance prescribed for payments other than salary payments.

9. Heard and record perused.

10. The preliminary objection raised by the petitioners with respect to the Notices impugned is that an illegal person has issued the Notices under Rule 44(4) of the Rules. Rule 44(4) of the Rules is reproduced below:--

44. Annual statement of tax collected or deducted.---(1) An annual statement required to be furnished under subsection (1) of section 165 for a financial year shall be in the form as set out in Part VIII and Part IX of the Second Schedule to these rules.

(4) A person required to furnish the statements under sub-rule (1) or (2) shall, wherever required by the Commissioner, furnish a reconciliation of the amounts mentioned in the aforesaid annual and (monthly) statements with the amounts mentioned in the return of income, statements, related annexes and other documents from time to time.

The argument of the petitioners is that the Commissioner is the competent authority to issue notice under Sub-Rule 4. Delegation of power is provided under the Ordinance. Section 210 read with Section 211 of the Ordinance reads as under:--

210. Delegation.---(1) The Commissioner (subject to subsection (1A) may, by an order in writing, delegate to any (officer of Inland Revenue, subordinate to the Commissioner) all or any of the powers or functions conferred upon or assigned to the Commissioner (subject to subsection (1A) under this Ordinance other than the power of delegation.

211. Power or function exercised.---(1) Where, by virtue of an order under section 210 (an officer of Inland Revenue) exercise a power or performs a function of the Commissioner, such power or function shall be treated as having been exercised or performed by the Commissioner.
In terms of Sections 210 and 211 of the Ordinance, the Commissioner can delegate his powers to any officer subordinate to him except the powers of amendment of assessment as contained in subsection (5A) of Section 122 of the Ordinance. In such cases, only the power can be delegated to an officer not below the rank of Additional Commissioner Inland Revenue. The argument that the delegation of power does not apply to the Rules is totally misconceived. The Rules are framed under Section 237 of the Ordinance and are subordinate to the substantive law being the Ordinance. The Ordinance provides for delegation of power under Sections 210 and 211 which is applicable to the Rules framed under the Ordinance. Therefore the Rules do not have to specifically provide for delegation of power by the Commissioner. As per Section 210 of the Ordinance, the Commissioner can delegate his powers by an order in writing which order was admittedly issued. Hence there is no merit in this objection.

11. The substantive issue raised by the petitioners with respect to the Notices issued under Section 161 of the Ordinance read with Rule 44 of the Rules is that calling for a reconciliation statement amounts to an audit into the income tax affairs of the petitioners. Their argument is that an audit is subject to conditions under Section 214C and subject to selection under Section 177 of the Ordinance. The emphasis of the argument raised by the petitioners is that use of the word "income tax affairs" under Section 177 of the Ordinance as well as under Section 214C of the Ordinance includes information pertaining to the collection and deduction of withholding tax which cannot be done separately under the garb of Rule 44(4) of the Rules. The petitioners do not dispute the fact that they are required to deduct or collect withholding tax and they are admittedly filing returns under Section 165 of the Ordinance. They dispute the calling for the reconciliation statements under Rule 44(4) of the Rules. Under Section 165 of the Ordinance every person collecting tax under Division II of this Part (or Chapter XII) or deducting tax from a payment under Division III of this Part (or Chapter XII) shall furnish to the Commissioner a monthly statement in the prescribed form set out in the stated Section. Rule 44(4) of the Rules empowers the Commissioner to call for a reconciliation statement of the amounts mentioned in the monthly statements filed by the petitioners. Since the monthly statement is specifically with respect to the withholding tax deducted and collected by the petitioners, it is not an audit of the income tax affairs of the petitioners. Audit under Section 214C read with Section 177 of the Ordinance is of a wider scope involving the tax affairs of the petitioners whereas Rule 44(4) of the Rules is specifically with respect to the withholding tax. It is a verification of the amounts mentioned in the statements to ensure that the petitioners have deducted or collected tax in accordance with law. The petitioners are agents of the Government and the amounts collected and deducted by them are amounts which belong to the Government and have to be deposited into the Government treasury. Therefore

reconciliation of the statements filed by the petitioners under Rule 44(4) of the Rules cannot be equated with an audit of the income tax affairs of the petitioners.

12. The Notices issued in these petitions mentioned in Schedule-A have all challenged the calling for reconciliation of amounts mentioned in the monthly statements. The requirement of furnishing a reconciliation statement is not an adverse order because it does not prejudice the petitioners rights or interest nor does it infringe upon any right of the petitioners. The Ordinance requires the petitioners to file monthly statements with respect to the withholding tax collected or deducted by them and Rule 44(4) of the Rules requires the respondents to reconcile the information provided in the statements so as to ensure that the correct tax amounts have been deducted or collected by the petitioners. Calling for such information is the right of the respondents Authorities duly conferred under the law. The respondents have issued notices to the petitioners calling upon them to furnish reconciliation statements along with evidence of deduction and payment of tax whenever such deductions or collections are made. At this stage, the Notices issued under Rule 44(4) of the Rules simply calls for certain information. There is no finding or ruling against the petitioners meaning that there is no adverse order issued against them. For those cases pursued under Section 161 of the Ordinance read with Rule 44(4) of the Rules, no determination has been made and the matter is still pending. All accounting objections or otherwise can be made at the time when the case is heard. It was held in the case titled Deputy Commissioner of Income Tax/Wealth Tax, Faisalabad and others v. Messrs Punjab Beverage Company (Pvt.) Ltd., (2007 PTD 1347) that tendency of by-passing the remedy provided under law, and resort to Constitutional jurisdiction of High court was deprecated. In view of the contents of the notice the Department only contemplates to take action against them. The petitioner instead of rushing to the High Court and consuming sufficient time should have submitted reply before invoking the jurisdiction of the High Court. We have held in the judgment that such practice is to be deprecated because if merely on the basis of show-cause notice proceedings are started then in such position department would never be in a position to proceed with the cases particularly the recovery of revenue etc. Thus keeping in view the circumstances of the case we are of the opinion that respondent had wrongly availed remedy under Article 199 of the Constitution.

13. In view of the aforesaid, the Impugned Notices have been issued in accordance with law under Rule 44(4) of the Rules. Mere filing of monthly statements will not absolve the petitioners from their obligation to reconcile their statements with respect to the withholding tax deducted or collected. Since the petitioners are performing their duties as withholding agents of the Government, the respondents are well within the statutory right to reconcile the information provided by the petitioners for the purposes of the withholding tax.

14. Under the circumstances, all the petitions are dismissed.

MH/N-18/L Petition dismissed.

2015 P T D 1855
[Lahore High Court]
Before Mrs. Ayesha A. Malik, J
Mst. SHAGUFTA ABDULLAH
versus
COMMISSIONER INLAND REVENUE and 3 others
W.P. No.13030 of 2015, heard on 14th May, 2015.

(a) Words and phrases---

----"Hardship"---Defined.
Black's Law Dictionary by Bryan A., Garner, Ninth Edition and Oxford Advanced Learner's Dictionary of Current English by A.S. Hornby, Eighth Edition rel.

(b) Words and phrases---

----"Undue"---Meaning---Undue is something greater or more extreme than is wanted, expected or thought to be reasonable.
Prestige Lights Ltd. v. Custom, Excise and Service Tax Appellate Tribunal (Uttaranchal) (D.B.) 2004 (2) U.D. 265 rel.

(c) Interpretation of statutes---

----Taxing statute---Scope---Taxing statute is to be construed literately in sense in which it has been provided---Intent of Legislature should be clear from words in the legislation---Court must look squarely at words of statute and interpret them in the light of what has been clearly expressed---If there is any ambiguity caused by language, the benefit of that ambiguity goes to taxpayer.
Sohail Jute Mills Ltd. and others v. Federation of Pakistan through Secretary, Ministry of Finance and others PLD 1991 SC 329 and Messrs Elahi Cotton Mills Ltd. and others v. Federation of Pakistan through Secretary M/o Finance, Islamabad and 6 others PLD 1997 SC 582 rel.

(d) Income Tax Ordinance (XLIX of 2001)---

----Ss. 128 & 131(5)---'Undue hardship'---Proof---Taxpayer must show its absolute inability to pay tax and must establish that under existing financial circumstances his income and expenses do not allow to pay required tax---Not about inability to pay tax or inconvenience to pay the tax nor is it about commercial viability or profit making; it is a financial disability to pay tax making it virtually impossible for taxpayer to pay tax---Taxpayer must plead "undue hardship" based on its income and expenses so that it can be evaluated---"Undue hardship" can also include situations where taxpayer is able to show a strong prima facie case.
Messrs L.G. Electronics India (Pvt.) Ltd. v. Commissioner of Central Excise Nodia (Allahabad) 2009 (6) ADJ 246 rel.

(e) Sales Tax Act (VII of 1990)---

----Ss. 11(2) & 33(13)---Income Tax Ordinance (XLIX of 2001), Ss.128 & 131(5)---Constitution of Pakistan, Art.199---Constitutional petition---Conditional stay---Undue hardship, non-pleading of---Assessee was aggrieved of order passed by Income Tax Appellate Tribunal granting stay with a condition to deposit 30% of disputed tax---Validity---Grant of stay as per Income Tax Ordinance, 2001, was not granted as of right---Stay was subject to discretion of appellate forum when considering undue hardship---Deposit of 30% of disputed tax as a precondition to stop recovery of assessed tax fell within the discretion of Income Tax Appellate Tribunal---Tribunal had given taxpayer a concession by requiring him deposit a small part of disputed tax and not entire tax because he did not plead undue hardship but emphasized on irreparable loss caused to him---Under S.131 of Income Tax Ordinance, 2001, purpose of providing one hundred and eighty days stay from recovery of tax was to ensure that appeal would be decided in a timely manner thereby ensuring that revenue was paid at the earliest---High Court declined to interfere in condition imposed by Income Tax Appellate Tribunal while granting conditional stay order---Petition was dismissed in circumstances.

Z.N. Exports (Pvt.) Ltd. v. Collector of Sales Tax 2003 PTD 1746; Messrs Pak Saudi Fertilizers Ltd. v. Federation of Pakistan and others 2002 PTD 679; Muhammad Asif Nawaz v. Additional Sessions Judge/Justice of Peace Multan and 2 others 2014 CLD 45; Messrs Askari Leasing Ltd. through Chief Manager v. Presiding Officer and another 2015 CLD 196; Pakistan Mobile Communication Ltd. v. Judge District Consumer Court, Gujranwala and 3 others PLD 2015 Lah. 204; Balochistan Glass Limited through Authorized Representative and 2 others v. Bank Alfalah Limited and 2 others 2015 CLD 52 and Mahmood Barni v. Inspecting, Additional Commissioner of Income Tax, Gujranwala and another 2005 PTD 165 ref.

Mirza Bilal Zafar for Petitioner.

Sarfraz Ahmad Cheema for Respondents.

Date of hearing: 14th May, 2015.

JUDGMENT

MRS. AYESHA A. MALIK, J.---Through this petition, the petitioner has impugned order dated 9-4-2015 issued by respondent No.4 which requires the petitioner to deposit 30% of the impugned tax for grant of stay against the recovery of the assessed tax.

2. The facts of the case are that respondent No.3 issued a show cause notice to the petitioner on 28-6-2014 with respect to inadmissible input tax and its recovery under Section 11(2) of the Sales Tax Act, 1990 ("Act") along with default surcharge. The petitioner appeared before respondent No.3 and sought adjournments as the record was not available. Respondent No.3 passed an assessment order on 12-9-2014 directing the petitioner to deposit the principal

amount of sales tax of Rs.4,989,459 along with default surcharge (to be calculated at the time of recovery) under Section 34(1)(c) of the Act. A penalty of Rs.4,989,459 (equal to 100% of principal amount of sales tax) under subsection (13) of Section 33 of the Act was also imposed. Aggrieved of this order, the petitioner filed an appeal before respondent No.2 which was dismissed on 27-11-2014. The petitioner challenged the said order before respondent No.4 which has not been fixed for hearing so far. In the meantime, respondent No.3 initiated recovery proceedings against the petitioner vide recovery notice dated 25-2-2015. The petitioner moved an application for grant of stay against the recovery proceedings initiated by respondent No.3. Respondent No.4 vide order dated 9-4-2015 passed the following order:--

"Therefore, we are inclined to grant stay against recovery of impugned tax demand for a period of 60 days subject to payment of 30% of the impugned tax demand, which will be deposited in the Treasury within 5 days of the receipt of this order otherwise this order will not hold the field."

Learned counsel for the petitioner argued that respondent No.4 failed to consider that the appeal of the petitioner is pending, therefore grant of conditional stay against recovery is wholly unwarranted and is without authority. It is their case that the petitioner is entitled to interim relief until adjudication of its dispute by one independent judicial forum. Learned counsel argued that the demand in dispute has yet to be settled by an independent judicial forum, hence the petitioner is entitled, as of right, to interim relief. He argued that in this regard respondent No.4 could not impose any condition on the petitioner for deposit of the disputed tax. Learned counsel further argued that no coercive measures for recovery of the disputed tax can be taken pending a decision in appeal. He also urged that in similar cases, no deposit was sought yet in his case deposit of 30% has been ordered which is discrimination.

3. Learned counsel for the respondents submits that the petitioner was given sufficient time to defend his case but he failed to do so and kept delaying the matter. The petitioner did not respond to the show cause notice, therefore, an assessment order was issued. He stated that the conduct of the petitioner before the respondents does not entitle him to any discretionary relief. Further argued that under the law, it is the discretion of respondent No.4 to grant interim relief and in this case no delay has been caused by respondent No.4 in hearing the stay application. He explained that each case will be seen in the light of its own facts and circumstances, so there is no question of discrimination.

4. Heard and record perused.

5. The basic issue is whether respondent No.4 can impose a condition to deposit a certain percentage of the tax when granting interim relief thereby preventing recovery of the tax under the Ordinance. The relevant Section for the purposes of this petition is Section 131(5) of the Income Tax Ordinance, 2001 ("Ordinance") which reads as follows:-

Notwithstanding that an appeal has been filed under this section, tax, shall, unless recovery thereof has been stayed by the Appellate Tribunal, be payable in accordance with the assessment made in the case:
Provided that if on filing of application in a particular case, the Appellate Tribunal is of the opinion that the recovery of tax levied under this Ordinance and upheld by the Commissioner (Appeals), shall cause undue hardship to the taxpayer, the Tribunal after affording opportunity of being heard to the Commissioner, may stay the recovery of such tax for a period not exceeding one hundred and eighty days in aggregate:
Provided further that in computing the aforesaid period of one hundred and eighty days, the period, if any, for which the recovery of tax was stayed by a High Court, shall be excluded.
It is noted that the same provision exists in Section 128 of the Ordinance which reads as follows:--
128. Procedure in appeal.---(1) The Commissioner (Appeals) shall give notice of the day fixed for the hearing of the appeal to the appellant and to the Commissioner against whose order the appeal has been made.
[(1A) Where in a particular case, the Commissioner (Appeals) is of the opinion that the recovery of tax levied under this Ordinance, shall cause undue hardship to the taxpayer, he, after affording opportunity of being heard to the Commissioner against whose order appeal has been made, may stay the recovery of such tax for a period not exceeding thirty days in aggregate.]
(2) The Commissioner (Appeals) may adjourn the hearing of the appeal from time to time.
(3) The Commissioner (Appeals) may, before the hearing of an appeal, allow an appellant to file any new ground of appeal not specified in the grounds of appeal already filed by the appellant where the Commissioner (Appeals) is satisfied that the omission of the ground from the forum of the appeal was not wilful or unreasonable.
(4) The Commissioner (Appeals) may, before disposing of an appeal, call for such particulars as the Commissioner (Appeals) may require respecting the matters arising in the appeal or cause further enquiry to be made by the Commissioner.
(5) The Commissioner (Appeals) shall not admit any documentary material or evidence which was not produced before the Commissioner unless the Commissioner (Appeals) is satisfied that the appellant was prevented by sufficient cause from producing such material or evidence before the Commissioner.
As per Section 131(5) of the Ordinance, the tax must be paid in accordance with the assessment order unless its recovery has been specifically stayed by the Appellate Tribunal. The Appellate Tribunal can stay the recovery of the tax in hardship cases where deposit of the tax shall cause undue hardship to the taxpayer. A bare reading of the Section shows that stay against recovery of tax is not a matter of right. It is subject to the discretion of the Appellate Tribunal who has to hear the taxpayer and decide upon the question of hardship. The same condition exists in Section 128 of the Ordinance which clearly provides that irrespective of the filing of an appeal and the pendency of an appeal, the tax must be paid. There is no ambiguity in the words of the statute in this regard. The Appellate Tribunal or the Commissioner (Appeals)

at its discretion can stop the recovery of tax if it finds that it is a case of undue hardship for the taxpayer. The appellate forum will by exercising its discretion decide whether it is a fit case of undue hardship. For proper evaluation the taxpayer has to specifically plead its undue hardship.

6. The word 'hardship' has not been defined anywhere in the statute. As per the Black's Law Dictionary by Bryan A.Garner, Ninth Edition, hardship has been defined as suffering or adversity. In the Oxford Advanced Learner's Dictionary of Current English by A.S. Hornby, Eighth Edition 'hardship' is defined as a situation that is difficult and unpleasant because you do not have enough money, food, clothes etc. economic/financial, etc. The Ordinance does not require the taxpayer to show 'hardship' but requires it to be a case of undue hardship which means something more severe, harsher than simple difficulty, unpleasantness. "Undue" is something greater or more extreme than is wanted expected or thought to be reasonable. The meaning of undue hardship has been examined in the case titled Prestige Lights Ltd. v. Custom, Excise and Service Tax Appellate Tribunal (Uttaranchal) (D.B.) (2004 (2) U.D.265) as follows:--
The term 'undue hardship' is, however, not defined in any Law Dictionary. Reading the two words together the meaning would be 'unwarranted hardship'.
In order to appreciate the meaning of the word 'undue hardship' as used in sections 128 and 131(5) of the Ordinance the rules of construction in a taxing statute must be considered. A taxing statute is to be construed literately in the sense in which it has been provided. The intent of the legislature should be clear from the words in the legislation. The Court must look squarely at the words of the statute and interpret them in the light of what has been clearly expressed. If there is any ambiguity caused by the language, the benefit of that ambiguity goes to the taxpayer. Reliance is placed on the cases titled Sohail Jute Mills Ltd. and others v. Federation of Pakistan through Secretary, Ministry of Finance and others (PLD 1991 SC 329) and Messrs Elahi Cotton Mills Ltd. and others v. Federation of Pakistan through Secretary M/o Finance, Islamabad and 6 others (PLD 1997 SC 582).

7. Therefore the taxpayer must show its absolute inability to pay the tax. He must establish that under existing financial circumstances, his income and expenses do not allow him to pay the required tax. It is not about inability to pay the tax or inconvenience to pay the tax. Nor is it about commercial viability or profit making. It is a financial disability to pay the tax making it virtually impossible for the taxpayer to pay the tax. The taxpayer must specifically plead undue hardship based on its income and expenses so that it can be evaluated. The appellate forum must assess and evaluate whether it is a case of undue hardship. This evaluation is in the form of a concession available to the taxpayer under the Ordinance. The appellate forum in order to form an opinion as to whether the recovery of a tax would amount to undue hardship must consider the financial position of the taxpayer through its documents and ascertain whether on the basis of available assets and income, a taxpayer is prevented from meeting the required demand. Undue hardship can also include situations where the taxpayer is able to show a strong prima facie case. It was held in Messrs L.G. Electronics India (Pvt.) Ltd. v. Commissioner of Central

Excise Nodia (Allahabad) (2009 (6) ADJ 246) while considering the case of 'undue hardship', the authority is required to examine the prima facie on merits of the dispute as well. Pleading of financial disability would not be the only consideration. Where the case is fully covered in favour of the assessee by a biding precedent like that of the judgment of the Supreme Court, jurisdictional High Court or a Special Bench of the Tribunal, then to still insist upon the deposit of duty and penalty levied would certainly cause undue hardship to the assesse. Therefore the appellate forum will also have to assess the nature of the case and ascertain if the taxpayer has a strong case in law. In each case, a determination has to be made as to whether the recovery will cause undue hardship to the taxpayer. Each order must reflect application of an objective and judicious mind. Each case must be decided on its own merits.

8. In this case, the Appellate Tribunal heard the stay application filed by the petitioner against the recovery proceedings initiated by respondent No.3 and passed a conditional order on 9-4-2015. The petitioner questions that condition of deposit on the ground that he is entitled to the stay from the recovery process until a decision is delivered by the independent forum. As already stated, the grant of stay as per the Ordinance is not granted as of right. It is subject to the discretion of the appellate forum when considering undue hardship. In this case, the deposit of 30% of the disputed tax as a precondition to stop the recovery of the assessed tax falls within the discretion of the Appellate Tribunal. Essentially the Appellate Tribunal has given the taxpayer a concession by requiring him to deposit a small part of the disputed tax and not the entire tax because he did not plead undue hardship but emphasized on irreparable loss caused to him. The petitioner has relied upon the case titled Z.N. Exports (Pvt.) Ltd. v. Collector of Sales Tax (2003 PTD 1746) which is not applicable to his case because in the said case, there was a delay in hearing the case, hence it was held that since the Tribunal as a forum of first appeal did not dispose of the appeal, the petitioner could not be blamed. In all fairness, equity and justice, an assessee should not be forced to pay a demand created by a Revenue Authority unless the order creating such demand has undergone the scrutiny of at least one independent forum. In this case, his stay application was heard and a conditional order was passed. There is no delay element at this point. The other cases relied upon by the learned counsel for the petitioners i.e. Messrs Pak Saudi Fertilizers Ltd. v. Federation of Pakistan and others (2002 PTD 679), Muhammad Asif Nawaz v. Additional Sessions Judge/Justice of Peace Multan and 2 others (2014 CLD 45), Messrs Askari Leasing Ltd. through Chief Manager v. Presiding Officer and another (2015 CLD 196), Pakistan Mobile Communication Ltd. v. Judge District Consumer Court, Gujranwala and 3 others (PLD 2015 Lahore 204), Balochistan Glass Limited through Authorized Representative and 2 others v. Bank Alfalah Limited and 2 others (2015 CLD 52) and Mahmood Barni v. Inspecting, Additional Commissioner of Income Tax, Gujranwala and another (2005 PTD 165) require a speaking order, which is not an issue in this case. Hence those cases are not relevant.

9. Another aspect of this case is the relevance of the time frame within which the case must be decided. The stay application was heard and decided but the appeal has yet to be heard. Since the matter pertains to fiscal obligations of the taxpayer and recovery of government revenue the appeal must be decided at the earliest and the stay of the recovery of tax must commensurate with the final decision by the appellate forum. Under Section 131 of the Ordinance, the purpose of providing one hundred and eighty days stay from recovery of tax is to ensure that the appeal is decided in a timely manner thereby ensuring that revenue is paid at the earliest. It has been seen that the Appellate Tribunal in particular, tends not to decide the appeals in a timely manner and exceeds the stay period of one hundred and eighty days of the taxpayer before even attending to the appeal. Therefore, numerous petitions are filed before this Court seeking a direction to the Appellate Tribunal to decide the appeal and the stay matter in a timely manner giving the taxpayer an opportunity to avail the benefit of Section 131(5) of the Ordinance. For this reason, it is imperative to ascertain if any delay has been caused during the pendency of the appeal and to whom that delay is attributed. If the delay is attributable to an act of the taxpayer, then the Appellate Tribunal cannot be blamed for the delay and the taxpayer is not entitled to any protection from this Court in constitutional jurisdiction. However, where the delay is not attributable to the taxpayer, who has filed his appeal and is waiting for the matter to be heard, he can, if the facts permit be protected. Where the Appellate Tribunal has essentially exhausted the stay period for no fault of the taxpayer it goes against the spirit of the Ordinance. In such cases, this Court has interfered and required the appellate forum to decide the appeal within a given time. This is because the intent of the legislature is very clear. Whenever a stay is granted in an appeal under the Ordinance, there is a corresponding duty on the appellate forum to decide the appeal within the stipulated time particularly where the payment of tax has been stayed. Hence the Appellate Tribunal has to ensure that appeals are decided, so as to ensure that no prejudice is caused to the taxpayer.

10. Under the circumstances, no case for interference is made out. petition is dismissed.

MH/S-74/L Petition dismissed.

PLJ 2015 Lahore 978 (DB)

***Present*: MRS. AYESHA A. MALIK AND FAISAL ZAMAN KHAN, JJ.**

COMMISSIONER OF INCOME TAX, SPECIAL ZONE, LAHORE--Appellant

versus

M/s. CHAKWAL SPINNING MILLS LTD., LAHORE--Respondent

P.T.R. No. 60 of 2005, decided on 27.4.2015.

Income Tax Ordinance, 1979 (XXXI of 1979)--

----Ss. 5(1)(cc), 66-A & 133--Reference--Derived income from manufacturing and sale of cotton--Question of--Jurisdiction of Income Tax Commissioner--Question of fact--Validity--ITAT in a reference upheld order of ACIT on ground that only IAC had jurisdiction to invoke provisions of Section 66-A of Ordinance--Hence no question of law is made out. [P. 979] A

Mr. Safdar Mehmood & Mr. Muhammad Ilyas Khan, Advocates for Appellant.

Sardar Faiz Rasool Khan Jalbani, Advocate for Respondent.

Date of hearing: 27.4.2015.

ORDER

This is a Reference filed under Section 133 of the Income Tax Ordinance, 1979 ("Ordinance").

2. The Appellant urged the following question of law:

(i) Whether under the facts and in the circumstances of the case, the learned Income Tax Appellate Tribunal was justified to vacated the order of the CIT on the point of jurisdiction when the CIT specifically enjoyed revisional powers by virtue of Section 5(1)(cc) of the Income Tax Ordinance, 1979?

3. With reference to the question urged before us, the facts are that the respondent derives income from manufacturing and sale of cotton yarn. Assessment for the year 1997-98 was finalized under Section 62 of the Ordinance by the Assistant Commissioner Income Tax, Islamabad ("ACIT") on 24.6.1998. Subsequently *vide* order dated 21.6.2002 issued by Commissioner of Income Tax, Special Zone, Lahore ("CIT") cancelled the order passed under Section 62 of the Ordinance by observing that the order is erroneous in law and prejudicial to the interest of revenue and directed the assessing officer to pass a fresh order after providing an opportunity to the assesse of being heard. Aggrieved by this order of 21.6.2002, the respondent filed an appeal before the Income Tax Appellate Tribunal, Lahore, ("ITAT") who *vide* order dated 13.12.2003 observed that the CIT has wrongly exercised power under Section 66-A of the Ordinance as the same is vested in the Inspecting Assistant Commissioner ("IAC"). The matter was heard before the ITAT in a reference where the order of the ACIT was upheld *vide* order dated 20.12.2004 by the ITAT on the ground that only the IAC had jurisdiction to invoke the

provisions of Section 66-A of the Ordinance. They observed that whether CIT specifically enjoyed revisional powers by virtue of Section 5(1)(cc) of the Ordinance is a question of fact which did not give rise to any question of law.

4. We have heard the learned counsel for the Appellant and find that no question of law arises in the instant case as by virtue of Section 66-A of the Ordinance jurisdiction vested with the IAC. Whether CIT had jurisdiction under Section 5(1)(cc) of the Ordinance was a question of fact which was never established. Nothing was placed on record to show the basis of the argument. The ITAT in a reference upheld the order of ACIT on the ground that only the IAC had the jurisdiction to invoke the provisions of Section 66-A of the Ordinance. Hence no question of law is made out.

5. Under the circumstances, Reference is dismissed.

(R.A.) Reference dismissed

P L D 2015 Lahore 617
Before Mrs. Ayesha A. Malik, J
Qazi HUSSAIN SIRAJ---Petitioner
versus
Prof. SAJID MIR and others---Respondents
W.P. No.5783 of 2015, heard on 4th March, 2015.

Senate (Election) Act (LI of 1975)---

----S. 13(1) & (2)---Constitution of Pakistan, Arts. 199 & 218(2)---Constitutional petition---Locus standi---Petitioner as citizen of Pakistan assailed nomination papers of respondent submitted for senate election---Validity---Senate election could not be challenged at intermediate stage, except where there was no legal remedy available to aggrieved party and where orders of Returning Officer or Election Commission of Pakistan were patently illegal and without jurisdiction, the effect of which would be to disentitle a candidate to participate in elections---Candidate, in such cases could come to High Court in constitutional jurisdiction challenging order of Returning Officer and Election Commission of Pakistan for infringing upon his right to contest elections---Petitioner was not aggrieved person at such stage of election process because fate of respondent's participation in election was yet to be determined---In the event if respondent won the election, right of petitioner to challenge holding of office by respondent as member Senate would accure and petitioner could question the same---Petitioner had no right under Senate (Election) Act, 1975, to participate in election process and he had no direct nexus with senate election---Petitioner could not question qualifications of candidate at scrutiny stage, in constitutional jurisdiction---Petition was dismissed in circumstances.

Election Commission of Pakistan v. Javaid Hashmi and others PLD 1989 SC 396; Muhammad Raza Hayat Hiraj and others v. The Election Commission of Pakistan and others 2015 SCMR 233; Intesar Huassain Bhatti v. Vice-Chancellor, University of Punjab, Lahore and others PLD 2008 SC 313; Ch. Muhammad Arif Hussain v. Rao Sikandar Iqbal and 10 others PLD 2008 SC 429; Syed Nayyar Hussain Bukhari v. District Returning Officer, NA-49, Islamabad and others PLD 2008 SC 487; Lt.-Gen. (R) Salahuddin Tirmizi v. Election Commission of Pakistan PLD 2008 SC 735 and Hafiz Hamdullah v. Saifullah Khan and others PLD 2007 SC 52 ref.
Dr. Aon Muhammad Khan v. Lt.-Gen. (Retd.) Saeed Qadir and others PLD 1987 SC 490; Sh. Ihsanul Haq Piracha v. Wasim Sajjad and others PLD 1986 SC 200; Dr. Karim Ahmed Khawaja v. Returning Officer for Senate Elections, 2006 and another 2006 CLC 624; Sh. Riaz-ul-Haq and another v. Federation of Pakistan through Ministry of Law and others PLD 2013 SC 501 and Malik Umar Aslam v. Mrs. Sumaira Malik and others 2014 SCMR 45 distinguished.
Mubeen-ud-Din Qazi, Muhammad Ahsan Bhoon and Muhammad Azhar Siddique for Petitioner.
Muhammad Zikria Sheikh, D.A.G., Mirza Nasar Ahmad, D.A.G. along with Ali Akhtar Khan, Law Officer for Election Commission of Pakistan.

Anwaar-ul-Haq Pannun, Ch. Muhammad Rafique Jathol, Irfan Nasir Cheema, Ch. Umer Awais, for Respondent No.1.
Ch. Muhammad Ramzan, Muhammad Ilyas Khan, Shakeel Pasha and Haider Zaman for Respondent No.6.
Date of hearing: 4th March, 2015.

JUDGMENT

MRS. AYESHA A. MALIK, J.---Respondent No.1 Professor Sajid Mir is a candidate for the senate elections on the seats reserved for technocrats and ulema. The petitioner, a citizen of Pakistan challenges the acceptance of the nomination papers of respondent No.1 on the ground that he is not qualified and that he made false declarations in his nomination papers. In this regard, the petitioner has impugned order dated 20-2-2015 issued by the Returning Officer ("RO") and order dated 27-2-2015 issued by respondent No.3, Election Commission of Pakistan ("ECP").
The petitioner also prays for rejection of the nomination papers of respondent No.1 and for initiating proceedings against him under Sections 58(aa) and 62 of the Senate (Election) Act, 1975 ("Senate Act") for committing corrupt practice by submitting a false and incorrect declaration in his nomination papers.

2. The case of the petitioner is that respondent No.1 is not qualified to be elected as member Senate against the seat reserved for technocrats and ulema. Learned counsel stated that the petitioner raised four substantive objections against the nomination of respondent No.1, however, the RO did not consider any of the objections and instead dismissed his application on the ground that the petitioner is not competent to file objections against the nomination of respondent No.1 under section 13(1) and (2) of the Senate Act. In terms of the order of the RO, the petitioner was not a proposer, seconder, agent or candidate for the senate elections, hence he has no locus standi to raise objections against the nomination papers of respondent No.1. The petitioner then moved a petition under section 13(6) read with section 58(aa) and 62 of the Senate Act and Article 218(3) of the Constitution of Islamic Republic of Pakistan, 1973 ("the Constitution") against the order dated 20-2-2015 before the ECP. The ECP upheld the order of respondent No.2 and at the same time decided the matter on its merits, finding respondent No.1 had the qualification, experience and achievements required for contesting against the seat of technocrats and ulema.

3. Mr. Mubeen-ud-Din Qazi, learned counsel for the petitioner argued that the question whether or not respondent No.1 is qualified to become member Senate against the seat reserved for technocrats or ulema must be looked into by this Court. Learned counsel submitted that respondent No.1 is not qualified to be elected as member Senate because he has sworn a false declaration. respondent No.1 deliberately falsified information in his nomination papers and therefore should be disqualified. Learned counsel argued that respondent No.1 stated that he belongs to Pakistan Muslim League (N) whereas he belongs to an independent political party

namely Markazi Jamiat Al-Hadith of which he is the President and for which election symbol of 'Spectacle' was awarded vide notification dated 26-3-2013. Learned counsel further argued that respondent No.1 stated that he is a Professor, however as per the eligibility criteria for appointment of faculty in various disciplines, issued by the Higher Education Commission ("HEC"), he does not qualify for the post of Professor and was never promoted as Professor. He stated that this tantamounts to a false declaration by respondent No.1. Learned counsel argued that respondent No.1 claims to have two masters' degrees, one in English and the other in Islamic Studies whereas under the eligibility conditions for appointment of faculty issued by the HEC, the minimum qualification for Professor is a Ph.D. Learned counsel argued that he also does not meet the criteria for technocrats or ulema because he does not possess the qualifications given in the Explanation to Article 5(1)(c) of the Houses of Parliament and Provincial Assemblies (Election) Order, 1977 which provides for technocrats and aalim. Therefore he is neither a technocrat nor an aalim, and cannot be elected from the said seat.

4. On the other hand, learned counsel for respondent No.1 at the very outset questioned the locus standi of the petitioner. He argued that the petitioner is a citizen of Pakistan who does not have any right to scrutinize the nomination of candidates under the Senate Act. He argued that the process of scrutiny of nomination papers is under Section 13 of the Senate Act, which provides for the persons who can file objections against nomination papers. Under section 13(1) of the Senate Act only the candidate, proposer, seconder and authorized agent can file objections. A citizen is not entitled to interfere at the stage of scrutiny and so any objections filed by the petitioner cannot be entertained by the RO. In this regard, he relies upon the impugned order of the RO wherein the objections were dismissed under section 13(1) and (2) of the Senate Act on the ground that he does not have locus standi. Learned counsel further argued that the petitioner is not an aggrieved person because respondent No.1 has not been elected. Acceptance of the nomination papers simply enables respondent No.1 to participate in the election. Any grievance of the petitioner would actualize if respondent No.1 was elected against the seat of technocrats and ulema and was notified as member Senate. Even in such eventuality, the petitioner is not remediless but can question the appointment of respondent No.1 in the form of filing a constitutional petition for issuance of a writ of quo warranto. Learned counsel further argued that the election process cannot be challenged save in accordance with section 31 of the Senate Act which provides that the election can only be questioned through an election petition filed after the publication of the result of the election. Therefore the mandate of the Senate Act is that the election process should not be interrupted and any challenge to the election should be after the publication of the result. He further relied upon Rule 39 of the Senate Election Rules, 1975 ("Senate Rules") which provides that an election petition can be filed by a candidate in person or by a representative, authorized by the candidate and no one else. Therefore, the petitioner does not have any right to call into question the nomination of candidates under the Senate Act.

5. Mr. Muhammad Ahsan Bhoon, Advocate for the petitioner argued that the petitioner has a right to question the impugned orders dated 20-2-2015 and 27-2-2015 on the ground that neither the RO nor the ECP considered the nomination of respondent No.1 in accordance with the conditions laid down in section 13(3) of the Senate Act. He argued that the Court can, on a petition by a citizen, look into the legality of the order of the RO or the ECP if they have failed to exercise their duty under the Constitution and the Senate Act. He explained that respondent No.1 made several false declarations in his nomination form and that the RO was obligated to look into the false declaration, conduct an inquiry and reject his nomination papers. He further argued that no legal remedy is available to the petitioner under the Senate Act, hence he can come to this Court in a constitutional petition. He argued that the petitioner has a right to ensure that qualified people are elected and become member Senate, which right has to be protected by this Court. Therefore this Court can under Article 199 of the Constitution look at the impugned orders and can look into the objections raised by the petitioner with respect to the eligibility of respondent No.1 as a technocrat or aalim for the purposes of the senate elections.

6. Mirza Nasar Ahmad, learned DAG argued that the election is an ongoing process and in terms of the dicta laid down by the Hon'ble Supreme Court of Pakistan in the case titled Election Commission of Pakistan v. Javaid Hashmi and others (PLD 1989 SC 396), this Court cannot interfere in the election process due to the bar contained under Article 225 of the Constitution. The use of the word 'election' under Article 225 of the Constitution means the entire election process including the nomination process until the Notification of the result. He stated that this view has been upheld in several judgments including Muhammad Raza Hayat Hiraj and others v. The Election Commission of Pakistan and others (2015 SCMR 233).

7. Learned counsel for respondent No.6 adopts the arguments made by the learned counsel for the petitioner.

8. Heard. Record perused.

9. Section 13 of the Senate Act is reproduced hereunder:

Scrutiny.-(1) The candidates, their proposers and seconders and an agent authorized in writing in this behalf by each candidate, may attend the scrutiny of the nomination papers, and the Returning Officer shall give them reasonable opportunity for examining all nomination papers delivered to him under section 11.

(2) The Retuning Officer shall, in the presence of the persons attending the scrutiny under subsection (1), examine the nomination papers and decide any objection raised by any such person to any nomination.

(3) The Returning Officer may, either of his own motion or upon any objection, conduct such summary inquiry as he may, think fit and reject any nomination paper if he satisfied that

(a) the candidate is not qualified to be elected as a member;

(b) the proposer or the seconder is not qualified to subscribe to the nomination paper;

(c) any provision of section, 11 or section 12 has not been complied with [or submits any false or incorrect declaration or statement in any material particular] ; or

(d) the signature of the proposer or seconder is not genuine;
Provided that

(i) the rejection of a nomination paper shall not invalidate the nomination of a candidate by any other valid nomination paper;

(ii) The Returning Officer shall not reject a nomination paper on the ground; of any defect which is not of a substantial nature and may allow any such defect to be remedied forthwith; and

(iii) The Returning Officer shall not inquire into the correctness or validity of any entry in the electoral roll.

(3a) The Returning Officer may, for the purpose of scrutiny, require any agency or authority to produce any document or record.

(3b) Notwithstanding anything contained in subsection (3), where a candidate deposits any amount of loan; tax or utility charges payable by him before rejection of his nomination paper on the ground of default in payment of such loan, taxes or utility charges, such nomination paper shall not be rejected for default thereof.]

(4) The Returning Officer shall endorse on each nomination paper his decision accepting or rejecting it and shall, in the case of rejection, record a brief statement of the reasons therefor.

(5) Where the nomination of a candidate has been rejected under this section by a Returning Officer, an appeal shall lie, within two days of the scrutiny day, to the Commissioner [or a Member of the Commission Authorised by the Commissioner] ; and any order passed by the Commissioner [or such member, as the case may be,] on such appeal shall be final:)

[Provided that where a nomination paper is rejected by the Returning Officer on the ground that the candidate is a defaulter of loan or taxes or government dues or utility charges or has had the loan written off and the candidate pays such loan or, as the case may be, taxes, government dues or utility charges or the written off loan on or before the last date fixed for disposal of appeals and satisfies the Member of the

Election Commission that such payment has been made, his nomination shall be treated as having been accepted on that ground] .

[(6) If the member of the Commission, referred to in subsection (5), is, on the basis of information or material coming to his knowledge from any source, satisfied that a candidate whose nomination paper has been accepted is

(a) a defaulter of loans, taxes, government dues or utility charges or has had any loan written off or is subject to any other disqualification from being elected as a member of Senate, he may, on his own motion, call upon such candidate to show cause why his nomination should not be rejected, and if he is satisfied that the candidate is defaulter as aforesaid or has had a loan written off or is subject to any disqualification, he may reject his nomination paper] .

10. The basic issue before the Court is with respect to the locus standi of the petitioner and the maintainability of the Petition. On the question of locus standi, the petitioner is a citizen of Pakistan who claims that he has a right to question the nomination of candidates contesting the senate elections. Election of the senate is held under Article 59 of the Constitution and the Senate Act provides the manner in which the election is to be carried out. Section 13 of the Senate Act provides for scrutiny of the nomination papers. A candidate, his proposer, seconder and an agent authorized in writing may attend the scrutiny of the nomination papers and the Returning Officer shall give reasonable opportunity for examining all nomination papers delivered to him under Section 11. Section 13(3) provides that the Returning Officer may, either on his own motion or upon any objection, conduct such summary inquiry as he may think fit and reject any nomination paper if he is satisfied. Learned counsel for the petitioner relied upon section 13(3) to urge the point that the use of the words "upon any objection" includes an objection other than those mentioned in section 13(1). The petitioner's case is that section 13(3) gives him locus standi, as he can raise objections against a nomination, under this section which enables the RO to inquire into the nomination papers of the candidate and ensure that the candidate is qualified and has not made false declaration.

11. The scheme of law for the purposes of senate elections is clearly set out in the Senate Act. A voter from a province may propose or second the name of a person qualified for election to the senate from the province. The nomination papers are signed by the proposer and seconder along with the candidate, who has given a solemn affirmation in terms of section 11(2) of the Senate Act. At the time of scrutiny, the candidate, proposer and authorized agent are present and can examine the nomination papers. The RO in the presence of all examines the nomination papers and decides upon the objections, if any, raised. Section 13(1) and (2) of the Senate Act when read together stipulates that persons examining the nomination papers can raise objections, which shall be decided by the RO, in the presence of such persons. Section 13(3) of the Senate Act empowers the RO to conduct an inquiry with respect to information contained in the nomination papers. As per the section 13(3) the RO can hold a summary inquiry or call for documents or the

record if he is satisfied that the candidate is not qualified to be elected as a member; the proposer or the seconder are not qualified to subscribe to the nomination paper; any provision of section 11 or section 12 has not been complied with or if the candidate submits a false or incorrect declaration with respect to a material particular in the nomination papers or the signature of the proposer or seconder are not genuine. The use of the words "of his own motion" in section 13(3) simply means that the RO can decide on his own motion, whether an inquiry is required, irrespective of any objection that has been made. The Section authorizes the RO to determine whether he wants to inquire into the nomination papers on the basis of the conditions laid down in Section 13(3). In this case, he is not dependent on any objection(s) being raised against the nomination papers. The use of the word "objection" in section 13(3) must be read in conjunction with section 13(1) and (2). Section 13(3) refers to the objections made under subsection (2). It is with reference to the objections filed under section 13(2) that the RO can decide if he wants to conduct a summary inquiry. The RO can take this decision either on his own motion or on the basis of the objections that have been made under section 13(2). Objections under section 13(3) do not refer to objections by anyone other than the proposer, seconder agent or candidate. Therefore section 13(3) of the Senate Act does not create a right for a citizen to file objections before the RO.

12. At this point, it is necessary to examine the role of a citizen in the senate elections. Section 11 entitles a voter to propose or second the name of any person qualified for election to the senate from the Province. Voter is defined under section 2(q) of the Senate Act to be a person who is a member of the Provincial Assembly of that Province. So the member Provincial Assembly votes in the senate elections. Mr.Mubeen-ud-Din Qazi, learned counsel for the petitioner argued that since the citizen elects the Member Provincial Assembly, therefore the citizen has an interest in the name proposed for the senate elections and he has to protect his interest by objecting to the proposed name, if the candidate is not qualified. However, this argument is misconceived as the Senate Act does not envision a role for the citizen as he does not participate directly in the senate election. The fact that the Member Provincial Assembly is the voter does not give the petitioner a right to object to nominations, because he has no direct nexus with the nomination or the election process. The petitioner states that if he has no right under the Senate Act then a petition under Article 199 of the Constitution is the only remedy available to him.

13. To determine the maintainability of this petition Article 225 is relevant. The said Article reads 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).

In the case titled Election Commission of Pakistan through its Secretary v. Javaid Hashmi and others (PLD 1989 SC 396) the Hon'ble Supreme Court of Pakistan has held that the election is a continuous process consisting of several steps taken for its

completion. Mirza Nasar Ahmad, learned DAG argued that "election" under Article 225 means the entire process, commencing from the announcement of the election till the date of notification of successful candidates. He argued that Article 225 prohibits challenge to the election except by way of an election petition meaning that it mandates the completion of the election process before any challenge is made. In the Javaid Hashmi case it was held that the election process should be challenged at an appropriate stage, in appropriate proceedings before the election tribunal and it should not be challenged at any intermediate stage before any court. The Hon'ble Supreme Court of Pakistan found that Article 225 creates a right to challenge the election by an election petition before an election tribunal as determined by an Act of Parliament. In the Raza Hiraj case, the Hon'ble Supreme Court of Pakistan held that the interlocutory orders passed by the Election Tribunal impugned before the High Court, were not liable to be set aside in its Constitutional jurisdiction as the petitioners before the Court had remedy available to them by way of an appeal under section 67 of the Act after disposal of the election petitions. In the instant case, the petitioner has argued that if he does not have any right under the Senate Act to question the election process or the nomination papers then the instant petition is maintainable because as per the ratio of the Javaid Hashmi case, an election dispute can only be resolved by an election petition before the election tribunal. Since the petitioner cannot file an election petition before the election tribunal under section 13 of the Senate Act, the petitioner will be left without any remedy to question the qualification of respondent No.1 and respondent No.1 will contest the election even though he is not eligible. Hence remedy to invoke constitutional jurisdiction of this Court is available to the petitioner.

14. Based on the arguments made the question that needs to be considered is whether a citizen can challenge the qualification of a candidate nominated for the senate election through a constitutional petition. Article 225 of the Constitution provides that no election can be called into question except by an election petition before an election tribunal as laid down by an Act of Parliament. The right of the citizen has to be seen in the light of Article 225 of the Constitution. Section 31 of the Senate Act provides that senate election can only be called into question by an election petition under section 34. Section 34 provides that an election petition shall be presented to the Commissioner within forty-five days of the publication of the result of the election in the official Gazette. Rule 39 of the Senate Rules provides that an election petition may be presented by any candidate in person or by his authorized representative. Therefore for the purposes of the Senate Act, after the election process is completed, only a candidate can challenge the election result. A citizen cannot file an election petition under Section 34 of the Senate Act read with Rule 39 of the Senate Rules. Learned counsel for the petitioner has relied upon the cases titled Intesar Hussain Bhatti v. Vice-Chancellor, University of Punjab, Lahore and others (PLD 2008 SC 313), Ch. Muhammad Arif Hussain v. Rao Sikandar Iqbal and 10 others (PLD 2008 SC 429), Syed Nayyar Hussain Bukhari v. District Returning Officer, NA-49, Islamabad and others (PLD 2008 SC 487) and Lt.-Gen (R) Salahudding Tirmizi v. Election Commission of Pakistan (PLD 2008 SC 735) to urge the point that the bar under Article 225 would not be attracted when a

challenge was made under Article 199 of the Constitution to the competency and qualification of a person nominated as a candidate for the senate election. Learned counsel stated that in these cases the High Court in its constitutional jurisdiction could entertain the question of acceptance or rejection of nomination papers in which the disqualification of a person to contest the election was apparent on the record and could be decided without a factual inquiry. He stated that the Hon'ble Supreme Court of Pakistan in the cases cited held that if a person was not qualified to contest the election, the High Court could interfere against the order of acceptance of his nomination papers. This would not be in conflict with Article 225 because the powers under Article 199 of the Constitution are on a higher pedestal than the power emanating from Article 225 of the Constitution.

15. Having gone through the judgments cited by the learned counsel for the petitioner, it is necessary to ascertain the scope of Article 225 of the Constitution when a challenge is made to the qualification or disqualification of a potential candidate for the senate election under Article 199 of the Constitution. In terms of the dicta laid down in the Javaid Hashmi case, the Hon'ble Supreme Court of Pakistan found that there cannot be two attacks on the election process, one through a petition under Article 199 of the Constitution while the election is still underway and the other before the tribunal when it is completed. The reason given was to avoid conflicting decision and delay in the election process. The use of the word "no election shall be called into question" was held to mean that Article 225 gave exclusive jurisdiction to the election tribunal with reference to election disputes to the exclusion of all courts including the High Court. The reason being that Article 225 was expressed in the negative form thereby prohibiting any kind of intervention in the election process. The Hon'ble Supreme Court of Pakistan explained that elections should be held as per schedule, without undue delay or prolonged challenge at the intermediate stage. Since the question in the instant petition is with respect to the nomination of respondent No.1 for the purposes of contesting the senate election on the seat reserved for technocrats and ulema, the election process is still under way and it is an intermediate stage as the election result has not been announced.

16. The judgments relied upon by the learned counsel for the petitioner are distinguishable firstly on the ground that they have all been rendered by three Hon'ble Judges of the Hon'ble Supreme Court of Pakistan whereas the Javaid Hashmi case was delivered by four Hon'ble Judges of the Hon'ble Supreme Court of Pakistan. Secondly, the judgments relied upon carve out situations when the election process can be interfered with at the stage of nomination notwithstanding the bar under Article 225 of the Constitution. In the judgment cited at PLD 2008 SC 313 (supra) the Hon'ble Supreme Court of Pakistan held the competence and qualification of a candidate can be challenged under Article 199 of the Constitution where the tribunal has failed to exercise its jurisdiction or has improperly exercised its jurisdiction and the person aggrieved is left without any remedy, at a later stage of the proceedings. In this case, the Hon'ble Supreme Court of Pakistan permits interference at the stage of nomination with respect to the competence and

qualification of a candidate, if the tribunal has failed to exercise jurisdiction or it has improperly exercised jurisdiction.

17. In the case cited at PLD 2008 SC 429 (supra), the Hon'ble Supreme Court of Pakistan has held that a petition under Article 199 of the Constitution was maintainable on the question of rejection or acceptance of nomination papers if disqualification of a person is apparent and can be decided without a factual inquiry. The Court held that Article 199 is not controlled by Article 225 of the Constitution in all matters, rather the High Court can in suitable cases correct a legal error, defect or disability caused by the tribunal. A limited scope for interference was permitted in election matters, at an intermediate stage where the disqualification was apparent, floating on the record so to speak. The Hon'ble apex court further held that each case would have to be seen on its merits and there was no hard and fast rule on this issue. The Hon'ble Supreme Court of Pakistan permitted interference under Article 199 where the disqualification was apparent and did not require an inquiry and where the disqualification was ignored by the tribunal.

18. In the case cited at PLD 2008 SC 487 (supra), the Hon'ble Supreme Court of Pakistan permitted interference at the intermediate stage where a gross irregularity or illegality was committed during the election process. In the case cited at PLD 2008 SC 735 (supra), it is held that interference could be made by the High Court when the order was passed without lawful authority or was coram non judice or mala fide.

19. On the question of interference under Article 199 of the Constitution, the Ghulam Mustafa Jatoi's case which has been decided by five Hon'ble Judges of the Hon'ble Supreme Court of Pakistan also carves out an exception to the Javaid Hashmi case by permitting interference under two conditions; (i) where the order is patently illegal and without jurisdiction and (ii) where there is no legal remedy available to the aggrieved party. In the instant case, the order of the RO dismissed the objections of the petitioner on the ground that the petitioner was not competent to file objections under section 13 of the Senate Act. The petitioner's grievance is that his objections were not duly considered by the RO. However given that the Petitioner could not file objection under section 13 of the Senate Act, there is no patent illegality in this order. The petitioner then moved a petition under section 13(6) read with sections 58(aa) and 62 of the Senate Act and Article 218(3) of the Constitution against the order of the RO issued on 20-2-2015 before the ECP. The ECP upheld the order of the RO reiterating that the petitioner was not competent to file any objections under section 13 of the Senate Act and further decided the case on its merits finding respondent No.1 to possess the qualification and experience necessary for the seat of technocrat and that the petitioner had not brought any such information on the record warranting rejection of the nomination papers under section 13(6) of the Senate Act. The petitioner's grievance against this order is that it did not give due consideration to the objections raised by the petitioner. The arguments urged on behalf of the petitioner tantamounts to a disagreement with the orders of the ECP, where the petitioner thinks respondent No.1 should have been

disqualified but the ECP held otherwise. The ECP as per its wisdom and understanding found respondent No.1 competent to contest the senate election. The fact that the petitioner disagrees with this order does not qualify as a patent illegality or an order lacking in jurisdiction. More importantly on the basis of Ghulam Mustafa Jatoi case and even the judgments relied upon by the learned counsel for the petitioner, an important element which determines whether interference is necessitated under Article 199 of the Constitution is to see if the aggrieved person has no remedy available to him. In this case, the petitioner has remedy available to him when the election result is announced and if respondent No.1 is declared a successful candidate. The grievance of the petitioner can be looked into once the election process has concluded and if respondent No.1 is declared a successful candidate. Going back to the Javaid Hashmi dicta, if a challenge is permitted at this intermediate stage under Article 199 by a citizen, it would mean that any person can challenge the acceptance or rejection of nomination papers, causing interference and delay in the election process. Since the Senate Act does not recognize the petitioner as a necessary party to the scrutiny process, the right of the petitioner to challenge the election of respondent No.1 will accrue if and when respondent No.4 is notified as a member of Senate. A citizen can always challenge the holding of public office by a member Senate through a constitutional petition for issuance of writ of quo warranto because the citizen's rights accrue when the candidate becomes a member of senate and holds public office. In the case titled Hafiz Hamdullah v. Saifullah Khan and others (PLD 2007 SC 52) the Hon'ble Supreme Court of Pakistan held that a writ of quo warranto could be invoked in public interest by any person where the question of a returned candidates right to hold office was called into question and not the validity of the el ction process itself.

20. To conclude the legal position on the basis of the Javaid Hashmi case read with Ghulam Mustafa Jatoi case, Article 225 of the Constitution prohibits challenge to the election of a house or a provincial assembly except by way of an election petition before the election tribunal. This means that the senate election cannot be challenged at an intermediate stage except where there is no legal remedy available to an aggrieved party and where the orders of the RO or ECP are patently illegal and without jurisdiction, the effect of which would be to disentitle a candidate to participate in the elections. In such cases, a candidate can come to this Court in constitutional jurisdiction challenging the order of the RO or ECP, for infringing upon his right to contest elections. The petitioner is not an aggrieved person at this stage of the election process because the fate of respondent No.1's participation in the election is yet to be determined. In the event that he wins the election, the rights of petitioner to challenge the holding of office by respondent No.1 as member Senate will accrue and the petitioner may question the same. Since the petitioner does not have a right under the Senate Act to participate in the election process and he has no direct nexus with the senate election, he cannot question the qualifications of a candidate at the scrutiny stage in constitutional jurisdiction. In the Javaid Hashmi case, the Hon'ble Supreme Court of Pakistan held that the exercise of power under Article 199 cannot be placed on any higher footing than that emanating from

Article 225 of the Constitution; and that while the power under Article 199 exercisable by the High Court is "subject to the Constitution" there is no such limitation in Article 225. This Article by its language creates an independent jurisdiction for the decision of election disputes under the law and its contents, therefore, should be given the fullest meaning irrespective of anything contained in any other Article. More particularly it is an essential part of parliamentary jurisdiction which under the law entrusts election disputes for decision to the Election Tribunal and in appeal to the Supreme Court whose decision is final both on questions of law and fact.

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21. Learned counsel for the petitioner has also relied upon the cases titled Dr. Aon Muhammad Khan v. Lt. Gen. (Retd.) Saeed Qadir and others (PLD 1987 SC 490), Sh. Ihsanul Haq Piracha v. Mr. Wasim Sajjad and others (PLD 1986 SC 200), Dr. Karim Ahmed Khawaja v. Returning Officer for Senate Elections, 2006 and another (2006 CLC 624), Sh. Riaz-ul-Haq and another v. Federation of Pakistan through Ministry of Law and others (PLD 2013 SC 501) and Malik Umar Aslam v. Mrs. Sumaira Malik and others (2014 SCMR 45) to urge the point that the instant petition is maintainable and that the petitioner has locus standi. However, all these cases arise out of election petitions and do not address the question of locus standi or maintainability. Hence they are not relevant to the controversy at hand.

22. Under the circumstances, no case for interference is made out. Petition is dismissed.

MH/H-10/L Petition dismissed.

P L D 2015 Lahore 661

Before Syed Mansoor Ali Shah and Mrs. Ayesha A. Malik, JJ

NATIONAL ELECTRIC POWER REGULATORY AUTHORITY---Appellant

versus

FAISALABAD ELECTRIC SUPPLY COMPANY LIMITED---Respondent

I.C.A. No.67 of 2015, decided on 28th May, 2015.

(a) Law Reforms Ordinance (XII of 1972)---

----S. 3---Regulation of Generation, Transmission and Distribution of Electric Power Act (XL of 1997) S.12A---National Electric Power Regulatory Authority (Tariff Standards and Procedure) Rules, 1998, R.16(6)---Constitution of Pakistan, Art. 199---Constitutional petition---Intra-court appeal---Maintainability---Appellant, National Electric Power Regulatory Authority ("Authority") impugned order passed in constitutional petition whereby, inter alia, the Authority's order on a motion for leave to review was set aside---Contention of respondent was that since remedy of appeal under S.12A of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 was available to the Authority, therefore intra-court appeal was not maintainable---Held, that the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 read with the National Electric Power Regulatory Authority (Tariff Standards and Procedure) Rules, 1998 could not contemplate a remedial forum for the Authority, where it could challenge its own orders as the Authority itself was the Appellate and Reviewing Authority; therefore, S.12A of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 had no applicability to the appellant Authority---Provision of one appeal, review or revision against original order, under S.3 of the Law Reforms Ordinance, 1972 must be available to the parties to the dispute in order to question maintainability of the intra-court appeal and no such remedy was available to the appellant Authority in the present case---Appellant Authority, therefore, could not be deprived for its right of intra-court appeal---Intra-court appeal was therefore, maintainable.

(b) Regulation of Generation, Transmission and Distribution of Electric Power Act (XL of 1997)---

----Ss. 7, 12 & Preamble---Constitution of Pakistan Art.10A, 9, 25, 2A & 154---Electricity tariff, determination of---Functions of the National Electric Power Regulatory Authority ("Authority")---Power to determine or modify tariffs---Adjudication of the Authority on a motion for leave to review---Full strength of the Authority mandatory for discharging essential and core functions/duties---Constitutional context of federalism and provincial autonomy and the consequent fundamental rights of the people (consumers) of various Provinces in determination of Electricity Tariff under the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997---Scope---Preamble of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 provided for

regulation of generation, transmission and distribution of electric power and matters connected thereto and the Authority enjoyed the mandate under the law to determine tariff for all the generation, transmission and distribution companies in the country and it is for such reason that the constitution of the Authority had representation from the four Provinces by having four members, one from each province---"Electricity" fell within Part-II of the Federal Legislative List of the Constitution which was to be overseen by the Council of Common Interests under Art.154 of the Constitution and the purpose of the Council was to support and strengthen federalism and democracy as well as to ensure that the interests of all the Provinces were weighed and considered equitably---Electricity being a basic utility, every Province (and the consumers therein) had the right to have equal representation in the Authority and in the consequent decision making of the Authority regarding determination of tariff and such right flowed from the right to fair determination under Art.10A of the Constitution and as it dealt with electricity, which was a basic utility, it also bordered on the right to life under Art.9 of the Constitution---Determination of Tariff of electricity was not an insulated unitary act, but a result of deliberative participatory process involving all the stakeholders and the Authority entrusted with said task under the Act, was therefore, not a mere unstructured amalgam of people, but enjoyed a unique character of Provincial representation and in a way, microcosmically represented the Federation by allowing representation of all the four Provinces on the Authority---Presence of every Member was important, as each of them represented a Province and if the Authority was short of the total statutory strength, it was in fact dysfunctional, as far as, performance of its core and essential functions were concerned---Such essential functions were enumerated under S.12 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 and the Authority was not allowed to delegate such powers amongst the Chairman or the Members---Any proceedings for the determination of tariff without a Member would deprive the whole Province and its people from participating and deliberating in the determination of electric power for the said Province, which would be discriminatory under Art.25 of the Constitution and violate the right to fair determination under the Objectives Resolution---Establishment of the Authority, with proportional representation of the four Provinces, had a constitutional significance and its full strength could not be diluted or altered when performing its essential functions.

(c) Regulation of Generation, Transmission and Distribution of Electric Power Act (XL of 1997)---

----Ss. 12, 7, 3 & 5---National Electric Power Regulatory Authority (Tariff Standards and Procedure) Rules, 1998, R.16(6)---Law Reforms Ordinance (XII of 1972), S. 3---Constitution of Pakistan, Art. 199---Intra-court appeal---Electricity tariff, determination of---Functions of the National Electric Power Regulatory Authority ("Authority")---Power to determine or modify tariffs---Adjudication of the Authority on a motion for leave to review---Full strength of the Authority mandatory for discharging essential and core functions/duties---Interpretation of

Ss.5, 3(6) & 12 of the Regulation of Generation. Transmission and Distribution of Electric Power Act, 1997---Scope---Appellant, National Electric Power Regulatory Authority ("Authority") impugned order passed in constitutional petition whereby, inter alia, order of the Authority in leave to review motion was set aside and the term "full strength of the authority" under R.16(6) of the National Electric Power Regulatory Authority (Tariff Standards and Procedure) Rules, 1998 was held to mean all five Members of the Authority (NEPRA), including the Chairman---Held, that the term "full strength" under R.16(6) of the National Electric Power Regulatory Authority (Tariff Standards and Procedure) Rules, 1998 was not the available strength but the statutory strength as provided under S. 3 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 that was, five Members including a Chairman because under the said Rule, the Authority discharged one of its essential functions---Rule 16(6) of the National Electric Power Regulatory Authority (Tariff Standards and Procedure) Rules, 1998 simply reiterated said principle that the Authority had to act with full strength in matters which fell within the core and essential functions of the Authority and where delegation was not permissible and it was not only at the time of hearing a motion for leave for review that the Authority must have full strength, but the full strength of the Authority must be there when the tariff was to be determined by the Authority or while performing the other functions issued under S.12 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997---Section 5 of Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 dealt with administrative character of the Authority and its secretarial provision, regulating the procedures for holding a meeting and such meetings and the decisions taken thereunder had no co-relation with one of the core and essential quasi-judicial powers and functions of the Authority; which was the determination of tariff or deciding the motion for leave to review---High Court observed that the contention that if the quorum was complete the Authority could call a meeting and determine tariff, was misconceived as it incorrectly mixed two different functions of the Authority and the said S.5 dealt with administrative meetings and was a secretarial provision with no nexus with the determination of tariff which was a quasi-judicial function of the Authority---Section 3(6) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 applied once the Authority had been duly constituted in terms of the said S.3 of the Act, and its composition was complete and reference to the terms "vacancy" and "defect" in the said section pertained to absence of the member or a procedural defect or irregularity in the membership and both such disqualifications assumed that the Authority had been fully constituted---Section 3(6) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 therefore, addressed a temporary problem and protected the acts or proceedings of the Authority to allow smooth operability of the Authority in a situation where a duly appointed member refused to attend the proceedings of the Authority for tariff determination or some irregularity in the appointment of any member who was part of the proceedings---Purpose of S.3(6) of Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 was to ensure that such hiccups did not derail the Authority or its decisions and in the case of determination of tariff,

while full strength was mandatory, there could be a situation where the Member was genuinely not able to attend the meeting or his appointment suffered from any irregularity making it difficult for him to attend, and in such a situation, which should be duly recorded in the minutes of the proceedings, the Authority could proceed and determine the tariff or decide the motion for leave for review---Such exceptions were few and far between but in the present case, S.3(6) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 had no relevance as the Authority was not properly and lawfully constituted to begin with, as the Chairman and one other Member had not been appointed---Section 3(6) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 did not empower the Authority to proceed without proper constitution in terms of S.3 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 and any such interpretation can lead to absurd results, as the Chairman or a few Members, under the garb of S.3(6) of the Act could proceed on their own and continue to determine tariff for the longest time---Federal Government, in such an eventuality, would have no incentive or obligation to appoint Members under the Act or complete the constitution of the Authority and any such interpretation was also violative of the fundamental rights and the constitutional vision---Authority while determining the electricity tariff including on a motion for leave to review, must have full strength, i.e. five members including the Chairman, fully representing four Provinces subject to the exception as explained by the High Court---Appeal was dismissed, in circumstances.

Mansoor Usman Awan for Appellant.
Sh. Muhammad Ali for Respondent.
Date of hearing: 9th February, 2015.

JUDGMENT

MRS. AYESHA A. MALIK J.---The appellant is aggrieved of judgment dated 3-12-2014 passed by the learned judge in chambers, wherein the term full strength of the Authority in Rule 16(6) of National Electric Power Regulatory Authority (Tariff Standards and Procedure) Rules, 1998 ("Tariff Rules") has been interpreted to mean all the five Members of the Authority (or NEPRA) including the Chairman as per section 3 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 ("Act").

2. Brief facts are that against the tariff determined by the Authority (Appellant) on 6-2-2014, a motion for leave to review was filed by the respondent Company before the Authority under Rule 16(6) of the Tariff Rules, which was decided by the Authority on 16-6-2014. At the time, the Authority consisted of only three Members, as the office of the Chairman and one Member was vacant, hence the motion for leave to review was decided by three Members of the Authority.

3. Learned counsel for the appellant argued that the three available and appointed Members represented the full strength of the Authority, at the time. He further

argued that all acts and proceedings of the Authority, irrespective of any vacancy or defect in its constitution are valid and protected under section 3(6) of the Act. He argued that Rule 16(6) of the Tariff Rules is subordinate to section 3(6) of the Act and cannot be given an overriding effect.

4. Learned counsel for the respondent in the first instance raised a preliminary objection with regard to the maintainability of the ICA. He argued that under section 3 of the Law Reforms Ordinance, 1972 ("Ordinance"), if the petition under Article 199 arises out of any proceedings in which the law applicable provides for at least one appeal, review or revision to any Court, Tribunal or authority against the original order, appeal (ICA) before this Court is not maintainable. He pointed out that the remedy of appeal is available to the appellant under section 12A of the Act. On merits, learned counsel argued that full strength of the Authority under Rule 16(6) is the mandate of the law and cannot be dispensed with. He further submitted that full strength does not mean the available full strength but the statutory strength of five members. He submits that section 3(6) of the Act does not apply to the instant case, as 'vacancy' and 'defect' under the said Section assume that the constitution of the Authority is otherwise complete.

5. Responding to the preliminary objection, learned counsel for the appellant argued that the remedy of appeal, review or revision should have been available under the Act to the appellant. He went on to argue that section 12A of the Act does not provide for any remedy to the appellant, hence, the appellant cannot be deprived of its right to approach this Court in an ICA.

6. We have heard the parties and have gone through the record.
Preliminary Objection

7. The appellant decided the motion for leave to review vide order dated 16-6-2014, which was impugned before the learned judge in chambers, who set aside the said order, holding that Rule 16(6) of the Tariff Rules required full strength of the Authority to hear the motion for leave to review. The Authority has impugned the judgment of the learned single judge before us and is not aggrieved of the order issued in the motion for leave to review as the said order was actually the order passed by the Authority itself. The Act read with Tariff Rules cannot possibly contemplate a remedial forum for the Authority where it would challenge its own orders as the Authority itself is the appellate and reviewing authority under the Act and the Tariff Rules. Therefore, section 12A has no applicability to the case of the appellant. The provision of one appeal, review or revision against the original order, under section 3 of the Ordinance must be available to the parties to the dispute in order to question the maintainability of the ICA. No such remedy is available to the appellant under the Act and therefore the appellant cannot be deprived of its right of appeal (ICA) before us. Any such interpretation would also be against the right to access to justice. Hence, the preliminary objection, being without any substance is overruled.
Full strength of the Authority

8. The legal question, arising from the impugned judgment is the interpretation of the term full strength of the Authority as provided under Rule 16(6) of the Tariff Rules. However, deeper examination of the case reveals that the question that requires our consideration is much broader, that is, what is the strength or composition of the Authority required for the purposes of tariff determination or alternatively, whether full strength of the Authority is required for the determination of tariff and motion for leave to review. We have examined these questions under the structure of the Act and the Tariff Rules and in the larger constitutional context of federalism and provincial autonomy and the consequent fundamental rights of the people (consumers) of various Provinces.

9. The term full strength of the Authority appears for the first time under Rule 16(6) of the Tariff Rules in the following manner:

Rule 16(6): Within ten days of service of a final order, determination or decision of the Authority, a party may .file a motion for leave for review by the full strength of the Authority of such final order, determination or decision, as the case may be.
The Authority is established under Section 3 of the Act consisting of a Chairman and four Members, one from each Province. Section 7 of the Act provides for the powers and functions of the Authority and one of the powers and functions of the Authority is to determine the tariff under section 7(3)(a) of the Act. All the powers and functions of the Authority, enumerated under section 7, can be delegated to the Chairman or any Member of the Authority except the following under section 12 of the Act:

(a) The power to grant, reject, amend, vary or revoke licenses or any condition thereof

(b) The power to determine or modify tariff

(c) The power to approve, disapprove or modify an investment program or a power acquisition program;

(d) the power to make or repeal rules and regulations made under the Act; and

(e) the power to make orders on an application for review of its orders.

In the instant case, the power to determine tariff cannot be delegated by the Authority. Hence, the Authority established under Section 3 of the Act i.e., five Members including a Chairman and no one else, can determine tariff and decide upon a motion for leave to review of the tariff. In this regard, Rule 9(5) of the Tariff Rules provides that all the final decisions and determinations of tariff are to be made by the Authority itself on the basis of the recorded proceedings.

10. The preamble of the Act provides for regulation of generation, transmission and distribution of electric power and matters connected thereto. The Authority enjoys

the mandate under the law to determine tariff for all the generation, transmission and distribution companies in the country and it is for this reason that the constitution of the Authority has representation from the four Provinces by having four members, one from each province. "Electricity" falls within Part-II of the Federal Legislative List of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution") which is to be overseen by the Council of Common Interests under Article 154 of the Constitution. The purpose of the Council is to support and strengthen federalism and democracy. It is to ensure that the interests of all the Provinces are weighed and considered equitably. Electricity being a basic utility, every Province (and the consumers therein) has the right to have equal representation in the Authority and in the consequent decision making of the Authority regarding determination of tariff. This right flows from the right to fair determination under Article 10A of the Constitution and as it deals with electricity which is a basic utility it also borders on the right to life under Article 9 of the Constitution.

11. Determination of Tariff of electricity is not an insulated unitary act, but a result of deliberative participatory process involving all the stakeholders. The Authority entrusted with this task under the Act, is therefore, not a mere unstructured amalgam of people, but enjoys a unique character of provincial representation and in a way microcosmically represents the Federation by allowing representation of all the four Provinces on the Authority. The presence of every Member is important, as each of them represents a Province. If the Authority is short of the total statutory strength, it is in fact dysfunctional, as far as, performance of its core essential functions are concerned. These essential functions are enumerated under section 12 of the Act and the Authority is not allowed to delegate these powers amongst the Chairman or the Members. Any proceedings for the determination of tariff without a Member will deprive the whole Province and its people from participating and deliberating in the determination of electric power for the Province. This would be discriminatory under Article 25 and violative of the right to fair determination under the Objectives Resolution and upholds the constitutional ethos and values of cooperative federalism and participatory democracy. Therefore, the establishment of the Authority, with proportional representation of the four Provinces, has a constitutional significance and its full strength cannot be diluted or altered when performing its essential functions.

12. The term full strength under Rule 16(6) of the Tariff Rules is not the available strength but the statutory strength as provided under section 3 of the Act i.e., five Members including a Chairman because under the said Rule, the Authority discharges one of its essential functions. Rule 16(6) simply reiterates this principle that the Authority has to act with full strength in matters which fall within the core essential functions of the Authority and where delegation is not permissible. It is important to highlight that it is not only at the time of hearing a motion for leave for review that the Authority must have full strength, but the full strength of the Authority must be there when the tariff is to be determined by the Authority or while performing the other functions issued under Section 12 of the Act.

13. The Authority has other administrative powers and functions listed under section 7 of the Act. These administrative functions and its decisions are taken in the meetings of the Authority. Section 5 deals with this administrative character of the Authority and its secretarial provision, regulating the procedures for holding a meeting. These meetings and the decisions taken thereunder have no co- relation with the core and essential quasi-judicial powers and functions of the Authority e.g., the determination of tariff or deciding the motion for leave to review. Hence, the argument that if the quorum is complete the Authority can call a meeting and determine tariff, is hopelessly misconceived as it incorrectly mixes two different functions of the Authority. Section 5 deals with administrative meetings and is a secretarial provision with no nexus with the determination of tariff which is a quasi-judicial function of the Authority.

14. Learned counsel for the appellant has relied on section 3(6) of the Act to argue that decisions of the Authority cannot be declared to be void if only three Members have made the determination of tariff or have decided the motion for leave to review: Section 3(6) provides:

No act or proceeding of the Authority shall be invalid by reason only of the existence of a vacancy in, or defect in, the constitution of the Authority.

This is an operational provision which applies once the Authority has been duly constituted in terms of Section 3 and its composition is complete. The reference to the terms "vacancy" and "defect" pertain to absence of the member or a procedural defect or irregularity in the membership. Both these disqualifications assume that the Authority has been fully constituted. Section 3(6) addresses a temporary problem and, therefore, protects the acts or proceedings of the Authority to allow smooth operability of the Authority. There could be a situation where a duly appointed member refused to attend the proceedings of the Authority for tariff determination or some irregularity in the appointment of any member who is part of these proceedings. The purpose of section 3(6) is to ensure that such hiccups do not derail the Authority or its decisions. In the case of determination of tariff, while full strength is mandatory, there could be a situation where the Member is genuinely not able to attend the meeting or his appointment suffers from any irregularity making it difficult for him to attend, in such a situation, which should be duly recorded in the minutes of the proceedings, the Authority can proceed and determine the tariff or decide the motion for leave for review. This exception is few and far between but in the present case, section 3(6) has no relevance as the Authority was not properly and lawfully constituted to begin with, as the Chairman and one other Member had not been appointed. Section 3(6) does not empower the Authority to proceed without proper constitution in terms of section 3 of the Act. Any such interpretation can lead to absurd results, as the Chairman or a few Members, under the garb of section 3(6) can proceed on their own and continue to determine tariff for the longest time. In such an eventuality, the Federal Government will have no incentive or obligation to appoint Members under the Act or complete the constitution of the

Authority. Any such interpretation is also violative of the fundamental rights and the Constitutional vision as discussed above.

15. For the above reasons, we uphold the judgment of the learned single judge and set aside the decision of the Authority dated 16-6-2014 passed on a motion for leave to review. We also declare that the Authority while determining the tariff, including the motion for leave to review, must have full strength i.e., five members including the Chairman, fully representing the four Provinces, subject to exceptions discussed above. As a consequence, the case is remanded to the Authority to hear the motion for leave to review of the respondent Company afresh, by the statutory full strength of the authority. This appeal is therefore, dismissed in the above terms.

KMZ/N-22/L Case remanded.

2015 C L D 1532
[Lahore]
Before Mrs. Ayesha A. Malik and Faisal Zaman Khan, JJ
ALLIANCE TEXTILE MILLS LIMITED and 8 others---Appellants
versus
Mrs. NAHEED KAYANI and 9 others---Respondents
I.C.A. No. 9/L of 2006, decided on 18th May, 2015.

Companies Ordinance (XLVII of 1984)---

----Ss. 76 & 152---Law Reforms Ordinance (XII of 1972), S. 3---Intra-court appeal---Rectification of register of members of company---Transfer of shares and debentures---Pre-requisites---Power of court to rectify register of members---Transfer of shares on basis of disputed agreement---Principles---Petitioner filed petition under S.152 of Companies Ordinance, 1984 seeking rectification of register of members claiming that register of members in question had been tampered with and his name had been fraudulently omitted from the same, as he had not transferred any shares in favour of respondents---Court below, accepting said petition, declared that petitioner had never transferred any shares in favour of respondents, and rectification in register of members was fraudulently made to reflect such transfer---Respondents took plea that shares had been transferred in their names by petitioner on basis of valid contract for valuable consideration, and that said agreement had been entered into with prior written permission of Bank in whose custody the instruments of shares were lying---Validity---Alleged transfer of shares in favour of respondents did not meet mandatory requirements of S.76 of Companies Ordinance, 1984---Section 76 of Companies Ordinance, 1984 provided that company should not have registered transfer of shares or debentures unless proper instrument of transfer, duly stamped and executed by transferor and transferee, had been delivered to company along with script---Original instrument of transfer was admittedly in custody of Bank by way of pledge during alleged transfer---Rectification in register of members to show transfer in favour of respondents was not in accordance with law---Court below had rightly concluded that register of members could not have been changed on basis of disputed agreement---Respondents would have to prove their claim before appropriate forum before they could seek rectification in register of members---Appeal was dismissed in circumstance.

Ms. Raeesa Sarwat for Appellants.
Abrar Ahmed for Respondents.

ORDER

This appeal has been filed against order dated 28-6-2006 passed in C.O. No.58 of 2002.

2. The facts of the case are that respondent No.1 moved a petition under section 152 of the Companies Ordinance, 1984 ("Ordinance") for rectification of the register of members, before the learned Company Judge of this Court. The case of respondent No.1 was that the register of members had been tampered with and the name of respondent No.1 was fraudulently omitted from the register of members at the behest of the appellants. The impugned order found that respondent No.1 never transferred any shares in favour of the appellants, hence the rectification in the register of members was fraudulently made to reflect such a transfer. The appellants urged that the transfer on the basis of a valid contract was made in their favour by respondent No.1, for valuable consideration which was duly paid and hence the rectification in the register of members was made to reflect the valid sale. The learned Single Judge found that in fact no valid transfer had taken place in terms of section 76 of the Ordinance as the original shares were in the custody of Habib Bank Limited. Admittedly, the shares were pledged with the Bank and the transfer of shares in favour of the appellants was never made in terms of section 76 of the Ordinance.

3. Learned counsel for the appellants urged that the transfer was made on the basis of a valid agreement dated 27-6-1993. Due consideration was paid by pay order and two cheques and permission was duly taken from the Habib Bank Limited to effect the sale. Learned counsel further argued that in this regard a certificate was issued by Habilb Bank Limited stating therein that while the shares were in their custody, they were transferred in favour of appellants Nos.2 and 3. Learned counsel has relied upon the certificate to state that on the basis of agreement dated 21-4-1993 as well as the certificate, a valid transfer has been affected and the said sale was duly reflected in the register of members in accordance with law. Learned counsel for the appellants argued that the transfer of shares in the name of the appellants was reflected in Form A from 1995 and it was at the filing of the petition under section 152 of the Ordinance in 2002 that the issue was raised by respondent No.l. Learned counsel argued that from 1995 till 2002, the respondents never agitated against the transfer. Learned counsel argued that the impugned order requires the appellants to enforce their right before the appropriate forum whereas in fact the right of the appellants was duly endorsed in the register of members and it was for the respondents to prove their claim against the appellants with respect to the transfer of shares.

4. We have heard the learned counsel for the appellants at length and find that the alleged transfer of shares in favour of the appellants did not meet the requirements of section 76 of the Ordinance. Section 76 of the Ordinance clearly provides that the company shall not register a transfer of shares or debentures unless proper instrument of transfer duly stamped and executed by the transferor and the transferee has been delivered to the company along with the scrip. Admittedly, in this case, the original instrument of transfer was in the custody of Habib Bank Limited where they had been pledged. Therefore the mandatory requirement of section 76 of the Ordinance was never complied with and any rectification in the

register of members to show the transfer in favour of the appellants was not in accordance with the law.

5. Under the circumstances, we find that the learned Single Judge while relying upon section 76 of the Ordinance has rightly concluded that the register of members could not have been changed on the basis of a disputed agreement dated 21-4-1993 and that the appellants would have to prove their claim before the appropriate forum before they could seek rectification under section 152 of the Ordinance.

6. In view of the aforesaid, this appeal is dismissed.

SL/A-92/L Petition dismissed.

PLJ 2015 Lahore 996
***Present*: MRS. AYESHA A. MALIK, J.**
MUHAMMAD EJAZ NIZAMI--Petitioner
versus
LEARNED JUDGE BANKING COURT NO. II, LAHORE
and 2 others--Respondents
W.P. No. 16189 of 2012, decided on 20.4.2015.

Constitution of Pakistan, 1973--

----Art. 199--Civil Procedure Code, (V of 1908), O. I, R. 10--Banking Court--Auction proceedings--No jurisdiction to validate transaction--Right on basis of agreement to sell does not create substantive rights in property--Validity--Banking Court does not have jurisdiction under Financial Institutions (Recovery of Finances) Ordinance, 2001 to decide upon title issues between parties furthermore irrespective of any agreement sell, Banking Court was obligated to auction property which was mortgaged by judgment debtors to satisfy decree--Impugned order passed by Banking Court was set aside. [P. 997] A

Mr. Faiz Jalbani, Advocate for Petitioner.
Ch. Mehmood-ur-Rehman, Advocate for Respondent No. 2.
Date of hearing: 20.4.2015.

ORDER

Through this petition, order dated 6.6.2012 passed by Respondent No. 1 Judge Banking Court No. II, Lahore has been challenged by the petitioner.

2. The case of the petitioner is that a suit was filed by Respondent No. 2, Trust Leasing and Investment Bank Limited, against the petitioner and two others. An application for leave to appear and defend was filed by the petitioner which was dismissed on 29.7.2008 by Respondent No. 1, Judge Banking Court No. II, Lahore for non-prosecution as well as for being barred by time. The suit was ultimately decreed on 29.7.2008. Respondent No. 1 proceeded to execute the judgment and decree dated 29.7.2008. On 14.6.2010 an application under Order I Rule 10, CPC was filed by Respondent No. 3, Allah Ditta for becoming party in the execution proceedings. In the said application, Respondent No. 3 claimed that he had entered into an agreement with the petitioner for the sale of 02 *marlas* property subject of the auction proceedings before the Court. He prayed for stay of the proceedings. Respondent No. 3 claimed that an agreement to sell was entered into between him and the petitioner regarding the property measuring 02 *marlas* comprised in Khewat No. 3/4, Khatoni No. 7, Khasra No. 11/6/2 measuring 01-*Kanal* and 02-*Marlas*, out of which share measuring 02 *marlas* situated at Jassokey Gurditta, Tehsil Depalpur, District Okara. Respondent No. 1 *vide* the impugned order dated 6.6.2012 decided the application of Respondent No. 3 by validating the transaction between the petitioner and Respondent No. 3. Learned counsel for the petitioner argued that

Respondent No. 1 had no jurisdiction to validate the transaction between the petitioner and Respondent No. 3, Allah Ditta regarding the property exclusively owned by the petitioner. Learned counsel further argued that mere assertion of a right on the basis of an agreement to sell does not create substantive rights in the property.

3. Having heard the arguments of the learned counsel for the parties and after going through the record, it is seen that impugned order dated 6.6.2012 passed by Respondent No. 1 is contrary to the law. Respondent No. 1 does not have jurisdiction under the Financial Institutions (Recovery of Finances) Ordinance, 2001 to decide upon title issues between parties furthermore irrespective of any agreement to sell, Respondent No. 1 was obligated to auction the property which was mortgaged by the judgment debtors to satisfy the decree dated 29.7.2008. Therefore the impugned order dated 6.6.2012 passed by Respondent No. 1 is set aside. The application under Order I Rule 10, CPC shall be deemed pending before Respondent No. 1, Judge Banking Court No. II, Lahore who shall pass a fresh order on the application by Respondent No. 3, in accordance with law, after hearing all the necessary parties within a period of three months from the receipt of certified copy of this order.

4. Disposed of accordingly.

(R.A.) Petition disposed of.

KLR 2015 Civil Cases 390

[Lahore]

Present: **MRS. AYESHA A. MALIK and FAISAL ZAMAN KHAN, JJ.**

Mst. **Jamila Begum, etc.**

Versus

Mst. **Sheedan Bibi, etc.**

Writ Petition No. 20203 of 2004, decided on 4th May, 2015.

CONCLUSION

(1) The limitation to file an application under Section 12(2), C.P.C. is governed by Article 181 of the Limitation Act, 1908, which provides for a period of 3 years.

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

---S. 12(2)---Application---Limitation point---The limitation to file an application under said section is governed by Article 181 of Limitation Act, 1908 which provides for a period of 3 years for assailing an order from the date of the passing of the judgment, decree or order.

(Para 11)

SETTING ASIDE ORDER ON GROUND OF FRAUD ETC. --- (Point of limitation)

(b) Constitution of Pakistan (1973)---

---Art. 199---Civil Procedure Code, 1908, S. 12(2)---Limitation Act, 1908, Art. 181---Seeking setting aside order on ground of fraud---Invocation of application under Section 12(2), C.P.C.---A judgment, decree or order under said provision can only be challenged, in case it has been passed due to fraud, misrepresentation or want of jurisdiction---Impugned order was neither procured through fraud or through misrepresentation---It was also not case of applicants that respective Single Bench had no jurisdiction to pass an order dismissing writ petition on ground of non-appearance of applicants---It was not case of applicants that they never retained named Advocate as the counsel who failed to intimate applicants to appear before High Court---Impugned order was passed on 27.6.2007 against which applicants had been approaching different forum for redress of their grievance and ultimately after failing before all forums, on 15.11.2010 preferred instant application---Application under Section 12(2), C.P.C. was barred by time---Applicants did not file any application for seeking condonation of delay---Application under Section 12(2), C.P.C. dismissed.

(Paras 9, 10, 11, 12)

زیر تنقید حکم بذریعہ فراڈ یا غلط نمائندگی کے ذریعہ حاصل نہ کیا گیا تھا۔ درخواست زیر دفعہ 12(2) زائد المعیاد تھی۔ خارج شد۔

[Impugned order was neither procured through fraud nor through mis-representation. Application under Section 12(2), C.P.C. was barred by time. Dismissed].

For the Applicant-Respondent (in C.M. No. 3/2010): **Muhammad Shahzad Shaukat, Advocate.**

For the Respondent (Sheedan Bibi) & Applicants (in C.M. No. 346/2012): **Zia-ud-Din Kasuri and Muhammad Javed Kasuri, Advocates.**

Date of hearing: **4th May, 2015.**

ORDER

C.M. Nos. 3/2010 & 346/2012

This order shall decide Civil Misc. Nos. 3/2010 and 346/2012.

2. The facts in brief are that Niaz Muhammad predecessor-in-interest of applicants in C.M. No. 3/2010 **(applicants)** was allotted some land by the GHQ. He expired on 21.12.1991. Applicants executed a general power-of-attorney in favour of one Muhammad Sarwar son of Ali Muhammad **(attorney)** on 26.12.1991. On the same date, they also entered into an agreement with their attorney with the stipulation that the attorney will get the property transferred in the name of the applicants through his own means and will give them a certain share. Thereafter, on 04.01.1992, the attorney entered into an agreement to sell of 7/8th share of the property with his wife ***Mst.*** Sheedan for a sum of Rs. 120,000/- out of which he received Rs. 115,000/- as earnest money. Subsequent to this power-of-attorney was cancelled whereafter, applicants successively executed power-of-attorneys in favour of the attorney on 24.8.1992, 26.03.1994 and 7.8.1996.

3. On the strength of the agreement to sell, a suit for possession through specific performance was filed by ***Mst.*** Sheedan, which was decreed on 8.3.1994 on the conceding statement of the attorney. Thereafter, while cancelling previous power-of-attorneys through registered cancellation deeds, applicants executed a fresh power-of-attorney in favour of Muhammad Hanif.

4. On 24.4.2000, through the newly appointed attorney, an application under Section 12(2), C.P.C. was filed by the applicants before Civil Judge, Kasur against the judgment and decree passed in favour of ***Mst.*** Sheedan. The said application was accepted on 30.7.2004 and the judgment and decree was set aside. Feeling aggrieved, ***Mst.*** Sheedan filed a revision petition before Additional District Judge, Kasur which was accepted on 5.11.2004 and the order passed by the Civil Judge was set aside. Feeling aggrieved, applicants preferred Writ Petition No. 20203/2004 before this Court, which was dismissed on 27.6.2007 because of non-appearance of the applicants **(impugned order).** Feeling aggrieved, the applicants simultaneously filed CPLA No. 1395-L/2007 as well as Review Application No. 59/2007. ***Vide*** order dated 30.4.2008, CPLA was withdrawn by the applicants. Thereafter, when the matter was highlighted before this Court in the review application that the applicants simultaneously availed two remedies, on 8.6.2009, applicants withdrew their review application. Against the afore-noted withdrawal, applicants preferred CPLA No. 1416-L/2009, which was also withdrawn on 02.03.2010 on the ground that the applicants will seek their relief by way of filing an application under Section 12(2), C.P.C. before this Court. Subsequent thereto, on 15.11.2010 Civil Misc. No. 3/2010 (present application) was filed by the applicants on 25.10.2010. During the pendency of the said application, Civil Misc. No. 346/2012 was filed by the respondents for the rejection of the application filed under Section 12(2), C.P.C.

5. Learned counsel for the respondents, at the very outset, has raised the following preliminary objections:--

(a) that the application under Section 12(2), C.P.C. is barred by limitation; and

(b) that in view of the fact that applicants themselves withdrew CPLA Nos. 1395-L/2007 & 1416-L/2009 and Review Application No. 59/2007, therefore, they are debarred from filing the present application.

6. Replying to the above, learned counsel for the applicants submits that the applicants were never intimated that they are required to appear before this Court; the counsel who represented them on the fateful day, ***i.e.*** 27.6.2007 when the writ petition was dismissed, was not the counsel for the applicants. Learned counsel has also endeavoured to argue the application on merit, however, he has been asked to first satisfy this Court ***qua*** maintainability of this application, for which he relied on the above submissions.

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

8. For better appreciation of the controversy, it shall be imperative to reproduce the impugned order:---

"The perusal of the order sheet shows that repeated orders have been passed by the Court (16.3.2005, 13.12.2006, 7.5.2007 and 6.6.2007) for the personal appearance of the petitioners, who have failed to enter appearance. On the last date of hearing, i.e. 6.6.2007, a specific date was fixed for this purpose, i.e. today. Even today, none of the petitioners is present in person and no justification is being brought forth for their non-presence. The non-compliance of Court's orders without any lawful justification shows deliberate avoidance to comply with the Court's orders. It is a petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, wherein the conduct of the party assumes great relevance and importance. The conduct of the petitioners disentitles them to seek this discretionary and equitable remedy.

The petition is dismissed accordingly".

From the afore-noted order, it is clear that on the previous four dates of hearing, specific orders were passed by this Court for appearance of the applicants in person however, none appeared. The learned Single Judge granted sufficient opportunities to the applicants to comply with the Court's order however, due to non-appearance of the applicants, he was left with no option but to proceed against them and to dismiss the writ petition.

9. From the perusal of the order sheet, it has surfaced that Syed Muhammad Kaleem Ahmad Khurshid, Advocate has been representing the applicants. He on 16.03.2005 was instructed to produce the applicants in person whereupon he undertook to do the needful. Subsequent thereto, on 13.12.2006 and 7.5.2007, he appeared himself however the applicants never appeared before the Court. On the fateful day, one Mr. Fazal Elahi, Advocate appeared on behalf of the applicants; he neither got his statement recorded nor did he give any explanation about non-appearance/non-compliance of the orders passed by this Court. As the learned counsel, who appeared on behalf of the applicants neither deposed anything against the applicants nor did he take any action which could adversely affect the rights of the applicants enabling them to approach this Court invoking Section 12(2), C.P.C. Syed Muhammad Kaleem Ahmad Khurshid, Advocate learned original counsel for the applicants was successively intimated by the learned Single Judge starting from 16.3.2005 to ensure presence of the applicants, for which he never offered any explanation. It is not the case of the applicants that they never retained Syed Muhammad Kaleem Ahmad Khurshid, Advocate as their counsel who failed to intimate the applicants to appear before this Court.

10. In order to examine the scope of Section 12(2), C.P.C. it will be convenient to reproduce the said provision:--

"12. Bar to further suit.-- (1) ----------

(2) Where a person challenges the validity of a judgment, decree or order on the plea of fraud, misrepresentation or want of jurisdiction, he shall seek his remedy by making an application to the Court which passed the final judgment, decree or order and not by a separate suit."

From the perusal of the afore-noted provision, it is manifest that the scope of this section is limited and narrow. A judgment, decree or order under this provision can only be challenged, in case it has been passed due to fraud, misrepresentation or want of jurisdiction. From the impugned order, it is clear that the same was neither procured through fraud nor through misrepresentation. It is also not the case of the applicants that the learned Single Judge had no jurisdiction to pass an order dismissing the writ petition on the ground of non-appearance of the applicants.

11. We tend to agree with the submission made by the learned counsel for the respondents that the application under Section 12(2), C.P.C. is also barred by time. It is not denied by the applicants that the impugned order was passed on 27.6.2007 against which, applicants have been approaching different forums for the redress of their grievance and ultimately after failing before all forums, on 15.11.2010 preferred the present application. The limitation to file an application under Section 12(2), C.P.C. is governed by Article 181, Limitation Act, 1908 C.P.C. which provides for a period of 3 years for assailing an order from the date of the passing of the judgment, decree or order. The applicants did not file any application under Section 5 or 14 of the Limitation Act for seeking condonation of delay.

12. The resume of the above discussion is that impugned order neither fall within the purview of Section 12(2), C.P.C. nor has been assailed within time therefore **C.M. Nos. 346/2012 is accepted,** as a sequel to which **C.M. No. 3/2010 is dismissed** on merits as well as barred by limitation.

Civil Miscellaneous Application dismissed.

2015 P T D 2296
[Lahore High Court]
Before Mrs. Ayesha A. Malik, J
PUNJAB BEVERAGES CO. (PVT.) LTD. through Senior Finance Manager and others
Versus
ADDITIONAL COMMISSIONER INLAND REVENUE and others
W.Ps. Nos.824, 825, 1355, 3008 of 2014, 24807 of 2013, 9548 of 2015 and 15377 of 2014, decided on 22nd May, 2015.

Income Tax Ordinance (XLIX of 2001)--

----Ss. 113(2)(c), 122, 127 & 133---Constitution of Pakistan, Art.199---Constitutional petition---Alternate remedy---Petitioners were income tax assessees who assailed order-in-original without exhausting remedies available under Income Tax Ordinance, 2001--- Validity---Cases filed by petitioners were premature and preemptive as a question of law had yet to be framed in their cases based on facts of their case---Having gone through rigours of two appeals, cases of petitioners would ripen and then it was to be seen whether a question of law had arisen out of order of Income Tax Appellate Tribunal---Such was the intent of law and procedural form which had to be followed---Jurisdiction to High Court was given specifically under S. 133 of Income Tax Ordinance, 2001, to interpret a question of law and petitioners could not by-pass the entire process and pray for an interpretation on a question of law at an earlier stage in Constitutional petition---Each case of petitioners was to be decided on its own merits and each petitioner had opportunity to urge its case before Commissioner Inland Revenue, then if required before Income Tax Appellate Tribunal and then ultimately if required before High Court in a reference---Neither party could urge what the question of law was or be that would arise once the Appellate Tribunal had decided the case---If question of law was decided at such stage, the entire process given under Income Tax Ordinance, 2001, would become redundant and would give petitioners the ability to avoid due process as provided under Income Tax Ordinance, 2001, where a specific mechanism had allowed a case to become ripe before it could be seen whether a question of law was made out---Essentially exhaustion of specialized remedies under Income Tax Ordinance, 2001, was necessary before seeking interference from High Court---Petition was dismissed in circumstances.

Commissioner Inland Revenue, Zone-II, Karachi v. Messrs Kassim Textile Mills (Pvt.) Limited, Karachi 2013 PTD 1420; Mughal-e- Azam Banquet Complex through Managing Partner v. Federation of Pakistan through Secretary and 4 others 2011 PTD 2260; Collector of Customs, Customs House, Lahore and 3 others v. Messrs S.M. Ahmad and Company (Pvt.) Limited, Islamabad 1999 SCMR 138; Commissioner of Income Tax, Companies-II and another v. Hamdard Dawakhana (Waqf), Karachi PLD 1992 SC 847 and Anjuman-e-Ahmadiya, Sargodha v. (1) The Deputy Commissioner, Sargodha and (2) The Government of West Pakistan,

through the Secretary Colonies, Board of Revenue, West. Pakistan, Lahore PLD 1966 SC 639 ref.
Shahid Pervez Jami and Mudassar Shujauddin for Petitioners (In W.Ps. Nos.824, 825, 1355 and 3008 of 2014).
Khurram Shahbaz Butt for Petitioners (In W.Ps. Nos.24807/2013 and 9548/2015).
Muhammad Younas Khalid and Muhammad Ajmal Khan for Petitioner (In W.P. No. 15377/2014).
Malik Asad Mehmood and Muhammad Ilyas Khan, for Respondents.
Saeed-ur-Rehman Dogar for Respondent FBR (In W.Ps. Nos.824 and 825 of 2014).
Date of hearing: 3rd April, 2015.

JUDGMENT

MRS. AYESHA A. MALIK, J.---This common judgment decides upon the issues raised in the Writ Petitions detailed in Schedule `A', appended with this judgment, as all these petitions raise common questions of law and facts.

2. The petitioners all seek the benefit of section 113(2)(c) of the Income Tax Ordinance, 2001 ("Ordinance").

3. In this regard, the petitioners in W.Ps. Nos.9548/15 and 15377/14 have impugned show-cause notices dated 26-1-2015 issued by the Commissioner Inland Revenue, Lahore and 12-5-2014 issued by the Additional Commissioner Inland Revenue, Lahore respectively. The petitioners in W.Ps. Nos.24807/13, 3008/14 and 825/14 have impugned orders-in-original dated 30-6-2013, 31-12-2013 11-12-2013 respectively issued by the Additional Commissioner Inland Revenue. The petitioners in W.Ps. Nos.824 and 1355 of 2014 being aggrieved of the orders-in-original dated 13-11-2013 and 26-11-2013 issued by the Additional Commissioner Inland Revenue respectively have filed appeals before the Commissioner Inland Revenue (Appeals) and have come to this Court against the orders-in-original.

4. The case of the petitioners is that they are entitled to the benefit of Section 113(2)(c) of the Ordinance as they have been paying minimum tax under Section 113 of the Ordinance on account of declared losses. However, when they sought the benefit of section 113(2)(c) under the Ordinance it was denied to them. Mr. Shahid Pervez Jami and Mr. Mudassar Shujauddin, Advocates for the petitioners (In W.Ps. Nos.824, 825, 1355 and 3008 of 2014) submitted that the petitioners have been denied this benefit on account of the judgment in the case titled Commissioner Inland Revenue, Zone-II, Karachi v. Messrs Kassim Textile Mills (Pvt.) Limited, Karachi 2013 PTD 1420. Mr. Khurram Shahbaz Butt, Advocate for the Petitioners (In W.P. No. 24807/2013 and W.P. No.9548/2015) submitted that the impugned orders are without jurisdiction having been passed after the expiration of the period of limitation under Section 122(4) of the Ordinance. Learned counsel submitted that the issue is of one interpretation of Section 113(2)(c) of tilt Ordinance and whether the Respondents can refuse adjustment of minimum tax paid for the preceding tax years (in which loss was declared). They all argued that since it is a decided issue in

the Kassim Textile Mills Case, the remedy under the Ordinance is not adequate or efficacious.

5. At the very outset, learned counsel for the respondents raised an objection on the maintainability of the instant petitions on the ground that statutory remedy was available to all the petitioners. He stated that some of the petitioners are aggrieved by orders-in-original issued by the Additional Commissioner Inland Revenue against which appeals are pending before the Commissioner Inland Revenue (Appeals) whereas other petitioners have come against the orders-in-original and against show-cause notices. In this regard, following information has been placed before the Court:--

W.P. No.	Sec. 122(9)	Sec.122(5A)	Appeal filed
824/14	18-9-2013	13-11-2013	Pending
9548/15	26-1-2015	Nil	Nil
24807/13	22-6-2013	30-6-2013	Nil
3008/14	20-12-2013	31-12-2013	Nil
825/14	31-10-2013	11-12-2013	Nil
1355/14	29-10-2013	26-11-2013	Pending
15377/14	12-5-2014	Nil	Nil

Learned counsel for the respondents argued that the Ordinance provides remedy to all the petitioners in the form of two appeals and a reference. Therefore this Court should not interfere at this stage and allow the petitioners to bypass the statutory remedy. In this regard, reliance has been placed on the case titled Mughal-e-Azam Banquet Complex through Managing Partner v. Federation of Pakistan through Secretary and 4 others (2011 PTD 2260) wherein it was held that laying challenge to a show-cause notice was, no different than filing a petition on the basis of an apprehension or a speculation. Such a petition was premature and not ripe for adjudication. Learned counsel further argued that notwithstanding the Kassim Textile Mills Case, each case will be seen on its own facts and merits by the competent forum and it will be ascertained whether the Kassim Textile Mills Case is relevant to their case. Therefore he argued that the petitions are not maintainable.

6. Heard and record perused.

7. The common facts in all these cases are that the petitioners were issued notice under Section 122(9) of the Ordinance seeking amendment of the assessment under Section 122(5A) of the Ordinance read with Section 122(1) of the Ordinance. Two petitioners in W.Ps. Nos.9548/2015 and 15377/2014 have impugned the show-cause notices before this Court. Three petitioners in W.P. Nos.24807/2013, 3008/2014 and 825/2014 have impugned the orders-in-original passed under section 122(5A) of the Ordinance before this Court. Two petitioners in W.Ps. Nos.824/2014 and 1355/2014 have filed the appeals before the Commissioner Inland Revenue (Appeals) which are pending. The basic arguments of the learned counsel for the petitioners is that the remedy of appeal is illusionary on account of the fact that the matter in issue has

been decided by the Hon'ble Sindh High Court in Kassim Textile Mills Case and that the respondents will decide the issue on the basis of the said judgment. Learned counsel for the petitioners stated that the remedy available under the statute is no longer efficacious or adequate for the petitioners, hence the, petitions are maintainable. The petitioners seek interpretation of Section 113(2)(c) of the Ordinance to the facts of their cases. They disagree with the decision given in the Kassim Textile Mills Case and believe that their cases will suffer the same fate, hence they argue that the statutory remedy is neither adequate nor efficacious and the matter is a fait accompli.

8. The Ordinance is a comprehensive code which specifically provides for the remedy of an appeal before the Commissioner Inland Revenue (Appeals) under Section 127 of the Ordinance. Against the orders of the Commissioner Inland Revenue (Appeals), remedy under Section 131 of the Ordinance is provided being an appeal before the Appellate Tribunal. Against the said order, remedy is in the form of a Reference under Section 133 provided for under the Ordinance, which is remedy before this Court, in which questions of law can be decided. The Ordinance therefore provides the petitioners two appeals and a reference before this Court. The question that arises is whether the remedy is illusionary as the question of law stands decided in Kassim Textile Mills Case. In the case titled Collector of Customs, Customs House, Lahore and 3 others v. Messrs S.M. Ahmad and Company (Pvt.) Limited, Islamabad (1999 SCMR 138), the Hon'ble Supreme Court of Pakistan held that constitutional petition was maintainable in the presence of alternate remedy, if that remedy was illusionary in nature. The alternate remedy under the Customs Act, 1969 was considered illusionary in this case because the CBR declared the classification for imported wood. The Hon'ble Supreme Court of Pakistan held that since the CBR had rendered its decision and classified imported wood, it would be difficult to take a contrary view regarding the classification of imported wood. Therefore within the statutory hierarchy when the matter stood decided, the statutory remedy was considered illusionary as the customs department was bound by the opinion of the CBR.

9. So far as the petitioners in W.Ps. Nos.9548/15 and 15377/14, their petitions have been filed on the basis of an apprehension. They have come against a show-cause notice without filing any reply. In these cases there is no adverse order against the petitioners and the question of whether Kassim Textile Mills Case is relevant has not ripened. No substantive right of the stated petitioners has been infringed and at this stage it is a preemptive argument to urge that their cases will be decided as per the Kassim Textile Mills Case.

10. As to the other petitioners, they essentially seek the interpretation of Section 113(2)(c) of the Ordinance to the effect that they having declared loss are entitled to the benefit of Section 113(2)(c) of the Ordinance. The Hon'ble Sindh High Court in Kassim Textile Mills Case in I.T.R. No.132/2011 decided the question of law 'whether in-the facts and circumstances of the case, the learned Tribunal has 'correctly concluded that the benefit under Section 113(2) (c) of the Income Tax

Ordinance, 2001 is available to the respondent taxpayer'. In this case, the petitioner had gone through the statutory remedies available under the Ordinance bringing their cases ultimately to the High Court in a Reference for interpretation of a question of law. In the case titled Commissioner of Income Tax, Companies-II and another v. Hamdard Dawakhana (Waar), Karachi (PLD 1992 SC 847), the Hon'ble Supreme Court of Pakistan held that where a statute provides for alternate and efficacious remedy all the way up to the High Court, the process cannot be bypassed without valid and reasonable cause. In this case, the petitioners claim that the respondents will treat their cases in terms of the dicta laid down in the Kassim Textile Mills Case, hence denying them due process. What needs to be seen is whether the request of the petitioners is reasonable that the Court interpret the question of law raised by the petitioners at this stage when the petitioners have not availed the remedy of an appeal and have the right to file a reference under the Ordinance.

10A. In the Kassim Textile Mills Case relied upon by the petitioners the judgment was delivered in a Reference (I.T.R.A. No.132/2011) by the Hon'ble Sindh High Court meaning that the petitioners went through the statutory remedy and ultimately their case was decided in a reference. The present petitioners seek the same relief through these constitutional petitions without availing the alternate remedy. A reference before the High Court under Section 133 of the Ordinance can be filed in each case where a question of law arises out of the order of the Appellate Tribunal. Unless the dispute does not go through the stages of appeal the case of the petitioners will not ripen for interpretation on a question of law. At this stage, it is mere speculation that the question of law is the same as it was in the Kassim Textile Mills Case. The petitioners' case is based on a fear arising from what they anticipate will happen in their case based on the Kassim Textile Mills Case. They claim a reasonable certainty of a presumed threat on the basis of which they seek interference from this Court. However, even if their apprehensions culminate into an adverse order by the competent authority, the remedy of appeal and reference is available to the petitioner and the question of law can only arise from the order of the Appellate Tribunal. This court cannot preempt the question of law and decide upon it at this stage. The petitioners will have to go through the stages available under the act for their case to ripen for the purposes of interpretation of a question of law.

11. The question of whether alternate remedy is adequate was seen in the case titled Anjuman-e-Ahmadiya, Sargodha v. (1) The Deputy Commissioner, Sargodha and (2) The Government of West Pakistan, through the Secretary Colonies, Board of Revenue, West Pakistan, Lahore (PLD 1966 SC 639) wherein the court stated that to disentitle a person from extraordinary remedy the alternate remedy must be a remedy in law. One which is not less convenient, beneficial and effective and if what is sought to be enforced by such extraordinary remedy is a legal right to the performance of a legal duty of a public nature. The Court held that there are two exceptions to the rule one, that the Court will not interfere to enforce the law of the land through its extraordinary remedy of an order of mandamus in cases where

remedy is available under the law, and two when in accordance with the general rule where a statute creates an obligation and enforces its performance in a specified manner, the remedy by mandamus will not be available. In the said case, the Hon'ble Supreme Court of Pakistan held that the adequacy of the remedy, must further be judged, with reference to a comparison of the speed, expense or convenience of obtaining that relief through the alternate remedy, with the speed, expense or convenience of obtaining it under Article 98. The Court has to make a comparison of the speed, expense or convenience of giving that relief under Article 98, with the speed, expense or convenience of obtaining it from the other authority. In this case, the remedy available under the Act is adequate and efficacious for the petitioners. The question in these petitions of adequacy cannot be judged in the light of speed, expense or convenience of obtaining the relief but must be judged in the light of the provisions of the Act itself. The Act is a taxing statute, creating fiscal rights and obligations. Specific and specialized remedy is provided for under the Act which caters to the possible disputes which can arise. Furthermore given that it is a taxing statute, the words of the Act must be given effect to, such that nothing is to be read into it and nothing is to be implied. The Act provides for a specific manner in which a tax liability is to be adjudicated upon, the same should be followed as there is no equity in tax and no presumption as to tax.

12. The petitioners in W.Ps. Nos.824 and 1355 of 2014 whose appeals are pending apprehend that the decisions will be based on the Kassim Textile Mills Case, hence denying them true interpretation of law, which would grant diem the benefit of Section 113(2)(c) of the Ordinance. These cases are premature and preemptive as a question of law has yet to be framed in their cases based on the facts of their case. Having gone through the rigours of two appeals, their case will ripen and it will have to be seen whether a question of law arises out of the order of the Appellate Tribunal. This is the intent of the law and the procedural form which must be followed. Given that the Ordinance specifically gives jurisdiction to this Court under section 133 to interpret a question of law, the petitioners cannot bypass the entire process and pray for an interpretation on a question of law at an earlier stage in a constitutional petition. Each case of the petitioner will be decided on its own facts and each petitioner has the opportunity to urge its case before the Commissioner Inland Revenue, then if required before the Tribunal and then ultimately if required before this Court in a reference. At this stage, neither party can urge what the question of law is or be that will arise once the Appellate Tribunal has decided the case. If the question of law is decided at this stage, the entire process given under the Ordinance becomes redundant and gives the petitioners the ability to avoid due process as provided under the Ordinance where a specific mechanism allows a case to become ripe before it can be seen whether a question of law is made out. Essentially exhaustion of the specialized remedies under the Ordinance is necessary before seeking interference from this Court.

13. In view of the aforesaid, no case for interference is made out.
petitions are dismissed.
Schedule-A

Details of Writ Petitions mentioned in Judgment dated 3-4-2015 passed in W.P. No.824/2014

Sr. No.	W.P. Nos.	Parties Name	Counsel Name
1.	824/14	Punjab Beverages Co. Ltd. v. Additional Commissioner Inland Revenue, Faisalabad	Mr. Shahid Pervez Jami and Mr. Mudassar Shujauddin, Advocate
2.	824/14	Kamalia Sugar Mills Pvt. Ltd. v. Additional Commissioner Inland Revenue, Faisalabad	-do-
3.	1355/14	Standard Spinning Mills Pvt. Ltd. v. Additional Commissioner Inland Revenue, Lahore	-do-
4.	3008/14	K&N's Foods Pvt. Ltd. v. Commissioner Inland Revenue, Lahore	-do-
5.	24807/13	M/s. Put Sarajevo General Engineering Company v. Commissioner Inland Revenue, Lahore etc.	Mr. Khurram Shahbaz Butt, Advocate
6.	9548/14	M/s. 4B International Pvt. Ltd. V. Federation of Pakistan etc.	-do-
7.	15377/14	M/s Crescent Fibers Ltd. V. Federal Board of Revenue etc.	Mr. Muhammad Younas Khalid and Mr. Muhammad Ajmal Khan, Advocates.

MH/P-26/L Petitions dismissed.

2015 P T D 1945
[Lahore High Court]
Before Syed Mansoor Ali Shah and Mrs. Ayesha A. Malik, JJ
FLYING CEMENT COMPANY
Versus
FEDERATION OF PAKISTAN and others
I.C.A. No.1068 of 2014, decided on 29th May, 2015.

(a) Regulation of Generation, Transmission and Distribution of Electric Power Act (XL of 1997).--

----Ss. 7(3), 12(b) & 31(4) & (5)---National Electric Power Regulatory Authority (Tariff Standards and Procedure) Rules, 1998, R.- 17(3)---Law Reforms Ordinance (XII of 1972), S. 3---Intra-court appeal---Determination of electricity tariff---Exclusive function/domain of NEPRA---Scope---Contention of Federal Government was that although tariff of electricity was determined by NEPRA, but it was finalized by the Federal Government under the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997---Validity-- Under S.7(3) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997, NEPRA had the power to determine tariff, rates, charges and other terms and conditions for supply of electric power services by the generation, transmission and distribution companies and recommend the same to the Federal Government for notification---Determination or modification of tariff was one of the core functions of NEPRA, and it could not delegate such power---Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997, and the National Electric Power Regulatory Authority (Tariff Standards and Procedure) Rules, 1998, did not contemplate any role of the Federal Government in the determination process---Actual determination of tariff laid exclusively with NEPRA, meaning that if any party including the Federal Government desired any change or modification in the tariff, which could include reasons related to the prudency of costs, it would have to file a petition before NEPRA Tariff could only be determined and modified by NEPRA---Once the tariff was determined (by NEPRA) it had to be notified by the Government---Section 31(4) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 being a specific section regarding tariff, casted an obligation on the Federal Government to notify the tariff upon intimation by NEPRA---Any interpretation to the effect that NEPRA (only) recommended the tariff determined by it to the Federal Government for re-examination and review, was not only opposed to the provisions off' the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997, it also debilitated and enfeebled the role and purpose of NERPA, which was an autonomous and independent regulator under the said Act---Intra-Court appeal was allowed accordingly.

(b) Words and phrases---

----"Surcharge"---Meaning.

The Free Dictionary by Farlex ref.

(c) Regulation of Generation, Transmission and Distribution of Electric Power Act (XL of 1997)---

----S. 31(5)---National Electric Power Regulatory Authority (Tariff Standards and Procedure) Rules, 1998, R.17(3)---Constitution of Pakistan, Arts. 9 & 24(1)---Law Reforms Ordinance (XII of 1972), S.3 ---Intra-court appeal---Electricity tariff---Equalization surcharge---Debt Servicing Surcharge---Universal Obligation Fund Surcharge-- Neelum Jhelum Surcharge---Surcharges levied on electricity tariff by the Federal Government---Legality and Constitutionality-Involuntary extraction of money from consumers---Contention of Federal Government was that the necessity to impose the surcharges in question was that they represented the cost of the system i.e., the cost of transmission, generation and distribution of electric power consumed, and included capital and development costs for future projects to produce electricity; that the Federal Government was not raising any revenue by levying surcharges but was in fact simply recovering the cost of electricity to ensure economic and efficient generation, transmission and distribution of electricity; that surcharges (costs), over and above the tariff determined by NEPRA were constitutionally permissible and could be imposed by the Federal Government--Validity---Surcharge was an additional or extra charge on the original charge---Surcharge was supposed to be an add on or additional charge built on an existing charge---Federal Government had argued that all four surcharges (i.e. Equalization surcharge, Debt Servicing Surcharge, Universal Obligation Fund Surcharge and Neelum Jhelum Surcharge) were actually costs of the system, which were not included in the tariff determined by NEPRA---In order for such costs to qualify as a surcharge, there must first exist the original cost to which these surcharges owed their existence to---Impugned surcharges did not rest on an existing charge---NEPRA has opined that the surcharges in question did not rest on any original cost which is or was under consideration by NEPRA---NEPRA had categorically stated that it had not allowed these costs to be included in the tariff as they did not satisfy the prudency test nor were they directly related to the costs incurred for producing, transmitting or distributing electricity--- Surcharges in question represented costs which were otherwise not included or even considered in the tariff determined by NEPRA, therefore, the impugned surcharges levied by the Federal Government, even though packaged as costs of the system did not figure in the tariff determined by NEPRA---Surcharges in question were, therefore, at best an involuntary extraction of money from the consumers of electricity, labelled as costs of the system or the distribution companies by the Federal. Government---Federal Government levied surcharges in question at its own discretion with no accountability and disclosure of the amounts collected---No prescribed process was laid down under which money collected from consumers was allocated to the power producers---Mode and manner in which the money collected under the impugned surcharges was routed through different accounts maintained by different Government institutions, was not only unconstitutional but also exhibited poor financial governance and discipline, which amounted to playing a fraud on the

people---Such extraction of money in the garb of surcharges from the ordinary consumer of electricity was, therefore, violative of the fundamental right to life and property of the consumers---Impugned surcharges, also had no element of quid pro quo, therefore, they could not be labelled as fees---High Court declared the impugned surcharges namely; Equalization surcharge, Debt Servicing Surcharge, Universal Obligation Fund Surcharge and Neelum Jhelum Surcharge levied from time to time through impugned notifications, as unconstitutional and hence set aside the same---High Court directed the Federal Government to refund the amount of surcharges illegally extracted from the consumers---Intra-court appeal was allowed accordingly.

Messrs Gadoon Textile Mills and 814 others v. WAPDA and others 1997 SCMR 641; Sohail Jute Mills Ltd. and others v. Federation of Pakistan through Secretary, Ministry of Finance and others PLD 1991 SC 329; The Treasurer of Charitable Endowments for Pakistan v.. Central Board of Revenue and 2 others 1986 MLD 1731; Sheikh Nadeem Younas, Chief Executive, Noble Textile Mills, Pattoki, District Kasur v. WAPDA through Chairman WAPDA, WAPDA House, Lahore and 4 others 1996 CLC 1090 ref.

(d) Taxation---

----"Tax and fee"---Distinction---Tax was a common burden for raising revenue compulsorily from the public---Tax was a compulsory extraction of money by the government for a public purpose without reference to any special benefit on the payer of the tax and the amounts collected under a tax became part of the general revenue of the government---Fee on the other hand was levied for rendering some specific service and the amount collected went towards that particular purpose---In the case of a "fee" there must be an element of quid pro quo---"Tax" and "fee" were compulsory extraction of money but the difference between the two laid in the fact that the tax was not co-related to any particular service rendered but intended to meet the expenses of the government and a "fee" was meant to compensate the government for expenses incurred in rendering services to the persons from whom the fee was collected.
Collector of Customs and others v. Sheikh Spinning Mills 1999 SCMR 1402 ref.

(e) Constitution of Pakistan---

----Art. 77 & Fourth Schedule, Parts I & II---Federal Legislative List-- Taxation---Non-tax entries on the Federal Legislative List---Question as to whether the non-tax entries or subject specific generic entries on the Federal Legislative List included the power to taxation---Federal Legislature had the power to make laws in respect of any matter in the Federal Legislative List---Taxation had been specifically dealt with under entries 43 to 53 of Part-I of the Federal Legislative List---Part-II of the Federal Legislative List did not provide for any specific taxation---Purpose of providing specific entries for taxation (entries 43 to 53 of Part-I of the Federal Legislative List) showed that the constitutional intent was to consider "taxation" as

a separate subject---Taxation, therefore, could not be read into other generic subject entries in the Federal Legislative List as it enjoyed the status of a separate and distinct subject---Such special space carved out for taxation under the Constitution also found support from Art. 77 of the Constitution which mandated that tax could only be levied under the authority of an Act of Parliament---Such authority to impose taxation had to be specifically and clearly mentioned in the Constitution---In the presence of the specific and clear entries regarding taxation under entries 43 to 53 of Part-I of the Federal Legislative List, it could not be said that the generic entries also included the power of taxation-Taxation was a specific subject and unless specifically and clearly listed in the Federal Legislative List, the power of taxation, could not be read into the general subject entries.
State of W.B. and another v. Kesoram Industries Ltd. and others [(2004 (10) SCC 201] and Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector and E.T.I.O. and others [2007(5) SCC 447] ref.

(f) Regulation of Generation, Transmission and Distribution of Electric, Power Act (XL of 1997)---

----S. 31 (5)---Law Reforms Ordinance (XII of 1972), S. 3---Intra-court appeal --- Excessive delegation of power by the Legislature to the Executive---Electricity tariff---Surcharge---Power of the Executive (i.e. Federal Government) to levy surcharge on electricity tariff---Legality and Constitutionality---Section 31(5) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997, provided that "distribution company shall pay to the Federal Government such surcharge as the Federal Government, from time to time, notify in respect of each unit of electric power sold to the consumers..."---Said section did not specify the design and nature of surcharge to be imposed on the sale of the electric power; it also failed to provide legislative parameters or guidelines or legislative policy for determining the amount and nature of surcharge or the number of surcharges to be levied---Legislature has left it to the discretion of the Executive to decide what it wanted to recover and how---Power vested in the hands of the Executive (under S.31(5) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997) was unguided and uncontrolled ---Section 31(5) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997, delegated an essential legislative function to the Executive which was not permissible under the Constitution---Foundations of excessive delegation owed its genesis to the doctrine of separation of powers, which was a fundamental principle of constitutional construct-Section 31(5) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997, simply opened an unguided window and empowered the Executive to assume legislative responsibility, which offended separation of powers and fell within excessive delegation---Such unguided and unstructured delegation empowered the Executive with a power which was ex-facie discriminatory and hence not permissible under the Constitution-High Court declared S.31(5) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997, and the impugned surcharges namely; Equalization Surcharge, Debt Servicing Surcharge, Universal

Obligation Fund Surcharge and Neelum Jhelum Surcharge levied from time to time through impugned notifications, as unconstitutional and hence set-aside the same, and that the Federal Government by charging unconstitutional and illegal surcharges from the consumers of electricity had been unjustly enriched---High Court directed that the Federal Government should refund the amount of surcharges illegally extracted from the consumers; that NEPRA should work out the total amount of surcharges collected from the end consumers to date and evolve a plan for the repayment of the said amount through adjustment in tariff for the benefit of the end consumer---Intra-court appeal was allowed accordingly.
Khawaja Ahmad Hassan v. Government of Punjab and others 2005 SCMR 186; Engineer Iqbal Zafar Jhagra and another v. Federation of Pakistan and others 2013 SCMR 1337 and Messrs Pfizer Laboratories Limited v. Federation of Pakistan and others PLD 1998 SC 64 ref.

(g) Taxation.--

--Imposition, administration and implementation of taxes---Legislature and Executive, powers of---Delegation of power of taxation by the Legislature to the Executive---Scope---Legislature was omnipotent in the exercise of the taxing prerogative---Whereas the right to impose taxes and to determine the circumstances under which they would be done was the privilege of the legislative power, administration of the tax law was the responsibility of the executive power---Certain limitations on the taxing power of the Legislature were self-evident-Since the power to raise taxes was a prerogative of the public authority, a Government had only the right to impose a levy in so far as it was competent to do so---Under such principle, all that was necessary was that the rights of the tax administration and the corresponding obligations of the taxpayers be specified in the law---Implementation of the tax was generally regulated by the executive power---Power to fix the rate of tax was a legislative power but if the Legislature laid down the legislative policy and provided the necessary guidelines, that power could be delegated to the Executive---Merely on the ground that the legislature had entrusted the power to alter, modify, vary the tax, a provision could not be held to be impermissible delegation provided the legislation had given its policy and the relevant Act provided sufficient guidelines.
Taxmann's Interpretation of Taxing Statutes pp.5-9 ref.

(h) Legislature---

----Delegation of power by the Legislature---Scope---Legislature could not repose any power, essentially legislative, in another body or organ; it could not efface itself and set up a parallel legislative authority; it must exercise its judgment on vital matters of policy and enact the general principles which should be embodied in the legislation---Legislature could, however, confer upon any person or body, fit to exercise it, the power to work out details and particulars for carrying out its policy and in order to give effect to the legislation in a particular direction---Legislature could not delegate its power to make a law but it could make a law to delegate

powers to determine some facts or state of things upon which the law made or intended to make its own action dependant---Where the law was flexible, having laid down broad principles of its policy, the Legislature could leave the details to be supplied by the administrator to adjust to the rapid changing circumstances.
Taxmann's Interpretation of Taxing Statutes pp.5-9 ref.
Appellant'/Petitioners by:
Muhammad Azhar Siddique Assisted by Shahanshah `Shamil Pirracha, Muhammad Irfan Mukhtar, Muneer Ahmed, Shabbir Ahmad, Maryam Mazhar and Amna Liaqat, Mian Muhammad Hussain Chotya, Mustafa Kamal, Rana Ali Akbar Khan, Mian Muhammad Rashid, Miss Rohi Saleha, Muhammad Mohsin Virk, Shahzad Saleem Bhatti, Muhammad Asim Mumtaz, Adnan Ahmed, Muhammad Kamran Siddiqui, Hasham Ahmad Khan, Mian Tariq Mehmood, Mian Masroor Akbar, Ashfaq Ahmad Tabsassum, Muhammad Nawaz, Mirza Qasim Baig, Mirza Abbas Baig, Muhammad Junaid Ashraf, Saood Nasrullah Cheema, Malik Naveed Suhail, Mian Muhammad Tanveer Chotya, Fiaz Ahmed Khan Baloch, Hamad Shafqat Sulahria, Ch. Mumtaz ul Hassan, Azeem Akram, Ch. Farid Anwar, M. Irfan Liaqat, Rana Nadeem Ijaz, Khalil ur Rehman, Mohsin Ali, Saith Nadeem Hussain, Khurram Shahbaz Butt, Babar Ilyas Chatha, Ahmad Bilal, Rubia Latif, Naveed Shabbir Goraya, Ijaz Ahmad Awan, Mehar Shahid Mehmood, Ch. Muhammad Naseer Gujjar, Faisal Tahir, Ch. Inayat Ullah, Muhammad Adeel Chaudhry, Ch.Muhammad Shahbaz Kang, Amna Asif, Malik Aftab Aslam, Sheikh Akbar Ali Tahir, Mumtaz Ahmed Mangat, Jamil Khan, Rana Muhammd Zahid, Ch. Muhammad Ali, Ch. Abdul Razzaq, Ch. Anwaar-ul-Haq-I, Ms. Shabnum Aslam, Fakhar-uz-Zaman Akhtar Tarar, Rana Ali Akbar Khan, Malik Ahsan Mehmood, Muhammad Umer Riaz, Munir Hussain Panjotha, Irtiza Ali Naqvi, Sultan Hassan Malik, Ahmed Bilal Soofi, Mirza Bilal Zafar, Ch. Naveed Akhtar Bhutta, Main Tabssum Bashir, Abid Minhas, Misbah ul Hassan Qazi, Seth Iftikhar Ali Tayyab, Muhammad Javed Iqbal Qureshi and Muhammad Rasheed Bhatti.
Respondents By:
Mirza Nasar Ahmad and Mian Irfan Akram, Deputy Attorney Generals for Pakistan, Syed Akmal Hussain, Standing Counsel for Pakistan for Federation of Pakistan.
Munawar us Salam and Muhammad Shoaib Rashid for Ministry of Water and Power, Islamabad.
Muhammad Shafique for NEPRA.
Umer Sharif for WAPDA/NEPRA.
Amar Sikandar Ranjha and Mansoor Usman Awan for Respondent NEPRA.
Saad Rasool for WAPDA.
Rasaal Hassan Syed for WAPDA.
Sheikh Muhammad Ali, Barrister Haris Ramzan and Ms. Mubashra Khalid for NTDC/CPPA.
Sh. Muhammad Ali and Ms. Mubashra Khan for FESCO Sarfraz Ahmad Cheema for FESCO.
Aurangzeb Mirza for GEPCO.
Muhammad Ilyas Khan for LESCO and FESCO. Mian Muhammad Javaid for FESCO.
Dr. M. Irtiza Awan for IESCP.

Khalid Ishaq for GEPCO.
Syed Murtaza Ali Zaidi for RESCO and MEPCO.
Zargham Eshaq Khan, Joint Secretary, Ministry of Water and Power, Islamabad.
Muhammad Yousaf Raza, Manager Legal, LESCO and Muhammad Yasin Badar, Legal Consitant, LESCO.
Majid Khan, DG, Legal, NTDCL.
Syed Ausaf Ali, D.G. (Tariff) NEPRA.
Muhammad Shahzad, Addl. Secretary, CCI, Islamabad. Sabir Ali, CEO, PEPCO.
Qamar uz Zaman Farooqi, Joint Secretary (Bueget Imp), Ministry of Finance along with Khan Hafeez, Deputy Secretary, Ministry of Finance.
Amici Curiae:
Khaleeq-uz-Zaman, Waqqas Ahmad Mir, assisted by Hassan Niazi, Faizan Raja, Ms. Noor Bano Khan, Ms. Khizra Tariq, Ms, Fatima Arshad, Wasee-ul-Hasnain Naqvee, assisted by Barrister Saba Qaiser.
Assisted by:
Qaisar Abbas and Mo/lsirt Mumtaz, Civil Judi,cs/Researcb Officers, Lahore High Court, Research Centre (LHCRC).
Dates of hearing: 16th, 17th, 18th, 19th, 23rd, 24th, 26th February, 2nd, 3rd, 9th, 10th, 11th, 12th, 18th, 19th, 20th, 24th, 25th and 26th March, 2015.

JUDGMENT

MRS. AYESHA A. MALIK J.--Appellants and petitioners ("appellants") have challenged the constitutionality, and vires of section 31(5) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 ("the Act") and the Surcharges levied thereunder. Therefore, this consolidated judgment decides the instant ICA along with connected ICAs (detailed in Schedule 'A') which call into question the judgment of the learned Single Judge dated 26-9-2014, wherein Equalization Surcharge imposed under section 31(5) of the Act was upheld and writ petitions (detailed in Schedule '13') filed after the impugned judgment, challenging all the Surcharges imposed 'under the Act. All these cases raise common questions of law and facts.

2. Appellants before this Court are consumers of electricity who have challenged the vires of section 31(5) of the Act and the following Surcharges levied from time to time since 2008 including:--
(a) Equalization Surcharge ("EQ Surcharge") (subsequently withdrawn vide Notification dated 11-10-2013;
(b) Debt Servicing Surcharge ("D&Surcharge"),
(c) Universal Obligation Fund Surcharge ("UOF Surcharge"); and
(d) Neelum Jhelum Surcharge ("NJ Surcharge")
(b) and d levied through Notifications dated 3-10-2014 and 1-11-2014, collectively referred to as the "Surcharges").

3. The impugned judgment has upheld the levy of EQ Surcharge for being a part of the tariff and that the Federal Government enjoys exclusive power to levy a

surcharge under Section 31(5) of the Act. While relying on Messrs Gadoon Textile Mills and 814 others v. WAPDA and others (1997 SCMR 641) ("Gadoon Case"), the impugned judgment declared the EQ Surcharge to be a part of the tariff being cost of electricity. It also finds that the determination of the cost of electricity cannot be "intermingled" with the tariff determined by National Electric Power Regulatory Authority ("NEPRA"). With respect to the vires of section 31(5) of the Act, the impugned judgment holds that the Section neither offends the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution") nor any provisions of the Act.

4. The appellants argued that this is a contradiction in terms as the competent authority under the Act to determine tariff is NEPRA and section 31(5) of the Act allows the Federal Government to levy a surcharge independent of any tariff determination made by NEPRA. The basic issue as argued by the learned counsel for the appellants is the competence of the Federal Government: to levy surcharge without any determination from NEPRA given that NEPRA enjoys exclusive power to determine the tariff. It is their case that the Surcharges are unconstitutional as they are compulsory extraction of money from the consumers. The levy of the surcharge has been delegated to the executive without any guidelines, which renders it illegal and contrary to the constitutional mandate.

5. The appellants have argued that determination of tariff is the exclusive function of NEPRA under the Act and once the tariff is determined by NEPRA as per the Act and the National Electric Power Regulatory Authority (Tariff Standards and Procedure) Rules, 1998 ("Tariff Rules"), the imposition of surcharge over and above the tariff, so determined, defeats the independence and autonomy of NEPRA. It also impairs the right to life, property and fair determination of tariff thereby offending Articles 9, WA, 23 and 24 of the Constitution besides the principles of economic and social justice. It is their case that NEPRA is the regulatory authority which was established to regulate the power sector and for the specialized function of tariff determination. 1 Section 31(5) of the Act allows the Federal Government to bypass the entire process of tariff determination and impose costs which have not been placed before NEPRA and do not conform to the standards and guidelines issued by NEPRA for tariff determination. The appellants argued that the entire purpose and function of NEPRA is defeated when the. Federal Government levies a surcharge and deems it as a cost without any scrutiny from the regulator or under the tariff determination process. This according to them amounts to regulatory capture. They submitted that the imposition of. Surcharges, considered to be cost incurred by the distribution companies, is in effect compulsory extraction of money, which is not permissible under the Constitution. It was also argued that section 31(5) of the Act amounts to excessive delegation of power to the executive resulting in unguided exercise of power which is also unconstitutional. The appellants argued that the Surcharges have been levied to collect revenue from the consumers to meet costs generated due to inefficiency and financial defaults of the Government, theft and line losses in the power sector and related issues. Instead of addressing the faults and gaps in the system, the Federal Government is bridging the deficit by

recovering it under the garb of costs of the system from the consumers. It is their case that the Federal Government has failed in its obligation to provide electricity and has placed an unfair burden on the consumers. This amounts to extortion of money from the public which is illegal and violative of the fundamental rights of the consumers of electricity.

6. Learned Counsel for the Federal Government argued that section 31(5) of the Act has been introduced to harmonize the electricity tariff across the country between different distribution companies. The necessity to impose the Surcharges is that they represent the cost of the system i.e., the cost of transmission generation and distribution of electric power consumed and includes capital and development costs for future projects to produce electricity. Learned counsel argued that the Surcharges are aimed at ensuring affordable supply of electricity and stability in the power sector. It is contended that Federal Government is not bound to issue the tariff as determined by NEPRA as it has a constitutional duty to ensure social justice and of providing the basic utility of electricity at an affordable price. Relying on Gadoon's Case they argued that Surcharges (costs), over and above the tariff are constitutionally permissible and can be imposed by the Federal Government. It is their case that the Federal Government is not raising any revenue by levying Surcharges but in fact simply recovering the cost of electricity to ensure economic and efficient generation, transmission and distribution of electricity.

7. Learned Counsel for NEPRA argued that NEPRA did not recommend the levy of any surcharge challenged before this Court. He contented that Surcharges were levied by the Federal Government without any determination from NEPRA. The only surcharge, NEPRA has determined is late payment surcharge, which is a payment to be made by the consumers over and above the tariff, in case of late payment of the electricity bill.

8. Report and parawise comments have also been filed by the National Transmission and Dispatch Company ("NTDC") and Central Power Purchasing Agency ("CPPA") which state that NEPRA determines tariff rates and charges for its licensees and there is no provision under the Act where NEPRA can determine a cost related to the overall system as they only consider cost in terms of their own regulated standards and procedures. The comments further state that the Government has to ensure sustainability of the power sector and has, therefore, levied Surcharges covering costs which are incurred by the system but are not regulated by NEPRA. The role of NTDC and CPPA is to make payments to the producers of electricity. The amounts received by NTDC/CPPA are subject to audit by the Auditor General of Pakistan. Nothing has been concealed and amounts collected are duly notified by the Government. It has also stated that NTDC/CPPA do not maintain any escrow account but on the other hand have opened specific accounts in its name for payments to be made to the generation companies.

9. Pakistan Electric Power Company ("PEPCO"), in its written comments, supports the stance of the Federal Government. Learned Deputy Attorneys General explained

that the, Federal Government has the executive authority to levy the surcharge as it has executive authority over all matters contained in the Federal Legislative List ("FLL") and Electricity falls in Part II, Item 4 of the FLL. The Chief Executive Officer of PEPCO also appeared before the Court to explain the role of PEPCO with reference to the Surcharges. He submitted that PEPCO essentially allocates all the amounts recovered as Surcharges amongst the generation companies.

10. M/s. Khaleeq-uz-Zaman, Waqqas Ahmad Mir, and Wasee-ul -Hasnain Naqvee, Advocates were appointed as amici curiae who submitted that tariff determination is the exclusive function of NEPRA in exercise of the powers conferred under section 7(3)(a) of the Act, read with the Tariff Rules. NEPRA determines tariff after following an elaborate procedure in which costs are claimed by the relevant licensees and are determined by NEPRA on the basis of prudency. Tariff is an all inclusive determination which is issued by NEPRA after careful consideration of numerous factors and all costs prudently incurred by licensees to meet the demonstrated needs of their customers. In this entire process the Federal Government can at best require NEPRA to reconsider the tariff but it cannot impose extraneous costs on the tariff. They submitted that the Surcharges, unless determined by NEPRA as a part of tariff, amounts to unlawful extraction of money from the consumer as it has no nexus with the tariff or electricity consumed and therefore places an unfair burden on the consumer. In their opinion the Surcharges are unconstitutional because the Constitution does not allow the Federal Government to arbitrarily impose surcharges and recover its own costs from the consumer. They argued that the Surcharges do not constitute tax because the money collected instead of being deposited into the Federal Consolidated Fund is being routed to different accounts maintained by various institutions to meet the financial requirements of the Federal Government, hence this extraction of money does not pass for a tax and is, therefore, an impermissible levy which cannot be allowed to stand.

Overview of the Power Sector

11. Prior to 1997 electricity was produced, transmitted and distributed to end consumers by the Water and Power Development Authority ("WAPDA") under WAPDA Act, 1958 and Electricity Act, 1910. Thereafter, the entire power sector went through a major restructuring which resulted in the creation of generation companies, a transmission company and nine distribution companies. Generation companies ("GENCOs") include hydropower projects owned by WAPDA, thermal power projects, nuclear power projects, Independent Power Producers ("IPPs") and industrial units with surplus power generation. NTDC is the transmission company. The nine distribution companies are Faisalabad Electric Supply Company ("FESCO"), Gujranwala Electric Supply Company ("GEPCO"), Hyderabad Electric Supply Company ("HESCO"), Islamabad Electric Supply Company ("IESCO"), Lahore Electric Supply Company ("LESCO"), Multan Electric Supply Company ("MEPCO"), Rawalpindi Electric Supply Company ("RESCO"), Quetta Electric Supply Company ("QESCO") and Sukkar Electric Supply Company ("SESCO"), (collectively referred to as "DISCOs").

12. NEPRA is established under Section 3 of the Act and is referred to as the Authority under the Act. It comprises of five members including a Chairman and four members, one from each Province, all appointed by the Federal Government. NEPRA was established to regulate the generation, transmission and distribution of electric power and matters related thereto. The main functions attributed to NEPRA are the issuance of licenses for generation, transmission and distribution of electric power; the establishment and enforcement of standards to ensure quality and safety in the service of electric power to consumers; and to determine tariff for generation, transmission and distribution of electric power. Essentially NEPRA regulates the power sector to ensure coordinated, reliable and adequate supply of electric power. In doing so, NEPRA is mandated to protect the interest of the consumers and the investors. In terms of Section 7(6) of the Act, in performing its functions NEPRA, as far as practicable, must protect the interest of consumers and the companies providing electric power services in accordance with the provisions of the Act and the guidelines provided by the Federal Government. Section 7 of the Act provides that NEPR A shall determine tariff, rates, charges and other terms and conditions for supply of electric power services and recommend the tariff to the Federal Government for notification.

13. The Electricity Cycle entails electricity being produced by the GENCOs, transmitted across the country through NTDC and distributed to the end consumers by the DISCOs. The consumer pays the cost of electricity to the DISCOs, which then pay the cost of generating and transmitting electricity to NTDC. NTDC is the exclusive company engaged in the business of transmission of electric power through the 500 KV, 220 KV and 132 KV transmission lines. The entire process of making payments to generation companies on behalf of DISCOs for supply of electricity through the network is routed through NTDC, which in turn, has set up CPPA to make payments against the invoices raised by the GENCOs.

14. The Government issues its power policies from time to time to set out its vision and guidelines for the power sector. The National Power Policy, 1998 set out the role of NEPRA as an autonomous regulatory authority to promote the establishment of a competitive and efficient power sector while safeguarding the interests of electricity consumers and power sector investments. The Policy states that NEPRA is to determine the tariff and also set guidelines for tariff determination. In terms thereof tariff has two main components; capacity and energy. Tariff also includes prudent costs related to generation, transmission and distribution of electric power as determined by NEPRA. Under the Policy for Power Generation Projects, 2002, NEPRA was again seen as a friendly regulator to protect the interests of consumers and companies providing electric power in line with the guidelines provided by the Federal Government. In terms of the National Power Policy, 2013 issued by the Government of Pakistan, NEPRA was to be strengthened to create a world class regulatory authority with sophisticated and efficient capacity to establish tariffs and set the foundation for a competitive bidding process. The Policy recognizes that tariff rationalization will minimize or eliminate subsidy within the industrial, commercial and bulk consumers. One of the short term objectives set out in this

Policy is to harmonize the electricity capacity by rationalizing the tariff. The cost of power generation is to be reduced and efficiency of power generation, transmission and distribution to be increased. The Government of Pakistan also issued the National Power Tariff and Subsidy Policy Guidelines, 2014 with respect to electricity prices and cost allocation so that policy makers, planners, companies, regulators and customers have a concrete picture of the steps required to achieve a sustainable power sector for the country. The policies show that NEPRA is an independent and autonomous regulator of the power sector and enjoys the exclusive responsibility of determining tariff.

Scope and Meaning of Tariff

15. Tariff is defined under. Rule 2(m) of the Tariff Rules to mean: the rates, charges, terms and conditions for generation of electric power, transmission, inter-connection, distribution services and sales of electric power to consumer by a licensee.

Section 7 of the Act provides for the powers and functions of the Authority and vests exclusive responsibility with NEPRA to determine tariff. The Section is reproduced hereunder for ready reference:--

(1) The Authority shall be exclusively responsible for regulating the provision of electric power services.

(2) In particular and without prejudice to the generality of the foregoing power, only the Authority, subject to the provisions in subsection (4), shall -

(a) grant licences for generation, transmission and distribution of electric power;

(b) prescribe procedures and standards for investment programmes by generation, transmission and distribution companies;

(c) prescribe and enforce performance standards for generation, transmission and distribution companies;

(d) establish a uniform system of accounts by generation, transmission and distribution companies;

(e) prescribe fees including fees for grant of licences and renewal thereof;

(f) prescribe fines for contravention of the provisions of this Act;

(g) review its orders, decision or determinations;

(h) settle disputes between the licensees;

(i) issue guidelines and standards operating procedures; and

(j) perform any other function which is incidental or consequential to any of the aforesaid functions.

(3) Notwithstanding the provisions of subsection (2) and without prejudice to the generality of the power conferred by subsection (1) the Authority shall

(a) determine tariff, rates, charges and other, terms and conditions for supply of electric power services by the generation, transmission and distribution companies and recommend to the Federal Government for notification;

(b) review organizational affairs of generation, transmission and distribution companies to avoid any adverse effect on the operation of electric power services and for continuous and efficient supply of such services;

(c) encourage uniform industry standards and code of conduct for generation, transmission and distribution companies;

(d) tender advice to public sector projects;
(e) submit reports to the Federal Government in respect of activities of generation, transmission and distribution companies; and
(f) perform any other function which is incidental or consequential to any of the aforesaid functions.
(4) Notwithstanding anything contained in this Act, the Government of a Province may construct power houses and grid stations and lay transmission lines for use within the Province and determine the tariff for distribution of electricity within the Province.
(5) Before approving the tariff for the supply of electric power by generation companies using hydro-electric plants, the Authority shall consider the, recommendations of the Government of the Province in which such generation facility is located.
(6) In performing its functions under this Act, the Authority shall, as far as practicable, protect the interests of consumers and companies providing electric power services in accordance with guidelines, not inconsistent with the provisions of this Act, laid down by the Federal Government." [Emphasis added]
In terms of section 7(1) of the Act, NEPRA is exclusively responsible for providing electric power services, which means the generation, transmission or distribution of electric power and all other services incidental thereto [section 2(x)] section 7(3)(a) requires NEPRA to determine tariff, rates, charges and other terms and conditions for the supply of electric power services by the generation, transmission and distribution companies and recommend the same to the Federal Government. Section 31 of the Act pr. vides that NEPRA shall determine and prescribe the procedures and 'standards for determination, modification or revising rates, charges and terms and conditions for generation of electric power, transmission, inter-connection, distribution services and power services to consumers. The required standards and procedures are set out in the Tariff Rules. In terms thereof any licensee, consumer, or person interested in tariff can file a petition with NEPRA for its determination. The Tariff Rules sets out the procedure to be followed for tariff determination and Part III of the Tariff Rules provide the Standards and Guidelines which are applied when tariff is determined. In terms of Rule 17, NEPRA can issue standards and guidelines from time to time, and can modify, amend or revoke the same. Rule 17(3) sets out the applicable standards currently followed by NEPRA. Since NEPRA determines the tariff for generation, transmission and distribution companies, the petitions are filed by each licensee, separately. The generation tariff is determined for the term of the Power Purchase Agreement executed with the Federal Government, which is reflective of the life of the power project. The tariff is determined at the inception of the project and thereafter monthly adjustments are made by NEPRA to cater for the fuel cost as contemplated under section 31(4) of the Act. Transmission and distribution tariff is determined on an annual basis and is also subject to monthly adjustments under section 31(4) of the Act.

16. NEPRA hears the petitions in terms of the Act and the Tariff Rules and issues its rulings. Under Rule 16(2), a petition is to be decided within four months of the date of its admission. In the event that the tariff requires recalculation a party may

move NEPRA for its recalculation and adjustment. NEPRA can also be petitioned for review of the tariff by a party or by the Federal Government. Once the tariff is finalized it has to be notified by the Federal Government in the official gazette and becomes effective on the issuance of the notification. However, the monthly adjustments are notified by NEPRA.

17. Under Rule 17(3)(i) of the Tariff Rules, the tariff should allow the recovery of all costs prudently incurred.

17. Standards and guidelines:

(3) Tariffs shall be determined, modified or revised on the basis of and in accordance with the following standards, namely:-

(i) tariffs should allow licensees the recovery of any and **all costs prudently incurred** to meet the demonstrated needs of their customers, provided that, assessments of licensees, prudence may not be required where tariffs are set on other than cost - of - service basis, such as formula-based tariffs that are designed to be- in place for more than one years;" **[emphasis added]**

The term cost is not defined anywhere in the Act or the Tariff Rules, however, NEPRA has developed a prudency test against which the costs are considered. The Federal Government has justified the Surcharges for being a cost of the system which means the actual cost incurred in the generation, transmission and distribution of electricity and includes future costs for development and costs related to the growth of the system. They have also explained that all costs are directly related to the tariff determined by NEPRA but they were never placed before NEPRA for determination. It is the case of the Federal Government that they are fully competent to levy surcharge on the tariff because they finalize the tariffs. According to them, while NEPRA determines the tariff, its finalization is dependent upon the approval and consequent notification issued by the Federal Government. They argued that the Federal Government has to take into consideration many social and economic conditions related to the power sector and the different classes of consumers. The Government also takes into consideration factors which NEPRA cannot look into as per its standards and guidelines and also has to consider the over-all sector, its stability and growth. In this way the Federal Government can recover the cost of the system in the form of a surcharge on the tariff.

The Nature of the Surcharges

18. Before examining the legality and constitutionality of the Surcharges, it is necessary to first understand the nature of the levy. According to the Federal Government, the justification of the Surcharges is as follows:

UOF Surcharge

The surcharge was levied to maintain a uniform tariff which is based on socio economic objective and related budgetary targets, approved by the Council of Common Interest ("CCI") and Economic Coordination Committee of Cabinet ("ECC"). The amounts collected under this head are deposited into an account titled Universal Obligation Fund maintained with CPPA. The distribution company sends its demand to the CPPA against its invoice. The demand is forwarded to PEPCO

which then allocates amounts amongst the DISCOs. CPPA then releases the funds to the GENCOs as per PEPCO's allocation.

DS Surcharge

This surcharge is levied to service the mark up due to the IPPs. The Federal Government has explained that due to law and order situation, administrative and regulatory reasons and lack of consumer discipline, there has been a deficiency in the recovery of dues for supply of electric power. This caused a financial crunch and delayed payments to the IPPs. In order to resolve the matter and meet the financial requirements, the power producers were constrained to obtain funding from commercial banks to prevent the encashment of the sovereign guarantees. The DS Surcharge has been imposed to meet the mark up and late payment component of these loans. The amounts collected under this head are deposited into an account maintained with the CPPA and paid to the Federal Government for amounts paid to the IPPs.

NJ Surcharge

The Government of Pakistan is in the process of building the Neelum Jhelum Hydropower Project with an installed capacity of 969 MW in Azad Jammu and Kashmir by WAPDA through the Neelum Jhelum Hydro Company which is wholly owned by WAPDA. The surcharge collected under this head is deposited in a Fund called `Neelum Jhelum Development Fund" for use in the Neelum Jhelum Hydro Power Project.

EQ Surcharge

This surcharge is essentially an inter DISCO subsidy. Since the Government seeks to maintain a uniform tariff, the EQ Surcharge balances the cost profile of different DISCOs. The amounts collected under this head were deposited in an escrow account maintained by the CPPA for exclusive use for discharging the liabilities of the DISCOs.

19. In terms of the explanation provided by the Federal Government the Surcharges are a recovery of different costs of the power sector. It is their case that the imposition and- collection of the Surcharges directly relate to the cost of electricity and is being imposed as an additional charge on the original cost of electricity. During the course of arguments, Mr. Munawar us Salam, Advocate explained that the Surcharges are aimed at ensuring economic efficiency in the supply of electricity and stability of the power sector. Learned counsel stated that the Surcharges are in line with the policy guidelines set by the CCI and the ECC.

OPINION OF THE COURT

20. In order to examine the constitutionality of Section 31(5) of the Act and the legality of the impugned Surcharges, it is useful to first understand the role of NEPRA and the nature of the Surcharges.

Tariff Determination - sole prerogative of NEPRA

21. Under section 7 of the Act, NEPRA is exclusively responsible for regulating "electric power services" i.e., the generation, transmission or distribution of electric power and all other services incidental thereto [section 2(x)]. Under section 7(3)

NEPRA shall determine tariff, rates, charges and other terms and conditions for supply of electric power services by the generation, transmission and distribution companies and recommend to the Federal Government for notification. Determination is one of the core functions of NEPRA, as is evident from Section 12(b), which shows that NEPRA cannot delegate the power to determine or modify tariff. Section 31 (1) provides that NEPRA shall determine and prescribe procedures and standards for determination of tariff. The purpose of tariff determination is to eliminate exploitation and minimize economic distortions [section 31(2)(f)]. Notification of NEPRA's approved tariff for supply of electric power services by generation, transmission and distribution companies shall be made in the official gazette by the Federal Government upon intimation by NEPRA.

22. Collective reading of the above provisions of the Act reveals that the tariff can only be determined and modified by NEPRA. Once the tariff is determined it has to be notified by the Government. Section 31(4) being a specific section regarding Tariff, casts an obligation on the- Federal Government to notify the tariff upon intimation by NEPRA. The word "recommendation" in section 7(3) of the Act has to be read with section 31(4) and is in the nature of an intimation or request to the Federal Government to notify the tariff. The recommendation to the Federal Government under section 7(3) is only to notify the tariff. It is not that the tariff determined by NEPRA is being recommended to the Federal Government for re-examination and review. Any such interpretation is not only opposed to the provisions of the Act it debilitates and enfeebles the role and purpose of NERPA, which is an autonomous and independent regulator under the Act.

23. Further, the proviso to Section 31(4) of the Act states that the Federal Government can require NEPRA to re-consider its tariff determination and NEPRA shall provide its reconsidered determination within fifteen days. Therefore, the Federal Government at best can request NEPRA to reconsider the tariff determined and no more. The actual determination of tariff lies exclusively with NEPRA. This means that if any party including the Federal Government desires any change or modification in the tariff, which can include reasons related to the prudency of costs, it will have to file a petition before NEPRA. The Act and the Tariff Rules do not contemplate any role of the Federal Government in this determination process. This is also in line with the Power Policies issued by the Government from time to time, where NEPRA is seen as a front line regulator, as well as, a specialized forum where tariff is determined. The contention that the tariff is finalized by the Federal Government under the Act is totally misconceived and not supported by any provisions of the Act.

24. The specific role of NEPRA to determine tariff has a constitutional underpinning. Electricity is a basic utility and has a direct link with the livelihood and quality of life of the people. Tariff determination of this basic utility, therefore, assumes constitutional importance and touches upon the fundamental rights of the people. The legislative wisdom behind establishing an exclusive authority (NEPRA) for determination of tariff structured on provincial representation meets the

constitutional value of cooperative federalism. This thought is also echoed elsewhere in the Constitution, where common interests of the Federation are safeguarded by setting up a Council for Common Interests [Articles 153 and 154] which is headed by the Prime Minister and consists of the Chief Ministers of the Provinces and three members from the Federal Government. Similarly, NEPRA has a Chairman and four Members, each Member representing the four Provinces. Constitution mandates that institutions that are regulated by CCI and owe their genesis to Part-II of the FLL, must have a federative character, watching the common interests of all the Provinces and by functioning in an inclusive and collaborative manner. NEPRA is one such institution, which microcosmically reflects this constitutional ethos.

Meaning and validity of the Surcharges

25. The word "Surcharge" is an additional sum added to the usual cost and signifies an addition to an already existing charge.' The levy of 1 a surcharge has come up before the superior courts in several cases. In Gadoon's Case, WAPDA levied a surcharge on the tariff at the rate of 2.5% on the supply charge in the electricity bill. An additional surcharge of 10% for late payment of bill was also levied. The august Supreme Court of Pakistan held that mere nomenclature is not the decisive factor in determining the nature and meaning 'of the levy and the Court must consider the attending factors and circumstances of the case, the reality involved in it, the conduct of the parties, the manner and object of the levy and then decide what in effect the levy is.. The Court held that the word surcharge has to be construed in the context in which it is used.

26. In terms of the pronouncement of the august Supreme Court of Pakistan to appreciate the nature of the surcharge, it is necessary to understand the original charge, as the surcharge is an additional or extra charge on the original charge. In Gadoon's Case, the impugned surcharge was upheld because the surcharge was found, to be a part of the tariff. WAPDA wanted to increase the tariff so it imposed the surcharges. The august Supreme Court of Pakistan 'found -that since WAPDA was competent to determine the tariff for the' supply of electricity, WAPDA could, therefore, also enhance the tariff by imposing a surcharge. The Court held that the surcharge levied wag a part of the tariff and therefore its nomenclature was of little significance. The Court found that since the original charge was the tariff determined by WAPDA, it was well within the power of WAPDA to increase the tariff through a surcharge.

27. In Sohail Jute Mills Ltd. and others v. Federation of Pakistan through Secretary, Ministry of Finance and others (PLD 1991 SC 329), the levy of iqra surcharge by the Federal Government on imported goods was challenged. The august Supreme Court of Pakistan found that since the iqra surcharge was an additional customs duty imposed on the existing customs duty, it was legal. Therefore, a surcharge, is a levy which is over and above an existing charge and not an independent levy.

28. In The Treasurer of Charitable Endowments for Pakistan v. Central Board of Revenue and 2 others (1986 MLD 1731) the levy of flood relief surcharge was challenged. A Division Bench of the Sindh High Court found that the flood relief surcharge was an additional excise duty leviable on the production of sugar. The court held that surcharge means something additional or in excess of. Since the original charge was the excise duty levied by the Central Board of Revenue, the flood relief surcharge was in fact an additional excise duty on the existing excise duty. Hence the flood relief surcharge was upheld.

29. In Sheikh Nadeem Younas, Chief Executive, Noble Textile Mills, Pattoki, District Kasur v. WAPDA through Chairman WAPDA, WAPDA House, Lahore and 4 others (1996 CLC 1090), a Division Bench of this Court held that WAPDA fixed the tariff and thereafter imposed a surcharge at the rate of 2.5% of the tariff which was then increased up to 10.4% vide different notifications. An additional surcharge was levied which was further increased by subsequent notifications. The argument advanced in this case was that surcharge and additional charge was a tax and not a part of the tariff, hence could not have been imposed by WAPDA. It was argued that the surcharge is a tax which can only be levied through an act of Parliament. The court held that the surcharge was appendage to the tariff of the electricity consumed and therefore WAPDA could increase the tariff by way of a surcharge and an additional surcharge.

30. In the instant cases, the respondents have argued that all four Surcharges are actually costs of the system, which are not included in the tariff determined by NEPRA. In order for the costs to qualify as a surcharge according to the jurisprudence discussed above, there must first exist the original cost to which these Surcharges owe their existence to.

31. The DS Surcharge, services the mark up and late payment surcharge for the benefit of the Government of Pakistan. When payments by CPPA are delayed to the IPPs, the IPPs charge mark-up pursuant to their Power Purchase Agreements. This mark up is paid by the Government through the levy of the DS Surcharge, which is collected from the consumer by the distribution companies and deposited with the NTDC and finally paid to the IPPs by being routed through the CPPA.1 This stands established by the statement of the Government that it has made payments of approximately Rs.146 billion as mark up to the IPPs. Admittedly this cost is not included in the tariff nor considered by NEPRA as a prudent cost.

32. Universal Obligation Fund Surcharge and the Equalisation Surcharge according to the Federal Government is to impose a tariff that is uniform on all consumers in all regions. Therefore, for a particular type of consumer(s), in order to ensure uniformity in the tariff, the Federal Government allows a subsidy by committing to make payment of the unpaid amount under the determined tariff. The Federal Government notifies NEPRA's approved-tariff but instructs for a certain category of consumers to be charged less than that determined by NEPRA. Consequently only a portion of the tariff determined by NEPRA is paid by, the consumer, and the

difference (in the amount paid by the consumers and the tariff determined by NEPRA) is paid by the Federal Government as a subsidy. The UOF Surcharge recovers for the Federal Government all amounts paid by it in the form of a subsidy. The respondents have justified these Surcharges on the ground that even after its levy the Federal Government does not exceed the approved tariff determined by NEPRA, hence nothing extra is being charged from the consumer. In effect, the amount of subsidy, intended to politically project a people friendly image of the government, is immediately recovered, through financial gimmickry in the shape of Universal Obligation Fund Surcharge and the Equalisation Surcharge which has no legs or legal justification to stand on.

33. As to the NJ Surcharge it has been imposed to meet the capital cost for the construction of the Neelum Jhelum Hydro Power Project. The surcharge collected from the consumers is paid to a company engaged in the construction and development of the project. It has no direct relation or nexus with the unit of electricity consumed. It is money collected for the purposes of construction and development of the Neelum Jhelum Dam which has yet to be completed. Again there is no original cost (regarding tariff) on the basis of which this cost has been added on as a surcharge.

34. It has been repeatedly stated before us that the Surcharges represent the cost of electricity which are not included in the costs allowed by NEPRA. As explained by Mr. Khalique-uz-Zaman and Mr.Wasee ul Hassnain Naqvi, Advocates/Amici Curiae, NEPRA disallows all costs which are unjustified and a burden on the consumers. In their opinion the Surcharges do not rest on any original cost which is or was under consideration by NEPRA. This statement is not denied by the Federal Government who admit and accept that the Surcharges represent costs which are otherwise not included or even considered in the tariff determined by NEPRA. Therefore, the impugned Surcharges levied by the Federal Government, even though packaged as costs of the system do not figure in the tariff determined by NEPRA. Surcharge is supposed to be an add on or additional charge built on an existing charge. The impugned Surcharges do not rest on an existing charge. The constitutionality and legality of these Surcharges will be examined hereunder in this background.

Constitutional vires of Section 31(5), of the Act and the legality of the Surcharges.

35. The fundamental question before us is the constitutional vires of Section 31(5) of the Act and the constitutionality and legality of the surcharges imposed thereunder. Section 31(5) is reproduced hereunder for convenience:.

31. Tariff (1).-- As soon as maybe, but not later than six months from the commencement of this Act, the Authority shall determine and prescribe procedures and standards for determination, modification or revision of rates, charges and terms and conditions for generation of electric power, transmission, inter-connection, distribution services and power sales to consumers by licensees and until such procedures and standards are prescribed, the Authority shall determine, modify or

revise such rates, charges and terms and conditions in accordance with the directions issued by the Federal Government.
(2) The Authority while determining the standards referred to in subsection (1) shall
(a) protect consumers against monopolistic and oligopolistic prices;
(b) keep in view the research, development , and capital investment programme costs of licensees;
(c) encourage efficiency in licensees operations and quality of service;
(d) encourage economic efficiency in the electric power industry;
(e) keep in view the economic and social-policy objectives of the Federal Government; and
(f) determine tariffs so as to eliminate exploitation and minimize economic distortions.
(3) The procedures established under sub-section (1) shall include
(a) time frame for decisions by the Authority on tariff applications;
(b) opportunity for customers and other interested parties to participate meaningfully in the tariff approval process; and
(c) protect-ion for refund, if any, to customers while tariff decisions are pending.
(4) Notification of the Authority's approved tariff, rates, charges, and other terms and conditions for the supply of electric power services by generation, transmission and distribution companies shall be made, in the official Gazette, by the Federal Government upon intimation by the Authority:
Provided that the Federal Government may, as soon as may be, but not later than fifteen days of receipt of the Authority's intimation, require the Authority to reconsider its determination of such tariff, rates, charges and other terms and conditions. Whereupon the Authority shall, within fifteen days, determine these anew after re-consideration and intimate the same to the Federal Government;
Provided further that the Authority may, on a monthly basis and not later than a period of seven days, make adjustments in the approved tariff on account of, any variations in the fuel charges and, policy guidelines as the Federal Government may issue and, notify the tariff so adjusted in the official Gazette.
(5) Each distribution company shall pay to the Federal Government such surcharge as the Federal Government, from time to time, notify in respect of each unit of electric power sold to the consumers and any amount paid under this subsection shall be considered as a cost incurred by the distribution company to be included in the tariff determined by the Authority.
The Federal Government has taken pains to argue that Section 31(5) of the Act actually levies costs of the system which are packaged and labelled as Equalization Surcharge, Debt Servicing Surcharge, Universal Obligation Fund Surcharge and Neelum Jhelum Surcharge. NEPRA has categorically stated that it has not allowed these costs to be included in the tariff as they do not satisfy the prudency test nor are they directly I related to the costs incurred for producing, transmitting or distributing electricity. Surcharges are, therefore, at best an involuntary extraction of money from the consumers of electricity, labelled as costs of the system or the distribution companies by the Federal Government. The question before us is to first determine the nature of this involuntary extraction of money from the public and then judge its constitutionality and legality.

36. Under the Constitution, the only recognized mode of involuntary extraction of money from the people is through "Taxation" and another close variant is the levy of "Fee" where, the government charges for rendering a service in return. In. Federation of Pakistan through Secretary M/o Petroleum and Natural Resources and another v. Durrani Ceramics and others (2014 SCMR 1630) it has been held that "where the levy is extracted for public purpose, the imposition will be treated as a tax. Tax is a common burden for raising revenue compulsorily from the public." Tax is a compulsory extraction of money by the government for a public purpose without reference to any special benefit on the payer of the tax and the amounts collected under a tax become part of the general revenue of the government. A fee on the other hand is levied for rendering some specific service and the amount collected goes towards that particular purpose. In the case of a fee there must be an element of quid pro quo. In Collector of Customs and others v. Sheikh Spinning Mills (1999 SCMR 1402) it has been held that tax and fee are. compulsory extraction of money but the difference between the two lies in the fact that the tax is not co-related to any particular service rendered but intended to meet the expenses of the government and a fee is meant to compensate the government for expenses incurred in rendering services to the persons from whom the fee is collected.

37. Articles 77 and 142 read with the relevant entries in Part-I of the Federal Legislative List ("FLL") of the Constitution provide the legislative competence of the Federal Legislature in matters of taxation. Entries 43 to 53 of Part-I of the FLL deal with Taxation i.e., taxes on income, corporations, sales, capital value, mineral oil, natural gas and minerals used in generation of energy, on production capacity of any plant and terminal taxes on goods and passengers. Competence of the Federal Legislature to impose fee is provided under entry 54 of Part-I and entry 15 of Part-II of the FLL, which provides for the levy of "fees in respect of any matters in this Part." There is no other mechanism under the Constitution to charge money from the public. In the present context, the Surcharges, in pith and substance, are involuntary extraction of money and it matters less what name they carry.

38. Another aspect of this levy is the manner in which the amounts recovered are being spent. Interestingly, the amounts recovered are parked in different escrow/special accounts and then forwarded to CPPA for onward distribution amongst the GENCOs and to the Neelum Jhelum Company. This means that the recovered amounts are not placed in the Federal Consolidated Fund as prescribed by the Constitution as per Article 78 of the Constitution.

39. What is of concern here is the fact that the Federal Government levies Surcharges at its own discretion with no accountability and disclosure of the amounts collected. All Surcharges go into different accounts and from these accounts the money is routed to CPPA, which releases the payment to PEPCO for payments to the GENCOs. PEPCO having no mandate to do so under its Memorandum of Association releases the funds totally at its discretion. There is no prescribed process under which money collected from consumers is allocated to the power producers. PEPCO as a private limited company whose object as per its

Memorandum of Association is to act as a managing agent of WAPDA for the purposes of restructuring WAPDA is managing the revenue collected by the Federal Government under the impugned Surcharges. This self-prescribed role of PEPCO does not find any sanctity in the law or under the Constitution. The mode and manner in which the money collected under the impugned Surcharges is routed through different accounts maintained by different institutions, is not only unconstitutional but also exhibits poor financial governance and discipline, which amounts to playing a fraud on the people. This extraction of money in the garb of Surcharges from the ordinary consumer of electricity is, therefore, violative of the fundamental right to life and property of the consumers.

40. The impugned Surcharges, have no element of quid pro quo, therefore, they cannot be labelled as Fees. With respect to the NJ Surcharge, it could be argued, that there is an element of quid pro quo. However, even if this was the argument, the said Surcharge could not be levied by way of a Money Bill. It is an admitted position that section 31(5) was introduced through Finance Act, 2008 and, therefore, passes for a money bill. Reliance is placed on E.P.C.T. (Pvt.) Ltd. v. Federation of Pakistan, etc [2011 PTD 2643]. Even otherwise, the NJ Surcharge seeks to recover amounts for contribution in the capital costs for the construction of the Neelum Jehlum Dam. Since there is no immediate service being provided as the dam has yet to be constructed even the quid pro quo element of this surcharge is questionable. Hence NJ Surcharge cannot be construed as a Fee.

41. Without further deliberating on the question, whether the present surcharge is truly a tax or some hybrid extraction of money which has no constitutional permissibility or recognition, we proceed further assuming that the surcharge is a tax. This requires us to answer two questions: (a) Whether the Federal legislature is competent to impose the impugned Surcharges through section 31(5) of the Act? and (b) Whether section 31(5) of the Act suffers from excessive delegation, whereby the legislature has surrendered its essential legislative function and policy to the Executive ?

42. In response to the first question the Federal Government has argued that the Surcharges are costs and are imposed under the head `Electricity' (entry 4 of Part-II of the FLL). We have already discussed above that the Constitution does not recognize any involuntary extraction of money other than tax. So what needs to be examined is whetherin-tax entries or subject specific generic entries of the FLL include the power of taxation.

43. Closer review of the FLL shows that the Federal Legislature has the power to make laws in respect of any matter in the FLL. Taxation has been specifically dealt with under entries 43 to 53 of Part-I of the FLL and deals with the following taxes:

43. Duties of customs, including export duties.

44. Duties of excise, including duties on salt, but not including duties on alcoholic, liquors, opium and other narcotics.

45. Deleted

46. Deleted

47. Taxes on income other than agricultural income.

48. Taxes on corporations.

49. Taxes on the sales and purchases of goods imported, exported, produced, manufactured or consumed [except sales tax on services.]]

50. Taxes on the capital value of the assets, not including taxes on immovable property.

51. Taxes on mineral oil, natural gas and minerals for use in generation of nuclear energy.

52. Taxes and duties on the production capacity of any plant, machinery, undertaking, establishment or installation in lieu of the taxes and duties specified in entries 44, 47, 48 and 49 or in lieu of any one or more of them.

53. Terminal taxes on goods, or passengers carried by railway, sea or air; taxes on their fares and freights.

Part-II does not provide for any specific taxation. The purpose of providing specific entries for taxation shows that the constitutional intent is to consider "taxation" as a separate subject and takes it to be at par with other subjects. Taxation, therethre, cannot be read into other generic subject entries as it enjoys the status of a separate and distinct subject. This special space carved out for taxation under the Constitution also finds support from Article 77 of the Constitution which mandates that tax can only be levied under the authority of an Act of Parliament. This authority to impose taxation has to be specifically and clearly mentioned in the Constitution. In the presence of the specific and clear entries regarding taxation under items Nos.43 to 53 of the FLL, it cannot be said that the generic entries also include the power of taxation. This view finds support from State of W.B. and another v. Kesoram Industries Ltd. and others [(2004 (10) SCC 201], where a five member bench of the Indian Supreme Court held that "[taxation is not intended to be comprised in the main subject in which it might on an extended construction be regarded as included, but is treated as a distinct matter for purposes of legislative competence2." In Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector and E.T.1.0 and others [2007(5) SCC 447] Indian Supreme Court emphasised that "[A] clear distinction is provided for in the scheme of the lists of the Seventh Schedule between the general subjects of legislation and heads of taxation. They are separately enumerated. Taxation is treated as a distinct matter for purposes of legislative competence vis a vis the general entries...The power to impose tax ordinarily would not be deduced from a general entry as an ancillary power3."

44. Entries Nos. 54 and 15 of Part-I and Part-II of the FLL, show that FLL specifically provides for Fees in respect of any matters in these parts. There is no such provision for taxation besides it also shows that even fee cannot be imposed under the general entries. Therefore, we are of the view that taxation is a specific subject and unless specifically and clearly listed in the FLL, the power of taxation, cannot be read into the general subject entries. Therefore, Federal legislature does not enjoy the legislative competence to impose "taxation" (under section 31(5) of the Act) under the generic entry of Electricity in Part-II of the FLL.

45. Can these Surcharges pass for sales tax under entry 49 of Part-I of the FLL? We do not require to answer this question if section 31(5) of the Act falls on the score of excessive delegation. Section 31(5) of the Act does not provide legislative parameters or guidelines or legislative policy for determining the amount and nature of surcharge or the number of surcharges to be levied. The legislature has left it to the discretion of the executive to decide what it wants to recover and how. The power vested in the hands of the executive is unguided and uncontrolled. The unlimited and unchecked power in the hands of the Executive is visible if we look at the Notifications issued under section 31(5) of the Act. Some of the Notifications, for ready reference are reproduced hereunder:--

Government of Pakistan
Ministry of Water and Power
Islamabad, the October 03, 2014.

NOTIFICATION

SRO No. 984(1)/2014. In pursuance of subsection (5) of section 31 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (XL of 1997), the Federal Government is pleased to notify the surcharge at the rate of Rs.0. 30/KWh on account of recovering the debt servicing applicable to all the consumer categories on per unit consumption in respect of Ex-WAPDA Distribution Companies (XWDISCOs) namely:-

Government of Pakistan
Ministry of Water and Power
Islamabad, the November 01st 2014

NOTIFICATION

SRO No.984 (1)/2014. In pursuance of subsections (4) and (5) of section 31 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (XL of 1997), and in supersession of its Notification No. SRO No.913(1)/2013 dated the 11th October, 2013, the Federal Government is pleased to notify that there shall be levied a surcharge at the rate mentioned against following categories of electricity consumers for electricity sold by Faisalabad Electric Supply Company (FESCO), during each of the billing month, for maintaining uniform rates of electricity across the country for each of the consumer category in accordance with the Federal Government policy with effect from 1st October 2014 namely:-

No. Tariff category/Particular **Rate (Rs. kWh)**

Residential A1

1.	301-700 Units	1.00
2.	Above 700 Units	0.50
	For peak load requirement 5 kW and above	--
3.	Time of Use (TOU)- Peak	-0.50
4.	Time of Use (TOU)-off-Peak	1.00
	Commercial A 2	
6.	For peak load requirement less than 5 kW	0.50
	For peak load requirement 5kW and above	
6.	Regular	1.00
7.	Time of Use (TOU)-Peak	0.50
8.	Time of Use (TOU)-Off-Peak	1.00
	Industrial B	
8.	BI	-
10.	BI Peak	0.50
11.	BI Off Peak	1.00
12.	B2	-
13.	B2-TOU (Peak)	0.50
14.	B2-TOU (Off-peak)	1.00
15.	B3-TOU (Peak)	0.50
16.	B3-TOU (Off-peak)	1.00
17.	B4-TOU (Peak)	0.50
18.	B4-TOU (Off-peak)	1.00
	Single Point Supply for further distribution	
19.	Cl (a) Supply at 400 Volts-less than 5 kW	-
20.	,C1(b) Supply at 400 Volts-5kW and up to 500 kW	-
21.	Cl (c) Time of Use (TOU)-Peak	0.50
22.	Cl (c) Time of Use (TOU)-Off-Peak,	1.00
23.	C2(a) Supply at 11 Kv.	-
24.	C2(b) Time of Usew (TOU)-Peak	0.50
25.	C2(b) Time of Use (TOU)-Off-Peak	1.00
26.	C3 Supply above 11 Ky.	-
27.	C3(b) Time of Use (TOU)-Peak	0.50
28.	C3(b) Time of Use (TOU)-Off-Peak	1.00

2. Faisalabad Electric Supply Company (FESCO) shall deposit the amount of this surcharge in a Fund called the "Universal Obligation Fund" to be kept in the Escrow Account maintained at Central Power Purchasing Agency for exclusive use for discharging the liabilities of power producers and surcharge paid under this

notification shall be considered as 'a cost incurred by the distribution company to be included in the tariff determined by NEPRA.

3. Provided further that there shall be levied till the 31st December 2015, an additional charge at the rate of Rs.0.10/kwh on the consumption of electricity by every category of electricity consumer except the lifeline domestic consumers of the category "Residential A-1 and such additional charges:-
(a) shall not form a part while calculating the difference between the relevant rates of NEPRA determined tariff and Gop notified rate.
(b) shall be deposited in a Fund called the "Neelum-Jhelum Hydro Power Development Fund" to be kept in the Escrow Account of the Neelum Jhelum Company for exclusive use for the Neelum-Jhelum Hydro Power Project.

4. The Order of the Authority is placed at Annex-I, Fuel Price Adjustment Mechanism at Annex-II, FESCO Power Purchase Price at Annex-III and the Terms and Conditions at Annex-IV to this notification.
Government of Pakistan
Ministry of Water and Power
Islamabad, the November 01st 2014

NOTIFICATION
SRO No. 990(1)/2014. In pursuance of subsection (4) of section 31 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (XL of 1997) and in supersession of its Notification No. SRO No.325(1)/2014 dated the 25th April, 2014, the Federal Government is pleased to notify the National Electric Power Regulatory Authority's determined schedule of electricity tariffs for PESCO, Order of the Authority at Annex-I, Fuel Price, Adjustment Mechanism at Annex-II, PESCO Power Purchase Price at Annex-Ill and the Terms and Conditions of Tariff (for supply of electric power to consumers by distribution licensees) at Annex-IV to this notification, with effect from 01st October, 2014 in respect of the PESCO, namely.

2. Provided further that there shall be levied till the 31st December, 2015, an additional charge at the rate of Rs.0.10/kwh on the consumption of electricity by every category of electricity consumer except the lifeline domestic' consumers of the category "Residential A-I and such additional charges:
(a) Shall not form a part while calculating the difference between the relevant rates of NEPRA determined tariff and GoP notified rate.
(b) Shall be deposited in a fund called the "Neelum-Jhelum Hydro Power Development Fund" to be kept in the Escrow Account of the Neelum Jhelum Company for exclusive use for the Neelum Jhelum Hydro Power Project.

46. Section 31(5) in fact delegates an essential legislative function to the executive which is not permissible under the Constitution. The foundations of excessive delegation owes its genesis to the doctrine of separation of powers, which is a fundamental principle of our constitutional construct. "The first foundation of the

modern perspective of the separation of powers is that there is a recognized distinction between the different branches such that each branch of Government has a function that serves as its central and primary function. The primary function of the legislative branch is to legislate (to create statutes, in their functional meaning); legislate (to create statutes in their primary function of the executive branch is to execute the laws; the primary function of the judiciary branch is to judge (in other words, to resolve disputes by determining the facts, interpreting the law, filling in gaps, and/or developing the common law). This approach recognizes that the separation of powers is not pure and that, in addition to its primary function, each branch of government performs some functions that belong to the other branches, so long as they are intimately related to the branch's primary function. " "The legislature is omnipotent in the exercise of the taxing prerogative. Whereas the right to impose taxes and to determine the circumstances under which they will be done is the privilege of the legislative power, administration of the tax law is the responsibility of the executive power. Certain limitations on the taxing power of the Legislature are self-evident. Since the power to raise taxes is a prerogative of the public authority, a government has only the right to impose a levy in so far as it is competent to do so. Under this principle, all that is necessary is that the rights of the tax administration and the corresponding obligations of the taxpayers be specified in the law; that is in the text adopted by the peoples' representatives. The implementation of the tax is generally regulated by the executive power... It is true that the power to fix the rate of tax is a legislative power but if the Legislature lays down the legislative policy and provides the necessary guidelines, that power can be delegated to the executive... merely on the ground the legislature has entrusted the power to alter, modify, vary the tax, the provision cannot be held to be impermissible delegation provided the legislation has given its policy and the Act provides sufficient guidelines. The Legislature cannot repose any power, essentially legislative, in another body or organ; it cannot efface itself and set up a parallel Legislative authority; it must exercise its judgment on vital matters of policy and enact the general principles which should be embodied in the legislation. But it can confer upon any person or body, fit to exercise it, the power to work out details and particulars for carrying out its policy and in order to give effect to the legislation in a particular direction.... The Legislature cannot delegate its power to make a law but it can make a law to delegate powers to determine some facts of state of things upon which the law makes or intends to make its own action depends. The law being flexible, having laid down broad principles of its policy, the Legislature then can leave the details to be supplied by the administrator to adjust to the rapid changing Circumstances.5" It has been held in the case titled Municipal Corporation of Delhi v. Birla Cotton Spg. & Wvg. Mills (AIR 1968 SC 1232) that the principle is well settled that essential legislative function consists of determination of the legislative policy and its formulation as a binding rule of conduct and cannot be delegated by the Legislature. Nor is there any unlimited right of delegation inherent in the legislative power itself. This is not warranted by the provisions of the Constitution. The Legislature must retain in its own hands the essential legislative functions and what can be delegated is the task of subordinate legislation necessary far implementing the purposes and objects of the Act.

47. In the present case, section 31(5) of the Act provides that "distribution company shall pay to the Federal Government such surcharge as the Federal Government, from time to time, notify in respect Of each unit of electric power sold to the consumers..." This does not specify the design and nature of surcharge to be imposed on the Sale of the electric power. It also fails to specify the number of surcharge permissible under the law. It simply opens an unguided window and empowers the executive to assume legislative responsibility, 'Which offends separation of powers and falls within excessive delegation. Such unguided and unstructured delegation empowers the executive with power which is ex-facie discriminatory and hence not permissible under the Constitution. Reliance, with advantage is placed on Khawaja Ahmad Hassan v. Government of Punjab and others (2005 SCMR 186), where the august Supreme Court of Pakistan has held that:

Where a Court is required to determine whether a piece of delegated legislation is bad on the ground of arbitrary and excessive delegation, the Court must bear in mind the following 'Well-settled principles:-
(1) The essential legislative function consists of the determination of die legislative policy and its formulation as a binding rule of conduct and this cannot be delegated by the Legislature.
(2) The Legislature must retain in its own hands the essential legislative functions and what can be delegated is the task of subordinate legislation-necessary for implementing the purpose; and objects of the Acts.
(3) Where the legislative policy is enunciated with sufficient clearness or a standard is laid down, the Courts should not interfere.
(4) What guidance should be given and to what extent and whether guidance has been given in a particular case at all depends on a consideration of the provisions of a particular Act with which the Court has to deal, including its Preamble.
(5) The name of the body to which delegation is made is also a guidance in the matter of delegation.
(6) What form the guidance should take, will depend upon the circumstances of each statute under consideration, and cannot be stated in general terms. In some cases guidance in broad general terms may be enough in other cases more detailed guidance may be necessary.
In Engineer lqbal Zafar Jhagra and another v. Federation of Pakistan and others (2013 SCMR 1337) (Jhagra Case), it was held that the levy of tax is only permissible under the authority of an act of Parliament. This power of levying the tax cannot be delegated to the executive authority. The basic argument was that the power to impose tax by
Parliament cannot be delegated to the executive where the delegatee of such power can decide at what rate the tax is to be imposed and the duration for which the tax is to be imposed. The august Supreme Court of Pakistan in Jhagra Case held that the authority to levy tax cannot be delegated to the executive. Section 31(5) of the Act, therefore, suffers from excessive delegation and is therefore violative of Article 25 of the Constitution.

48. For the above reasons, Section 31(5) of the Act and the Surcharges namely; EQ Surcharge, DS Surcharge, UOF Surcharge and NJ Surcharge levied from time to time since 2008 through impugned Notifications are, therefore, declared as unconstitutional and hence set aside. For the same reasons, impugned Judgment of the learned single judge dated 26-9-2014 is also set aside.

49. The Federal Government by charging unconstitutional and illegal Surcharges from the consumers of electricity has been unjustly enriched. Therefore, the Federal Government is directed to refund the amount of Surcharges illegally extracted from the consumers. Reliance is place on the case titled Messrs Pfizer Laboratories Limited v. Federation of Pakistan and others (PLD 1998 SC 64). NEPRA is directed to work out the total amount of surcharges collected from the end consumers to date and evolve a plan for the repayment of the said amount through adjustment in tariff for the benefit of the end consumer within three months from the receipt of this judgment.

50. For the above reasons, the instant appeal and the connected matters are, therefore, allowed, with no orders as to costs.

MWA/F-23/L Appeal allowed.

2015 P T D 2654
[Lahore High Court]
Before Ayesha A. Malik, J
Messrs RAFIQUE ENTERPRISES through Proprietor
Versus
FEDERATION OF PAKISTAN through Secretary and 4 others
W.P. No.21279 of 2013, heard on 13th September, 2013.

Customs Act (IV of 1969)---

----S.26---Constitution of Pakistan, Art.199---Constitutional petition---Information to be furnished by importer---Release of seized consignments---Consignments were opened in presence of Clearing Agent of importers---Department was able to check consignments and had obtained all necessary information about consignments for purpose of establishing their case on conditions in which consignments were imported---Held, that there was no justification for department to seize the consignments---Consignments should have been released upon payment along with surety bonds to the satisfaction of the department---Department would continue with their investigation strictly in accordance with law---Importer was directed to participate in the investigation and provide department with necessary documents called for vide notice under S.26 of Customs Act, 1969---Order accordingly.

Mian Abdul Ghaffar for Petitioner.
Irteza Ali Naqvi for Respondents Nos. 3 and 5.
Nadeem Mahmood Mian for Respondents Nos. 2 and 4 along with Jamil Nasir Khan, Additional Director Customs Intelligence.
Date of hearing: 13th September, 2013.

JUDGMENT

AYESHA A. MALIK, J.---Through this single judgment, I intend to dispose of Writ Petitions Nos. 21279/2013 and 21281/2013 as common question of law and facts are involved in both these petitions.

2. The basic grievance of the petitioners is that their consignment of Blender and Single Juicer in W.P. No.21281/2013 and consignment Jug, Mill and small Cups in W.P. No.21279/2013 have been seized by the respondents Nos. 2 and 4 in contravention to the law.

3. Learned counsel for the petitioners argued that consignments were imported on 23-8-2013, assessment was made by the competent authority, duties were paid by the petitioners and the consignment were cleared. Thereafter the containers of the petitioners were seized by the respondents Nos. 2 and 4 on 28-8-2013. Learned counsel argued that the interception and seizure of the consignments which have been examined, assessed and cleared by the appropriate Custom Officers after payment of duty and taxes is illegal. Learned counsel argued that the respondents

Nos. 2 and 4 have issued notice to the petitioners under section 171 of the Customs Act, 1969 (1969 Act) wherein it has been alleged that the petitioners have imported consignments in CBU condition yet they had them valued in terms of the SKD valuation. It has further been alleged that the petitioners have made mis-declaration which is a violation of sections 32(1) and 178 of the 1969 Act.

4. Learned counsel on behalf of the respondent No.2 and respondent No.4 who appeared in person, explained that upon receipt of information that the petitioners have made a mis-declaration and have fraudulently deprived the exchequer of duty and taxes leviable on the imports, the consignments were seized. Notices under Section 171 of the 1969 Act were served on to the petitioners. Thereafter notice under Section 26 of the 1969 Act have also been issued to the petitioners for providing information which is required for the purposes of investigation. Learned counsel argued that the petitioners are not participating in the inquiry and have not provided the information requested by the respondents, hence the respondents are unable to further inquire in the matter. Learned counsel also explained that both the petitioners before this Court are real brothers and that they have deliberately mis-declared the manner in which the consignments have been imported so as to avoid the proper levy of custom duty. Presently the respondents are of the opinion that a short payment of Rs.7,36,802 each, has been made by the petitioners.

5. I have heard learned counsel for the parties and reviewed the record available on the file.

6. The main issue in the instant Writ Petitions is with respect to the seizure of the consignments imported by the petitioners. Admittedly, an investigation is pending before the Senior Intelligence Officers for which notices under Section 26 of the 1969 Act have been issued, therefore, the petitioners are not entitled to the prayer of declaration with respect to the assessment and valuation of the consignments. The third prayer in the instant Writ Petitions is with respect to the seizure of the consignments for which an application being C.M. No.2/2013 was moved for release of the consignments. The basic contention of learned counsel for the petitioners is that there is no reason or justification for the seizure of the goods and that the petitioners are willing to furnish security in the amount of Rs.7,36,802 each for the release of the consignments. Learned counsel for respondents Nos.2 and 4 was asked to explain the necessity to retain the consignments seized by the sated respondents. Learned counsel responded by explaining that since the matter was still under investigation the consignments were required till the completion of the investigation and. adjudication process. In this case the main question is of mis-declaration and short payment of customs duty and taxes. The consignments were opened in the presence of the clearing agents of the petitioners. The respondents were able to check the consignments and have obtained all necessary information about the consignments for the purposes of establishing their case on the conditions in which consignments were imported. I am of the opinion that there is no justification for the respondents to keep the seized consignments and that the consignments should be released to the petitioners upon payment of post-dated

cheques equal to Rs.7,36,802 each along with surety bonds to the satisfaction of the respondent No.3. The respondents Nos.2 and 4 may continue with their investigation strictly in accordance with law and the petitioners are directed to participate in the present investigation and provide the respondents Nos.2 and 4 with the necessary documents called for vide notice under Section 26 of the 1969 Act.

7. In the light of the aforesaid, the petitioners are disposed of.

RR/R-28/L Order accordingly.

2015 Y L R 2594
[Lahore]
Before Mrs. Ayesha A. Malik and Faisal Zaman Khan, JJ
COMMISSIONER INLAND REVENUE, ZONE-IX REGIONAL TAX OFFICE-II---Appellant
Versus
Messrs ENGLISH PHARMACEUTICALS INDUSTRIES, LINK KATTAR BUND ROAD, LAHORE---Respondent
I.C.A. No.457 in W.P. No.10212 of 2014, heard on 23rd April, 2015.

Law Reforms Ordinance (XII of 1972)---

----S.3---Intra-court appeal---Maintain-ability---Consent order---Appellant assailed consent order passed in constitutional petition---Validity---Order in question was passed in presence of parties and that too without objection, therefore, intra-court appeal was not maintainable---Intra-court appeal was dismissed in circumstances.

Abdul Wahab and others v. Habib Ali and others PLD 1969 Lah. 365 and Sh. Maqbool Elahi and others v. Khan Abdul Rehman PLD 1958 SC (Pak.) 96 rel.
Rai Tariq Saleem for Appellant.
Syed Ali Imran Rizvi for Respondent.
Date of hearing: 23rd April, 2015.

JUDGMENT

This Intra-Court Appeal is directed against the order dated 16-4-2014 passed by a learned Single Judge in Chambers in W.P.No.10212 of 2014.

2. Through that order on the consensus arrived at between the parties, the matter has been referred to the respondents for appropriate orders.

3. At the very outset, learned counsel appearing on behalf of appellant has been confronted with the situation that the impugned order is a consent order and was passed in presence of parties that too without objection, therefore, this Intra-Court Appeal is not competent.

4. Replying to the above, learned counsel for the appellant submits that the impugned order is against law and facts.

5. Be that as it may, in view of the fact that the impugned order was passed in presence of the parties and that too without objection, therefore, this appeal is not maintainable.

6. The above proposition has been dealt with and decided by this Court in judgment reported as Abdul Wahab and others v. Habib Ali and others (PLD 1969 Lah. 365) operative part of which is reproduced for convenience:--

"Apart from the technical bar in respect of appeal against decision based on consent, the party challenging such a decision cannot be allowed to argue that the Court passing the order did not follow the correct procedure in deciding the matter. The principle of estoppel by conduct applies with full force to such a situation. If a party, by its conduct, obliges the Court to adopt a course which is contrary to its practice, that party will be debarred from raising the objection as to the procedure, on the very salutary principle that after having led the Court to do a certain thing for the benefit of the parties, none of them can be allowed to challenge the same."

7. While discussing the import of judgment of the honourable Supreme Court of Pakistan reported as Sh. Maqbool Elahi and others v. Khan Abdul Rehman (PLD 1958 SC (Pak) 96), this Court has further held that:--
"The principle enunciated in this ruling supports our view that once a mode (procedure) is adopted by the High Court on the request of the parties, the decision given in pursuance of that mode should be given effect to. A necessary corollary of this rule will be that the, same parties are estopped from subsequently challenging that mode of decision in an appeal. Therefore in this view of the matter as well, there is no force in this appeal and merits to be dismissed in limine."

8. In view of the afore-noted, this Intra-Court Appeal is dismissed.

MH/C-15/L Intra Court Appeal dismissed.

PLJ 2016 Lahore 60 (DB)

Present: **MRS. AYESHA A. MALIK AND FAISAL ZAMAN KHAN, JJ.**

GOVERNMENT OF PUNJAB through Chief Secretary Civil Secretariat, Lahore and 2 others--Appellants

versus

Syed RIAZ ALI ZAIDI--Respondent

I.C.A. No. 565 of 2015 in W.P. No. 5406 of 2011,
heard on 9.7.2015.

High Court Rules--

----R. 17--Constitution of Pakistan, 1973, Arts. 122, 175 & 208--Law Reforms Ordinance, 1972, S. 3--Intra Court Appeal--Adhoc allowance--Employees of Lahore High Court--Grant of judicial and adhoc allowance staff of superior judiciary--Sought to be act upon letter--Directive of Prime Minister--No positive action was taken on basis of directive--Challenge to--No role of Governor--Employees of High Court fall directly under control of chief justice--No approval was required from governor--Administrative expenses--Validity--Fixation of posts, appointment to posts, grant of increment, seniority and promotion are all subject to decision of Chief Justice without any approval from Governor--Once rules are, approved, Governor has no role and cannot interfere in pay and allowances fixed by Chief Justice--Finding in judgment that approval of Governor under Rule 17 is a one off act is in accordance with mandate of Constitution and spirit of High Court Rules--Annual Budget Statement and its explanatory memorandums include expenses related to Lahore High Court--Appellants are obligated to comply with decision of Chief Justice and AC--Since obligation is mandate of Constitution question of retrospectivity and reliance on notification does not arise--If employees of High Court are granted adhoc allowance for year 2010, it will prompt claims from other departments who have been specifically ousted on basis of notification, to agitate their right to adhoc allowance for year 2010--No justification in denying adhoc allowance for year 2010 on basis of notification--Employees of Lahore High Court do not fall under control and management of appellants/provincial government hence question of discrimination would not arise--However, since they are not civil servants said notification cannot be made binding on them and question of discrimination, will not arise as they do not fall under control of Provincial Government--Appeal was dismissed.

[Pp. 65, 66, 67 & 68] A, B, C, D, E, F & G

Mr. Muhammad Shan Gull, Additional Advocate General assisted by *Mr. Naeem Yousaf,* Advocate alongwith *Mr. Ahmad Raza Sarwar,* Special Secretary Finance Department, *Muhammad Akhtar,* Treasury Officer and *Nadeem Riaz Malik,* Section Officer, Finance Department for Appellants.

Mian Bilal Bashir, Advocate assisted by *Raja Tassawar Iqbal,* Advocate for Respondent.

Mr. Muhammad Azhar Siddique, Advocate for Applicant (in C.M. Nos. 5061 and 5062 of 2015) and for Petitioner (in Crl. Org. No. 1719-W/2015).
Date of hearing: 9.7.2015.

JUDGMENT

Mrs. Ayesha A. Malik, J.--The Appellants are aggrieved by the impugned judgment dated 10.2.2015 in WP No. 5406/2011 as the learned Single Judge has granted fifty percent increase in Judicial Allowance and fifty percent increase in Adhoc Allowance with effect from 1.7.2010 to the employees of the Lahore High Court.

2. The case of the Appellants is that the Respondent is an, employee of the Lahore High Court Establishment who sought a direction to the Provincial Government to act upon Letter No. F.3(1)/2009-A-II dated 26.1.2011 issued by the Government of Pakistan, Law, Justice and Parliamentary Affairs Division, Islamabad wherein the Prime Minister approved a fifty percent increase in Judicial Allowance and a fifty percent increase at the uniform rate of the basic pay, known as Adhoc Allowance to the staff of all superior judiciary with effect from 1.7.2010. The learned Additional Advocate General, ("AAG") Mr. Shan Gull argued that the Prime Minister does not have any executive or legislative authority to direct the Province to make any such payment out of the Provincial Consolidated Fund. He argued that the Prime Minister cannot require the Provincial Government to make any kind of payment from the Provincial Consolidated Fund. He further argued that any payment with respect to Judicial Allowance or Adhoc Allowance must be first approved by the Governor of the Province in terms of Rule 17 of Chapter 10, Part "C" of the High Court Rules and Orders (Volume-V), ("High Court Rules"). Further argued that the Respondent has no legal right on the basis of the Prime Minister's directive to agitate a claim for fifty percent increase in the Judicial Allowance with effect from 1.7.2010. He explained that the Administrative Committee ("AC") of the Lahore High Court took, a decision on 13.5.2013 whereby it approved the payment of fifty percent increase in Judicial Allowance and Adhoc Allowance to its employees with effect from 1.7.2010. He stated that the decision of the AC is premised on the directive issued by the Prime Minister dated 26.1.2011. Hence it cannot be followed. He further argued that Judicial Allowance has been granted with retrospective effect which is patently illegal as a liability has been imposed on the Provincial Government retrospectively. He argued that the Appellants are aggrieved by the interpretation given to Rule 17 of the High Court Rules in the impugned judgment as the same is contrary to the mandate of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution"). With respect to Adhoc Allowance the learned AAG argued that the same cannot be granted to the employees of the Lahore High Court because in terms of Notification dated 15.7.2010, issued by the Finance Department of the Provincial Government, Adhoc Allowance granted in the year 2010 was not admissible to persons who were already getting allowance equal to one month's basic pay. He stated that on the basis of the said Notification, many employees of the Provincial Government including members of the Armed Forces,

National Highway and Motorway Police were denied Adhoc Allowance for the year 2010. For this reason since the employees of the High Court also fall in the category of persons who have received an allowance equal to one month's basic pay as provided in the Notification dated 15.7.2010 they are not entitled to this allowance. He clarified that with respect to Adhoc Allowance the dispute pertains to the year 2010 only as Adhoc Allowance for all other years has been paid.

3. Mr. Ahmad Raza Sarwar, Special Secretary, Finance Department appeared before us to explain the rationale of the case of the Appellants and to assist the Court with reference to the manner in which the process for granting the allowances with respect to the employees of the High Court is carried out. He explained that the payment for the employees of the judiciary comes from the Provincial Consolidated Fund which is a single and unified fund from which expenses are met by the Provincial Government. It is his understanding that in terms of the Constitution and Punjab Government Rules of Business, 2011 and the High Court Rules, if the AC and the Chief Justice recommend an allowance for its employees then that recommendation must be approved by the Governor of the Province. He stated that the Governor can modify the recommendation and send the matter back to the AC and the Chief Justice for reconsideration. He further stated that as per practice the AC has been submitting its recommendation to the Governor since 2003 which has been processed under the law and approved by the Governor. In this regard, he has placed before us the record containing approvals sought and granted for judicial allowance from the year 2003. He stated that if any allowance is recommended by the AC without the approval of the Governor, then as per his understanding the Provincial Government is under no obligation to make the funds available. The Government of Punjab sanctioned fifty percent increase of the existing basic pay known as Adhoc Allowance in the year 2010 to its employees with effect from 1.7.2010 subject to the condition that those employees who were already in receipt of any special allowance equal to one month's basic pay would not be allowed Adhoc Allowance. He stated that the employees of the High Court have been denied the grant of Adhoc Allowance as they were in receipt of different allowances equal to one month's pay hence they do not qualify for the Adhoc Allowance. He stated that the Government of Punjab is paying Judicial Allowance from 1.7.2014 which was duly approved by the Governor. As to the Adhoc Allowance, since there is a bar on the payment of Adhoc Allowance pursuant to Notification dated 15.7.2010, they are not willing to pay the same. He clarified that the issue of Adhoc Allowance is only with respect to the year 2010 as the Adhoc Allowances for the subsequent years have been paid to the employees of Lahore High Court.

4. Mian Bilal Bashir, learned counsel for the Respondent in support of the impugned judgment argued that fifty percent increase in Judicial Allowance and fifty percent increase in Adhoc Allowance have been given to all the employees of the other High Courts of the country and the august Supreme Court of Pakistan except for the employees of the Lahore High Court. He stated that Adhoc Allowance is granted every year to the employees of the Lahore High Court and could not be refused for the year 2010. He stated that there is no basis to deny the

employees the Adhoc Allowance on the strength of the Notification dated 15.7.2010 as they are not at par with the civil servants mentioned in Notification dated 15.7.2010. He stated that the employees of the Lahore High Court fall directly under the control of the Hon'ble Chief Justice. He stated that the Hon'ble Chief Justice and the AC approved fifty percent increase in Judicial Allowance and in Adhoc Allowance with effect from 1.7.2010 for its employees on 15.5.2013. He stated that the Appellants are obligated to comply with the decision of the AC and the Hon'ble Chief Justice in terms of Rule 17 of the High Court Rules.

5. Mr. Muhammad Azhar Siddique, learned counsel for Applicant in C.M. Nos. 5061 and 5062 of 2015 and for the Petitioner in Criminal Original No. 1719-W/2015 while supporting the impugned judgment argued that the Appellants have never challenged the directive of the Prime Minister dated 26.1.2011. They have also not challenged the decision of the AC dated 15.5.2013. Therefore they are obligated to comply with the same. Learned counsel further stated that the matter for grant of Judicial Allowance and Adhoc Allowance falls exclusively within the domain of the Hon'ble Chief Justice and the AC in terms of Rule 17 of the High Court Rules and as such no approval is required from the Governor.

6. Heard and record perused.

7. The facts of the case are that on 26.1.2011, the Prime Minister through a directive approved a fifty percent increase at the uniform rate of basic pay, referred to as Adhoc Allowance and fifty percent increase in Judicial Allowance to the staff of the superior judiciary across the country with effect from 1.7.2010. No positive action was taken by the Appellants on the basis of the directive hence on 15.5.2013 the AC in its meeting approved a fifty percent increase in the Judicial Allowance and in the Adhoc Allowance with effect from 1.7.2010. The said allowances were not granted by the Provincial Government, hence the Respondent filed WP No. 5406/2011 before this Court seeking implementation of the Prime Minister's directive dated 26.1.2011. The impugned judgment while relying on Articles 121, 122, 175 and 208 of the Constitution essentially held that judicial independence means and includes financial independence which means that the High Court has total budgetary and financial control and it can draw its own administrative expenses including remuneration of its officers and servants. The judgment farther holds that administrative expenses do not require the approval of the Governor or the assent of the Provincial Assembly in terms of Article 121 of the Constitution. The impugned judgment concludes that the expenses proposed by the High Court cannot be turned down, revised or altered by the executive or by the legislature and that there is no provision under the Constitution that allows the Provincial Executive to delay or reconsider, negate, alter, reduce the administrative expenses of the High Court which is a charged expenditure under Article 121 of the Constitution.

8. The basic issue raised by the Appellants is that in terms of Rule 17 of the High Court Rules approval of the Governor is necessary before any allowance, Judicial or Adhoc, can be increased. The said Rule is reproduced hereunder for convenience:--

> Members of the High Court Establishment shall be entitled to pay (including special pay) and allowances as fixed by the Chief Justice, from time to time with the approval of the Governor to these rules.

The learned AAG while relying on the stated Rule argued that no other rule in the High Court Rules requires the approval of the Governor except Rule 17. Since Rule 17 specifically makes mention of the approval of the Governor it means that an approval was thought to be necessary for the purposes of pay and allowances.

9. We have considered the arguments made before us however, we find that the emphasis on the approval of the Governor is totally misplaced. The High Court Rules provide for the appointment and conditions of service for the Establishment of the Lahore High Court. These Rules have admittedly been approved by the Governor and essentially lay down the terms and conditions of service of the employees of the High Court. The case of the Appellants is that the approval under Rule 17 is mandatory for the gram of increase in Judicial Allowance and Adhoc Allowance because when compared with the other rules, Rule 17 is the only Rule which requires approval from the Governor. We have gone through the High Court Rules and find that Rule 4 provides for the establishment of as many posts as may be fixed from time to time by the Chief Justice. As per the High Court Rules, all appointments are made by the Chief Justice and increments are granted under Rule 18 by the Chief Justice. In all these cases, the approval of the Governor is not required. Rule 17 however, provides that members of the High Court Establishment shall be entitled to pay, special pay and allowances as fixed by the Chief Justice, from time to time, with the approval of the Governor to these rules. We find that reference to 'approval of the Governor' is specifically in relation to the approval sought for making the High Court Rules and not for approval each time pay or allowance has to be increased. Not only does this understanding fit in well when reading the High Court Rules in its entirety but it is also in consonance with the principles of independence of the judiciary as held by the august Supreme Court of Pakistan in the case titled *Government of Balochistan through Additional Chief Secretary v. Azizullah Memon and 16 others* (PLD 1993 SC 341), *Government of Sindh through Chief Secretary to Government of Sindh, Karachi and others v. Sharaf Faridi and others* (PLD 1994 SC 105) and *Abdul Rasheed and others v. Province of Sindh and others* (2011 PLC (CS) 926). The Chief Justice as the competent authority creates the posts, makes the appointments, fixes the seniority and grants promotion. He is also competent authority to determine pay and allowances of the members of the Establishment of Lahore High Court. The argument that only for the purposes of pay and allowances the approval of the Governor is required but for all other matters relating to terms and conditions of service the Chief Justice is the competent authority does not find favour with the spirit of the High Court Rules. To our mind when reading the High Court Rules, it is evident that fixation of posts, appointment to the posts, grant of increment, seniority and promotion are all subject to the decision of the Chief Justice without

any approval from the Governor. On the basis of the same understanding, the terms and conditions of service, the pay and any increase thereof along with grant of any allowance will also be decided by the Chief Justice without any approval of the Governor. It is only the rules themselves when promulgated that need approval of the Governor in terms of Article 208 of the Constitution. It is the Constitution when mandates that the Governor approve the rules related to the terms and conditions of service. Once the rules are approved, the Governor has no role and cannot interfere in the pay and allowances fixed by the Chief Justice. Therefore the finding in the impugned judgment that the approval of the Governor under Rule 17 is a one off act is in accordance with the mandate of the Constitution and the spirit of the High Court Rules. In this regard, it is held in the case titled *Government of the Punjab through Secretary, Finance Department, Lahore v. Mubarik Ali Khan and 8 others* (PLD 1993 SC 375) that i*n the context of the Constitutional provisions reproduced above, it is clear that in the matter of the officers and servants employed in the establishment of the Supreme Court of Pakistan and the High Courts the legislature had not been given any role to determine the terms and conditions of the employees which of course would include their remuneration also. Such an exclusionary role was attributed to the requirement of maintaining the independence of judiciary. It was further held in this case that it is admitted that under Rule 17 no separate dispensation with the approval of the Governor has taken place in respect of pay and allowances. For this reason the residuary Rule 22 gets attracted*.

10. The next issue is with respect to the implementation of the decision dated 15.5.2013 of the Chief Justice and the AC wherein the increase in Judicial Allowance and Adhoc Allowance was allowed. A lot of emphasis was placed on the fact that the decision of the AC was based on the Prime Minister's directive dated 26.1.2011 which directive is not binding on the Provincial Government. Although the Appellants have argued that they are not bound by the said directive, we are of the opinion that this argument is not relevant to the controversy at hand because the Chief Justice and the AC took a decision on 15.5.2013 that it will give all its employees fifty percent increase in Judicial Allowance and Adhoc Allowance with effect from 1.7.2010. Given that a decision was taken by the AC and the Chief Justice, the Appellants were obligated to follow the same and ensure its compliance irrespective of the fact that the decision may have been based on the Prime Minister's directive dated 26.1.2011. The only answer to the question as to why the decision of the AC was not followed is that Rule 17 of the High Court Rules requires the approval of the Governor. Therefore there is no merit in this argument as the Appellants are bound to comply with the decision of the Chief Justice through the AC. The issue that the decision of the AC required Judicial Allowance and Adhoc Allowance to be paid with effect from 1.7.2010, being retrospective in nature is also misconceived as the Appellants are bound to comply with the orders of the Chief Justice and the AC. The Constitution protects the independence of the judiciary from the executive and the legislature which includes financial independence from the other two pillars of the state. The doctrine of separation of power means that each pillar of the State shall take care of itself. Hence the Constitution specifically provides under Article 120 that an Annual Budget

Statement be submitted in respect of every financial year before the Provincial Assembly. The Annual Budget Statement and its explanatory memorandums include the expenses related to the Lahore High Court. Article 121 of the Constitution protects the administrative expenses and remunerations payable to the officers and servants of the High Court by declaring it to be an expenditure *charged upon the Provincial Consolidate Fund*, Article 122 of the Constitution provides that charged expenditures as detailed in the Annual Budget Statement may be discussed in the Assembly but shall not be submitted to the vote. Therefore the Constitution specifically provides that no interference shall be made with respect to the administrative expenses and remuneration payable to the employees of the High Court. The strength and effectiveness of an independent judicial system means that it has absolute control over its employees and in this context that it decides on all matters related to the terms and conditions of their service. As an independent branch it is presumed that the judiciary will regulate and monitor its finances in the most prudent manner possible and take reasonable decisions. Such decisions cannot be made subject to the approval of the Governor and any matter related to pay and allowances cannot be turned down, modified or sent back by the Governor to the AC and the Chief Justice for reconsideration. In the instant case the Minutes of the Meeting of the AC dated 15.5.2013 show that the decision to grant Judicial Allowance and Adhoc Allowance with effect from 1.7.2010 was subjected to a process of deliberation by the AC and the Chief Justice, who in their wisdom concluded that the allowances should be granted with effect from 1.7.2010. The Appellants before us accept that the Judicial Allowance should be given to the employees of the High Court and they have stated that they are paying it with effect from 1.7.2014. Therefore with respect to Judicial Allowance they essentially dispute the effective date of 1.7.2010 and the amount due from 1.7.2010 to 30.6.2014. As to Adhoc Allowance they have expressed their inability to accept the decision of the AC and the Chief Justice on the strength of Notification dated 15.7.2010. However we are of the opinion that the Appellants are obligated to comply with the decision of the Chief Justice and the AC dated 15.5.2013. Since this obligation is the mandate of the Constitution the question of retrospectivity and reliance on Notification dated 15.7.2010 does not arise. Furthermore reference to past practice when the increase in Judicial Allowance was sent to the Governor will also not change the mandate of the Constitution. In this regard, we find that the impugned judgment has aptly dealt with the matter by finding that *The budgetary process of the High Court must be a collaborative exercise, where comments, suggestions and inputs are solicited from the provincial government, financial experts and other relevant institutions, in order to examine, appreciate and gauge the fiscal and economic conditions and realities of the Province before finalizing the charged expenditure. This is in line with the democratic spirit of co-operation, coordination, responsibility and accountability. Working relationship between different organs of the State is a path that enriches and strengthens democracy.*

11. With respect to the Adhoc Allowance, the issue raised by the Appellants is on the basis of Notification dated 15.7.2010 where certain departments of the Provincial Governments have been denied Adhoc Allowance. They argue that the

same will be made applicable to the employees of the Lahore High Court. The basic concern as explained by Mr. Ahmad Raza Sarwar, Special Secretary, Finance Department and the learned AAG is that if the employees of the High Court are granted the Adhoc Allowance for the year 2010, it will prompt claims from other Departments who have been specifically ousted on the basis of the Notification dated 15.7.2010, to agitate their right to Adhoc Allowance for the year 2010. However we find that there is no justification in denying Adhoc Allowance for the year 2010 on the basis of Notification dated 15.7.2010. The employees of the Lahore High Court do not fall under the control and management of the Appellants/Provincial Government hence the question of discrimination would not arise. As per Rule 22 of the High Court Rules they have only adopted to be governed by the provisions of the Civil Service Rules (Punjab) in matters of salaries, allowance, leave or pension. However, since they are not civil servants the said Notification cannot be made binding on them and the question of discrimination, in our opinion will not arise as they do not fall under the control of the Provincial Government.

12. In view of the aforesaid, impugned judgment dated 10.2.2015 passed by the learned Single Judge is upheld and this appeal is dismissed.

(R.A.) Appeal dismissed

2016 P T D 257
[Lahore High Court]
Before Ayesha A. Malik, J
Messrs FIRDOUS CLOTH MILLS (PVT.) LTD. through Company Secretary
Versus
FEDERATION OF PAKISTAN through Ministry of Finance and others
W.Ps. Nos.6363, 6903, 8211 and 1234 of 2015, heard on 9th June, 2015.

(a) Sales Tax Act (VII of 1990)---

----Ss. 38 & 40-B---Constitution of Pakistan, Art. 199---Constitutional petition---Entry into premises of taxpayer---Authorized officer, jurisdiction of---Petitioner was a company registered with Sales Tax Authorities and was aggrieved of entry of authorities into its premises without issuing any prior notice to it---Validity---Objective of Ss. 38 & 40-B of Sales Tax Act,1990, was to give authorized officer access to premises as well as record and documents of registered person---While S. 38 of Sales Tax Act,1990, contemplated a visit to premises, S. 40-B of Sales Tax Act,1990, allowed authorized officers to stay at the premises for a given period of time to monitor the premises, sale and stock position of registered person---Primary requirement of both the sections was a notice to taxpayer---Authorities, in the present case, issued a notice stating material evidence on the basis of which monitoring was necessary to investigate into allegations of tax fraud and evasion of tax---High Court declined to interfere in the matter---Petition was dismissed in circumstances.
Messrs Food Consults (Pvt.) Ltd., Lahore and others v. Collector (Central Excise and Sales Tax), Lahore and 2 others 2004 PTD 1731; Collector of Sales Tax and others v. Messrs Food Consults (Pvt.) Ltd. and another 2007 PTD 2356; Taj International (Pvt.) Ltd. and others v. Federation of Pakistan and others 2014 PTD 1807; Chairman, Central Board of Revenue and others v. Messrs Haq Cotton Mills (Pvt.) Ltd., Burewala 2007 PTD 1351; Dr. Ghulam Mustafa v. The State and others 2008 SCMR 76; Rana Shahid Ahmad Khan v. Tanveer Ahmad and others 2011 SCMR 1937; Kamalia Sugar Mills Ltd. v. Federation of Pakistan and others 2015 PTD 221; West Pakistan Tanks Terminal (Pvt.) Ltd. v. Collector (Appraisement) 2007 SCMR 1318 and Muhammad Asif and another v. Director Public Instruction, Punjab and another 2005 PLC (C.S.) 1434 ref.

(b) Sales Tax Act (VII of 1990)---

----Ss. 40 & 40-B---Entry into premises---Search warrant, requirement of---Principle---When an authorized officer enters the premises under S. 40-B of Sales Tax Act,1990, a warrant is not required under S. 40 of Sales Tax Act,1990---Need for a warrant arises when any officer of Inland Revenue has reason to believe that any document or record of a registered person may be useful or relevant to investigation and that document or record is not at the business or manufacturing premises of registered person but at some other place, then the officer may, after

obtaining a warrant from Magistrate, enter that place and cause a search to be made at any time.

Collector of Sales Tax and Central Excise (Enforcement) and another v. Messrs Mega Tech (Pvt.) Ltd. 2005 PTD 1933 rel.
Arslan Akhtar for Petitioner (in W.Ps. Nos.6363 and 6903 of 2015).
Ali Sibtain Fazli for Petitioner (in W.Ps. Nos.12324 and 8211 of 2015).
Muhammad Zikria Sheikh, DAG, Sarfraz Ahmad Cheema, Dr. Ishtiaq Ahmad Khan, Additional Commissioner, LTU, Lahore, Malik Afzal, ACIR, Muhammad Sohail, ACIR and Muhammad Rashid Naseem, Auditor for Respondents.
Date of hearing: 9th June, 2015.

JUDGMENT

AYESHA A. MALIK, J.---This common judgment decides upon the issues raised in Writ Petitions Nos.6363, 6903, 8211 and 12324 of 2015, as all the petitions raise common questions of law and facts.

2. The Petitioners in W.Ps. Nos.8211 and 6903 of 2015 have impugned notices dated 22.1.2015, 20.3.2015 and 9.3.2015 issued under Section 40B along with Section 38 of the Sales Tax Act, 1990 ("The Act"). Their basic grievance is that while exercising powers under Section 40B of the Act powers under Section 38 of the Act cannot be invoked.

3. The instant petition is filed by the Petitioner Firdous Cloth Mills (Pvt.) Limited against a similar notice dated 5.3.2015 issued under Section 40B read with Section 38 of the Act. However, in the case of Firdous Cloth Mills subsequent to the notice dated 5.3.2015, FIR No.8/2015 was registered on 22.4.2015. Thereafter Firdous Cloth Mills along with its five directors and company secretary filed W.P. No.12324/2015 praying for quashment of FIR No.8/2015.

4. The Petitioners are aggrieved by the notice issued by Respondent No.3 invoking Section 40B of the Act to monitor production and sale of taxable goods along with the stock position and through the same notice he has authorized the named officers to exercise all powers under Section 38 of the Act. The grievance of the Petitioners is that the Respondent No.3 cannot invoke Section 38 of the Act along with Section 40B of the Act. Learned counsel for the Petitioners argued that Section 40B of the Act authorizes the Commissioner to post an officer of Inland Revenue at the premises of a taxpayer to monitor production, sale and the stock position of taxable goods provided that he has material evidence that the taxpayer is involved in evasion of sales tax or tax fraud. Learned counsel for the Petitioners stated that under the garb of Section 40B of the Act, the Respondents cannot invoke Section 38 of the Act which is a separate and independent provision for which an investigation or inquiry on allegations of tax fraud is necessary. In this case, he argued that no investigation or inquiry is pending against the Petitioner and no notice with reference to the business records and documents maintained at the factory premises

has been issued by the Respondents under Section 38 of the Act. Learned counsel argued that in order to invoke Section 38 of the Act, a notice stating reasons should have been issued by the Respondents and thereafter, if required, a search warrant under Section 40 of the Act, on the basis of which they could enter the premises and confiscate documents or the business record of the Petitioners. In this regard he has placed reliance on the cases titled Messrs Food Consults (Pvt.) Ltd., Lahore and others v. Collector (Central Excise and Sales Tax), Lahore and 2 others (2004 PTD 1731) and Collector of Sales Tax and others v. Messrs Food Consults (Pvt.) Ltd. and another (2007 PTD 2356).

5. In W.P. No.12324/2015, the case of the Petitioners is that since the record was seized unlawfully under Section 38 of the Act, therefore, the FIR in pursuance thereof is also illegal and should be quashed. The Petitioners also pray that all record and accounts that have been seized should not be used against the Petitioners. Writ Petition No.16359/2015 has been filed by the same Petitioners, Firdous Cloth Mills (Pvt.) Ltd. through its Company Secretary and its directors who pray that a civil suit for declaration and permanent injunction against FIR No.8/2015 be decided first and in the meanwhile they should not be arrested pursuant to FIR No.8/2015. The merits of that case have been dealt with separately.

6. Learned counsel argued that FIR No.8/2015 has been lodged against the Petitioners in W.P. No.12324/2015 on the basis of information collected through the illegal act of seizure under Section 38 of the Act. Learned counsel for the Petitioner argued that search and seizure by the Respondents is in absolute violation of Section 38 of the Act and the FIR on the basis thereof, is also illegal. Learned counsel argued that the FIR has been lodged without determining the tax liability of Petitioner No.1 in accordance with Section 11 of the Act. He has placed reliance on the case titled Taj International (Pvt.) Ltd. and others v. Federation of Pakistan and others (2014 PTD 1807). Also placed reliance on the cases cited as 2004 PTD 1731 (supra) and Chairman, Central Board of Revenue and others v. Messrs Haq Cotton Mills (Pvt.) Ltd., Burewala (2007 PTD 1351) to urge the point that Section 38 of the Act is dependent upon the issuance of a warrant under Section 40 of the Act in order to carry out any search under Section 38 of the Act. Therefore, the Respondents were obligated to obtain a warrant from a Magistrate as stipulated in Section 40 of the Act. Learned counsel further argued that the Respondents are committing contempt of the orders of this Court because the impugned notice was suspended on 10.3.2015, such that the Respondents were restrained from entering the premises of the Petitioner. Thereafter by order dated 1.4.2015 the Respondents were allowed to continue with the monitoring process under Section 40B of the Act but they could not invoke the provisions of Section 38 of the Act. Notwithstanding the same, the Respondents exercised their powers under Section 38 confiscated the business record and documents of the Petitioners and proceeded with the registration of FIR. Therefore, they are in violation of the orders of this Court 1.4.2015 for which Crl. Org. No.1114-W/2015 is also pending.

7. Learned counsel for the Respondents at the very outset raised the objection that notices under Section 40B of the Act have been issued by the Commissioner Inland Revenue and they are appealable orders under Section 46 of the Act. In this regard, he stated that the Petitioner in the instant petition has filed its appeal which is pending. Learned counsel further stated given that a statutory remedy is available, the petitions are not maintainable. In response to this preliminary objection, learned counsel for the Petitioners admitted that an appeal is pending, however, he stated that the instant petitions are confined to the legal question as to whether the Respondents while invoking Section 40B can authorize the same officers to exercise all powers under Section 38 of the Act. He stated that he does not question the grounds raised in the notice for invoking Section 40B of the Act.

8. On merits, learned counsel for the Respondents stated that with respect to W.Ps. Nos. 6363, 6903 and 8211 of 2015 only a notice has been issued and as to the Petitioner Firdous Textile Mills, no search and seizure of the premises or record was carried out. The Respondents were given access to the premises under Section 40B and the officers appointed for the purposes of this provision were authorized to exercise powers under Section 38 of the Act. The officers asked for documents and record which were necessary in the investigation regarding evasion of sales tax and tax fraud. The stated Petitioner provided all documents with its consent. He argued that the Respondents did not raid the premises of the Petitioner nor did they seize any record. Learned counsel further argued that the FIR was registered on the ground that a case of tax fraud is made out against the Petitioner and if the Petitioner is of the opinion that no case is made out, it is required as per the law to participate in the proceedings and raise all objections in those proceedings. He further argued that the Petitioner is not entitled to the prayer for quashment of FIR in view of the pronouncement of the august Supreme Court of Pakistan in the cases titled Dr. Ghulam Mustafa v. The State and others (2008 SCMR 76) and Rana Shahid Ahmad Khan v. Tanveer Ahmad and others (2011 SCMR 1937). Learned counsel also stated that the Petitioners in W.P. No.12324/2015 filed another petition wherein they have sought the same relief and without disclosing W.P. No.12324/2015 they obtained order dated 29.5.2015 in W.P. No.16359/2015 preventing their arrest from another Court. Therefore, the learned counsel stressed that the conduct of the Petitioners in W.P. No. 12324/2015 does not entitle them to equitable relief from this Court.

9. Arguments heard and record perused.

10. The basic issue pertains to the issuance of a notice under Section 40B of the Act along with all powers under Section 38 of the Act. Section 40B of the Act provides for the posting of Officers of Inland Revenue within the premises of a registered person to monitor production or sale of taxable goods and the stock position. The Commissioner Inland Revenue issued the notices under Section 40B of the Act as he had reason to believe that the Petitioners are involved in evasion of sales tax or tax fraud. It has been held in the case titled Kamalia Sugar Mills Ltd. v. Federation of Pakistan etc. (2015 PTD 221) by a Division Bench of this Court that the

provisions of Section 40B do not prejudice the rights of a registered person as the section is invoked for the purposes of watching and observing the production or sale of taxable goods and the stock position. Hence there is no adverse order against the registered person and the Respondents can monitor purchase, sale and stock positions if they have material evidence of tax fraud or evasion of sales tax. Relevant part is reproduced for convenience:--

"Section 40B of the Act of 1990 is divided into two parts. The first part empowers the Chief Commissioner or the Board to post officers for the purposes of monitoring production, sale of taxable goods and the stock position. The proviso states that the Commissioner can also pass an order for posting of Inland Revenue Officers only if there is material evidence before him and he has reason to believe that the registered person is involved in evasion of sales tax or tax fraud. In such a situation the Commissioner has to record his reasons in writing, before passing such an order. The argument made before this Court essentially was that the fundamental rights of the Petitioners to do their business have been violated. I have considered the meaning and the scope of the power to "monitor" under Section 40B of the Act of 1990. The word 'monitor' has not been defined anywhere in the stated Acts. In the Concise Oxford English Dictionary, eleventh edition, the word 'monitor' means observe and check over a period of time. The Respondents understand monitoring to mean that the team posted at the manufacturing premises physically watches the production, sales and stock positions and collects the data maintained by the Petitioners. They are observing and recording the data as maintained by the Petitioners. The Respondents are collecting data made by the Petitioners related to production, sale and stock positions. They watch over the process and collect the relevant information as maintained and documented by the Petitioners on a daily basis. This enables the Respondents to collect data for a given period of time and consequently ascertain whether due tax is being paid. The Respondents state that the Petitioners do not reflect the correct position in their returns and the Respondents cannot determine the factual position for the purposes of levy of tax. Furthermore the Petitioners collect the sales tax from the end consumer and deposit it with the national exchequer. Hence the Respondents need to ascertain whether the collected tax has been duly deposited. Therefore I am of the view that the power to monitor is to watch and observe and to take the information maintained by the taxpayer with respect to its daily production, sales and stock position. A distinction was made on the basis of the powers under Section 40B invoked by the Board and that invoked by the Commissioner Inland Revenue. In that case, an order was issued by the Board wherein in terms of the Section itself, no specific allegation of evasion of sales tax or tax fraud is required. However, under the same Section, the Commissioner Inland Revenue issues an order which invokes Section 40B on the basis of material evidence before him with reference to the allegation of evasion of sales tax or tax fraud, therefore the objective of Section 40B remains the same. Where the order is issued by the Commissioner, the objective of the Respondent Department is to watch and observe with reference to the allegations of evasion of sales tax or tax fraud. The provision of 'monitoring' under Section 40B of the Act essentially means that the Respondents need to monitor production or sale of taxable goods and the stock position in order to ascertain whether the information

provided in the returns filed is reflective of the actual record maintained by the taxpayer. With reference to an order by the Commissioner, it means that the taxpayer is put to notice that the Respondents believe that the taxpayer is involved in evasion of sales tax or tax fraud, hence on the basis of material evidence, the Commissioner invokes the provisions of Section 40B of the Act."

11. The question that arises is that when Section 40B is invoked, can the Commissioner authorize the same officers to exercise powers under Section 38 of the Act. Sections 38 and 40B of the Act are reproduced below for ease of reference:--

38. Authorized officers to have access to premises, stocks, accounts and records. (1) Any officer authorized in this behalf by the Board [or the Commissioner], shall have free access to business or manufacturing premises, registered office or any other place where any stocks, business records or documents required under this Act are kept or maintained belonging to any registered person or a person liable for registration or whose business activities are covered under this Act or who may be required for any inquiry or investigation in any tax fraud committed by him or his agent or any other person; and such officer may, at any time, inspect the goods, stocks, records, data, documents, correspondence, accounts and statements, utility bills, bank statements, information regarding nature and sources of funds or assets with which his business is financed, and any other records or documents, including those which are required under any of the Federal, Provincial or local laws maintained in any form or mode and may take into his custody such records, statements, diskettes, documents or any part thereof, in original or copies thereof in such form as the authorized officer may deem fit against a signed receipt.

(2) The registered person, his agent or any other person specified in subsection (1) shall be bound to answer any question or furnish such information or explanation as may be asked by the authorised officer.

(3) The department of direct and indirect taxes or any other Government department, local bodies, autonomous bodies, corporations or such other institutions shall supply requisite information and render necessary assistance to the authorised officer in the course of inquiry or investigation under this section.

40B. Posting of [Inland Revenue] Officer. Subject to such conditions and restrictions, as deemed fit to impose, the [Board], [or Chief Commissioner] may post Officer of [Inland Revenue] to the premises of registered person or class of such persons to monitor production, sales of taxable goods and stock position.

Provided that if a [Commissioner] on the basis of material evidence, has reason to believe that a registered person is involved in evasion of sales tax or tax fraud, he may, by recording the reason in writing, post an Officer of [Inland Revenue] to the premises of such registered person to monitor production or sale of taxable goods and the stock position.

12. Section 38 authorizes an officer to have free access to premises, stocks, accounts and records of the taxpayer. In terms of the pronouncement of the august Supreme Court of Pakistan in the case titled Collector of Sales Tax and Central Excise (Enforcement) and another v. Messrs Mega Tech (Pvt.) Ltd. (2005 PTD

1933) the provisions of Section 38 of the Act expect that the registered person will keep the relevant record in an open and transparent manner at their declared premises and the use of the word 'free access' means that the authorized officers have free access to the business premises of a registered person at any time and the registered person shall be bound to answer questions or explanation required. The objective of Section 38 of the Act is to inspect the business or manufacturing premises and to be able to inspect the business record of the registered person. The Petitioners have relied upon the case cited at 2004 PTD 1731(supra) to urge the point that a warrant under Section 40 of the Act was necessary before entering and seizing the record under Section 38 of the Act. However, in that case the question of issuance of a warrant arose because the respondents raided the premises. Hence the question before the court was whether the respondents could have raided the premises of the taxpayer and seize its business record and documents without obtaining a warrant under Section 40 of the Act. In the instant case, the Respondents did not raid the premises of the Petitioner but entered the premises by invoking Section 40B of the Act and the record was handed over voluntarily. Therefore, reliance on the case cited at 2004 PTD 1731(supra) is misplaced and not applicable to this case.

13. To settle the controversy, the relevant question which needs to be decided is whether the Respondents can enter the premises of a taxpayer under Section 40B of the Act and at the same time exercise its power under Section 38 of the Act. The argument raised by the Respondents is that both the provisions of Section 40B and Section 38 of the Act are independent provisions having separate and independent procedures which must be followed. Section 40B of the Act is invoked by the Commissioner Inland Revenue on the basis of material evidence that a case of evasion of sales tax or tax fraud is made out. A notice under Section 40B of the Act must stipulate the material evidence on the basis of which the Commissioner Inland Revenue feels the need to monitor the production, sale of taxable goods and the stock position of the registered person. On the other hand, Section 38 of the Act gives an authorized officer free access to the business or the manufacturing premises or the registered office or any other place of a taxpayer where the stocks, business records, documents are maintained and kept. Section 38 allows the authorized officer free access to the premises and the business records and documents where an inquiry or investigation in tax fraud is underway. The authorized officer can inspect the goods, stocks, records, data, documents, correspondence, accounts and statements, utility bills, bank statements, information regarding nature and source of funds or assets with which the business is financed and any other record or document which are required for the purposes of the investigation. The authorized officer can also take into custody such records, statements, diskettes, documents or any part thereof in original or copies thereof in such form as the authorized officer may deem fit against a signed receipt. Furthermore under Section 38 of the Act, the taxpayer is bound to answer any question or furnish such information or explanation as may be required by the authorized officer. The principles of due process mandate that the registered person is put to notice under Section 38 of the visit and inspection. Section 38 allows the

visit and inspection so that the authorized officer can satisfy himself that the registered person is in compliance with the Act when manufacturing the record. It also allows a visit and inspection where there is an inquiry or investigation in tax fraud against the registered person or any other person connected in the investigation of tax fraud.

14. From the aforementioned it is evident that the objective of both the sections is to give the authorized officer access to the premises as well as the record and documents of the registered person. While Section 38 of the Act contemplates a visit to the premises, Section 40B allows the authorized officers to stay at the premises for a given period of time to monitor the purchase, sale and stock position of the registered person. The primary requirement of both sections is a notice to the taxpayer. In this case, a notice was issued stating the material evidence on the basis of which monitoring is necessary to investigate into allegations of tax fraud and evasion of tax. The Petitioners have argued that separate notices should have been issued under Section 38 of the Act for the purposes of entry in the premises of the Petitioners and for the purposes of seizure of the record a warrant under Section 40 was necessary. Having gone through these provisions of the Act it is clear that both Sections 38 and 40B of the Act are independent provisions which can be used independent of each other however they can also be used simultaneously. There is no restriction on the authorized officers who enters the premises of a registered person for the purposes of monitoring to also exercise powers under Section 38 of the Act as both Sections are in aid of an investigation into allegations of tax fraud and sales tax evasion. In both the cases, the Commissioner Inland Revenue has jurisdiction. He can invoke Section 40B of the Act on the basis of material evidence and he can authorize the same officers under Section 38 on the basis of the same material evidence to inspect the premises or record of the registered person with reference to the allegations of evasion of sales tax or tax fraud. Both the Sections require that the Respondents have reasonable cause to believe that a visit to the premises of the registered person where the record and the stocks are maintained will facilitate the investigation. Both Sections 38 and 40B of the Act give the Respondents free access to the premises of the registered person, subject to notice and material evidence pertaining to the allegations of evasion of sales tax or tax fraud. Therefore when an authorized officer enters under Section 40B of the Act, a warrant is not required under Section 40 of the Act. The need for a warrant arises when any officer of Inland Revenue has reason to believe that any document or record of a registered person may be useful or relevant to the investigation, and that document or record is not at the business or manufacturing premises of the registered person but at some other place, then he may, after obtaining a warrant from the magistrate, enter that place and cause a search to be made at any time. Reliance is placed on the case cited at 2005 PTD 1933 (supra). A warrant may also be necessary where the record is not produced voluntarily by the registered person but in the instant case, a warrant was not required as the authorized officers entered the business/ manufacturing place of the Petitioner, Firdous Textile Mills (Pvt.) Limited from whom the documents were handed over as per request, without any resistance.

15. The record shows that the Petitioners in these cases are under investigation with reference to allegations of tax fraud and evasion of tax. The purpose of both the Sections is to enable the Respondents to carry out the investigation and inquiry and obtain necessary information. The Act contemplates an inquiry/investigation process in which 'monitoring' and 'free access' is necessary. To say that while invoking Section 40B of the Act, the Respondents cannot use their power under Section 38 of the Act would therefore go against the mandate of the law. Both sections facilitate the inquiry process and since the Petitioners have been put to notice under Section 40B read with Section 38 of the Act no illegality is made out.

16. The other question argued by the learned counsel in W.P. No.12324/2015 is that a liability had to be determined in the first instance before lodging the FIR in this case. The Petitioners have relied upon 2014 PTD 1807 (supra) to urge the point that an assessment under Section 11 of the Act must be done first before initiation of criminal proceedings by registration of FIR No.8/2015. The operation of the judgment relied upon has been suspended by the august Supreme Court of Pakistan through its order dated 10.12.2014 passed in Civil Petitions Nos.1798 to 2024, 1721-1724 L, 1762-1770 L, 1773-1779 L, 1785-1787 L, 204-208 K and 212 K of 2014 (S.C Order) and the matter is still pending before the august Supreme Court of Pakistan, therefore, reliance on the said judgment is not applicable to the controversy at hand. It has been held in the case cited at 2008 SCMR 76 (supra) that this Court had no jurisdiction to quash an FIR as the same amounts to taking the role of the investigating agency while exercising constitutional jurisdiction. Quashing an FIR can only be done in exceptional circumstances, which do not exist in this case because the Petitioners have challenged the FIR on the ground that the record was illegally seized under Section 38 which could not be invoked when monitoring under Section 40B of the Act. Even otherwise, given the conduct of the Petitioners before this Court with reference to W.P. No.16359/2015, which has been dealt with by a separate order, the Petitioners in W.P. No.12324/2015 have approached this Court with unclean hands and are not entitled to any equitable relief from this Court. Reliance is placed on the cases titled West Pakistan Tanks Terminal (Pvt.) Ltd. v. Collector (Appraisement) (2007 SCMR 1318) and Muhammad Asif and another v. Director Public Instruction, Punjab and another (2005 PLC (C.S) 1434).

17. Under the circumstances, all W.Ps. Nos. 6363, 6903, 8211 and 12324 of 2015 are dismissed.

MH/F-29/L Petitions dismissed.

P L D 2016 Lahore 173
Before Ayesha A. Malik, J
T&T EMPLOYEES' IDEAL COOPERATIVE HOUSING SOCIETY LTD. through President---Petitioner
Versus
PROVINCE OF PUNJAB through Chief Secretary and others---Respondents
W.P. No.5817 of 2015, heard on 16th September, 2015.

Rules of Business (Punjab), 2011--

----R, 17 & Second Sched.----Co-operative Societies Act (VII of 1925), Ss. 43 to 44-E---Constitution of Pakistan, Art. 139(3)---Chief Minister's Inspection Team (CMIT)---Functions and jurisdiction---Determination---Distribution of business among departments---Inquiry by Registrar of Cooperative Societies---Inspection of books of indebted society---Powers of Registrar in course of inspection or inquiry---Special measures---Conduct of business of Provincial Government---Jurisdiction of Chief Minister's Inspection Team with regard to private complaint for which remedy is available under a statute---Respondent filed application against petitioner Cooperative Society before Chief Minister, levelling allegations of fraud and corruption against the Society and its management, in response to which, Chairman, Chief Minister's Inspection Team (CMIT) issued letter to Member of CMIT to conduct inquiry into the allegations and submit his report---Petitioner contended that CMIT had no jurisdiction to conduct any such parallel inquiry, as the jurisdiction was vested with District Officer (Cooperative), who, having conducted inquiries on all such allegations, had already decided several similar complaints of the same respondent---Validity---Chief Minister's Inspection Team was an independent department, whose basic function was to inspect government departments and government officers to ensure that they were doing their duties and functions efficiently and expeditiously---CMIT had jurisdiction to inspect a department, in case the department or an officer was delaying matters or not doing their work---CMIT was to bring important matters related to functioning of government departments and officers to the notice of Chief Minister for his consideration and necessary orders---CMIT could entertain complaints pertaining to discharge of duties by a department or an officer, and after obtaining necessary orders, could require the department or officer to carry out its functions efficiently and expeditiously---CMIT was strictly required to ensure good governance from Provincial Government department and officers and could carry out special assignments related to the working of the departments and officers on instructions of Chief Minister---Punjab Government Rules of Business, 2011, therefore, required CMIT to maintain close liaison with Anti- Corruption Department to ensure good governance from its departments and officers---Punjab Government Rules of Business, 2011 did not permit CMIT to assume investigative power on a private complaint, where a forum and specific authority for the same was provided under a statute---Sections 43 to 44-E of Co-operative Societies Act, 1925 gave specific powers to Registrar Cooperative Department to conduct inquires and inspect books of any Cooperative Society---Section 44-E of Co-operative Societies

Act, 1925 gave the Registrar special powers for adopting special measures---CMIT was not an additional or alternate forum for private complaints such as that of present respondent---High Court set aside the impugned letter for being against the mandate of Punjab Government Rules of Business, 2011---Constitutional petition was accepted in circumstances.
Waqar A. Sheikh and Ahmad Ali Ranjha for Petitioner.
Ch. Sultan Mahmood, AAG along with M. Farooq Inspector Cooperative.
Nemo for Respondents.
Date of hearing: 16th September, 2015.

JUDGMENT

AYESHA A. MALIK, J.---Through this petition, the Petitioner has impugned order dated 21.02.2015 issued by Respondent No.2 on the ground that the stated Respondent lacks jurisdiction to probe into the private complaint of Respondent No.5.

2. The basic case is that the Petitioner is a Cooperative Housing Society registered under Section 10 of the Cooperative Societies Act, 1925 ("Act"). Respondent No.5 filed several complaints against the Petitioner before various different forums including a complaint under Section 44-A of the Act. These applications have been decided by the competent forums/officers and yet repeatedly Respondent No.5 moved applications time and again to harass the Petitioner. In this way, Respondent No.5 filed an application before Respondent No.3 levelling allegations of fraud and corruption against the Petitioner Society and its management. On the basis of the said application, Respondent No.2 issued a letter to Respondent No.3, Chairman, Chief Minister Inspection Team ("CMIT") on 21.02.2015, which reads as follows:-
"On presentation of the enclosed application of Mr. Muhammad Zubair Rafiq and other resident of T&T ECH Society, Lahore, on subject noted above, Chief Minister has been pleased to desire that in the interest of justice and fair play the matter be probed and outcome of the same may be put up for his information/orders."
It is noted on the said letter that Member General-V ("MG-V") may conduct this enquiry and submit report within two weeks. On 26.02.2015 MG-V issued a letter to the District Officer (Cooperative), Lahore calling for the complete record of the Petitioner Society including registration, layout plan, total membership, sale of land, development, commercialization, audit reports and for reply on the complaint. Subsequently, another letter was issued by MG-V on 25.08.2015 wherein it is mentioned that. Respondent No.5 has complained that he was not given an opportunity to submit his evidence nor was he heard properly during the inquiry by the District Officer (Cooperative) hence he should be heard and that he has raised further allegations with respect to the management of the Society which requires a response from the District Officer (Cooperative). The said District Officer (Cooperative) was called on to the MG-V office along with complete record pertaining to the allegations highlighted in the letter dated 03.03.2015 as well as with respect to the further allegations raised in letter dated 09.05.2015.

3. It is argued on behalf of the Petitioner that Respondent No.4 does not have the jurisdiction to conduct an inquiry on the complaint of Respondent No.5. The jurisdiction of such a complaint vests with the District Officer (Cooperative)/Respondent No.6 who has already decided upon several complaints filed by Respondent No.5 including one under Sections 44 and 44-A of the Act and has enquired into all allegations and passed its order on 03.03.2015. Under these circumstances, the power under the Act to inquire into complaint vests with District Officer (Cooperative), the CMIT cannot conduct parallel enquiries.

4. On behalf of Respondent No.5 whose learned counsel has argued his complete case on a previous date of hearing, it was urged that he has serious grievances against the Petitioner, which could not be looked into under the Act, hence he moved a complaint before the CMIT. With respect to the other applications moved before the DOC/DR, DG Anti-Corruption, Additional Secretary Cooperatives, Lahore, Secretary Cooperatives Department, Director Anti-Corruption, Lahore etc as well as to the Police department, he admitted that the same have been moved and that orders have been passed on some applications.

5. On behalf of Respondents Nos.1, 2, 3 and 4 learned Law Officer has stated that CMIT oversees the working of all the departments in terms of the Punjab Government Rules of Business, 2011 ("Rules of Business"). The CMIT is directly answerable to the Chief Minister and conducts its business under his orders. As per the second schedule of the Rules of Business, CMIT can inspect important matters affecting Government/public interest and seek appropriate action where required by the Chief Minister. Learned Law Officer stated that MG-V has merely called for the record of the Society so as to enquire into the issue and to place a comprehensive report before the Chief Minister in the public interest. He stated that it is not the intention of the stated Respondent to usurp the jurisdiction given to the Registrar Cooperative Housing Societies, Punjab under the Act.

6. Heard and record perused.

7. The Rules of Business framed under Article 139 (3) of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution"), provides that the Provincial Government shall also make rules for the allocation and transaction of its business. Under Rule 17 of the Rules of Business there is a CMIT, which is directly answerable to the Chief Minister of the Province and shall conduct business under his orders. As per the Rules of Business CMIT is deemed to be a department and it has a Chairman and a Secretary of the Department. Second Schedule of the Rules of Business provides for the distribution of business among departments. In terms of the schedule the CMIT has 12 functions as listed below:--

(1) Inspect sample development projects throughout the province with the following objectives:

(a) That development projects are properly planned and are executed efficiently, expeditiously and economically with effective quality controls and to recommend appropriate action against the defaulting officials/departments.

(b) That directives/orders of the Government regarding development projects are being fully implemented.

(c) That officials of Nation Building departments and contractors are carrying out their duties, responsibilities and tasks properly and efficiently.

(2) Inspect or cause to be inspected all Government departments including Police, Autonomous/Semi-Autonomous Bodies/ Corporations, Institutions and Local Bodies to see whether or not these departments/Agencies discharge their duties/functions efficiently and expeditiously and to bring serious observations to the notice of the Government together with recommendations for improvement.

(3) Take cognizance of any important matter affecting Government/public interest and draw attention of the authorities concerned for appropriate action and place it before the Chief Minister for his consideration/order.

(4) Entertain complaints of serious/urgent nature and pass these on to the concerned quarters for expeditious disposal or carry out investigation/probe directly as may be appropriate.

(5) Undertake special assignments which may be entrusted to it under orders of the Chief Minister on any matter not specified in this Charter.

6. Any requisition made or assistance required by the Inspection Team in these regards shall be complied with promptly by all concerned.

(7) Other departments may assign specific important tasks to the Inspection Team with prior permission of the Chief Minister.

(8) The Chairman, Chief Minister's Inspection Team shall submit his reports to the Chief Minister directly. Copies may be endorsed to the concerned departments/officials except those which may be of confidential nature.

(9) The Chief Minister's Inspection Team shall maintain close liaison with Anti-Corruption Department and pass on cases which may be appropriate to be dealt with by them.

(10) Budget, accounts and audit matters.

(11) Purchase of stores and capital goods for the department.

(12) Service matters except those entrusted to Service and General Administration Department.

On a plain reading of the Rules of Business, it is evident that the CMIT is an independent department whose basic function is to inspect government departments and government officers to ensure that they are doing their duties and functions efficiently and expeditiously. Where the work is not being done or matters are delayed by a department or an officer, the CMI has the jurisdiction to inspect that department to see whether it has discharged its functions and duties expeditiously and to bring it to the notice of the Chief Minister. In this context if there are important matters related to the functioning of government departments and government officers, the CMIT is to bring it to the notice of Chief Minister for his consideration and necessary orders. In the same context where there are complaints pertaining to the discharge of duty by a department or an officer, the CMIT can entertain such a complaint and after obtaining necessary orders require the department or officer to carry out its functions efficiently and expeditiously. So the purpose of the CMIT is to ensure that government departments and government officers carry out their functions as required under the law. The Rules of Business do not permit the CMIT to assume an investigative power on a private complaint, where a forum for such investigative powers has been provided under a statute, to a specific authority. In this case, Sections 43 to 44-E of the Act gives specific powers to the Registrar Cooperative Department to conduct inquiries and inspect the books of any Cooperative Society. Furthermore, Section 44-E gives him Special Powers for adopting special measures. Section 44D of the Act provides for the Registrar's powers (1) Where the Registrar is satisfied that in the public interest or to prevent the affairs of any Society from being conducted in a manner detrimental to the interest of its members of depositors or the Society or to secure the proper management of any Society generally, it is necessary to issue directions to the Societies generally or to any Society in particular, it may issue necessary direction and the Societies or as the case may be the Society shall be bound to comply with such directions. (2) The Registrar may on a representation made to him or on his own motion modify or cancel any direction issued under subsection (1) and is not modifying or cancelling any direction impose such conditions as he may think fit subject to which the modification or cancellation shall have effect.

8. Admittedly, Respondent No. 5 moved a complaint under Section 44 of the Act and an inquiry was held under Sections 44 and 44-A of the Act vide letter dated 14.11.2014. The Petitioner Society and its management filed replies, the matter was enquired into and ultimately, an order was issued on 03.03.2015 dismissing the complaints and applications filed by Respondent No.5. Respondent No.5 then moved a complaint before CMIT on 17.02.2015. On that complaint an order was issued by Respondent No.2 that the Chief Minister is required in the interest of justice and fair play that the matter be probed into and the outcome of the same may be put up for his information/orders. On the order of Chief Minister, Respondent No.4 was directed to conduct an inquiry and submit his report. In terms of the Rules of Business, the CMIT can look into the functioning of Provincial Government

departments and its officers to ensure that they are performing their duties and functions efficiently and expeditiously. The CMIT can on its own initiative look into the departments and its officers where matters of public interest are under consideration, to ensure its efficient handling and working. In fact the purpose and scope of the CMIT is to keep a watching eye on the departments and officers, who are State functionaries carrying out public service. In the event that a department or officer fails to perform its/his duty or is slow to perform, the CMIT can inquire and recommend action against it/him. However, it cannot initiate an inquiry on a private complaint which complaint can be filed and decided under a statute before a statutory authority which is a proper forum to deal such like complaints. The CMIT is not an additional or alternate forum for private complaints such as that of Respondent No.5. It is a forum strictly required to ensure good governance from Provincial Government departments and officers. It can carry out special assignments related to the working of the departments and officers on the instructions of the Chief Minister, however, it cannot conduct inquiries on the basis of private complaints where such inquiries are catered for under a statute. That is why the Rules of Business require the CMIT to maintain a close liaison with the Anti-Corruption Department so that it can ensure good governance from its departments and officers.

9. Under the circumstances, this petition is accepted and the impugned order is set aside as it is against the mandate of Rules of Business.
SL/T-19/L Petition allowed.

2016 Y L R 415
[Lahore]
Before Ayesha A. Malik, J
PUNJAB EDUCATION BOARDS EMPLOYEES through Chairman---
Petitioner Versus
PUNJAB BOARD COMMITTEE and others---Respondents
W.P. No.16398 of 2012, decided on 30th April, 2014.

Punjab Procurement Rules, 2014---

----Rr.4 & 67---Constitutional of Pakistan, Art. 199---Constitution petition---Maintainability and locus standi---Peittioner sought that contract, awarded to respondent, be declared as illegal on ground that large amount of money had been siphoned away by the private party for execution of the same---Authorities took the plea that no details of alleged illegality or fraud had been given in the present petition---Validity---Relevant years, regarding which disputed contract was awarded, had already been concluded; thus the contract was no more subsisting between the authorities and the party---Contract, in fact, did exist between the private party and authorities in the manner as alleged by petitioners, as there were more than one such contract---Grievance of petitioner on basis of public interest stood negated by conclusion of work in question---Petitioner, did not append any document to show legal basis as to formation of their federation and as to who was competent authority for purposes of authorization---Petitioner, not being aggrieved person, had no locus standi to file present petition, as their right or interest was not adversely affected in any manner due to award to contracts in question---Constitutional petition was dismissed in circumstances.

Akhtar Shah for Petitioners.
Mehboob Azhar Sheikh for Respondents.
Mrs. Samia Khalid, A.A.-G.
Ali Masood Hayat for Respondent No.3.
Syed Hassan Ali Raza and Asad Javed for Respondent.
Date of hearing: 25th February, 2014.

JUDGMENT

AYESHA A. MALIK, J.---This Writ Petition decides upon the issues raised in W.Ps. Nos. 16398 and 31453 of 2012. The Petitioners in these petitions seek declaration that the contract awarded to National Institute Facilitation Technologies (NIFT) be declared as illegal.

2. The main grievance of the Petitioners is that the Respondent No.1 illegally entered into a contract with the Respondent No.10 for service of printing of roll number/award sheet and scanning OMR/OCR/ICR. Learned counsel argued that this contract should not have been executed and consequent to the execution of this contract large amount of money has been siphoned away by the private party.

3. At the very outset, learned counsel for the Respondent No.10 raised the objection with the maintainability of the instant petitions. He argued that there was an independent contract between each of the Boards of Intermediate and Secondary Education (BISE) and NIFT, such that there were eight contracts with eight different BISEs which cannot be interfered with by the Petitioners. Learned counsel argued that in any event the contracts have expired and as such the prayer in the instant petitions has become infructuous. Learned counsel argued that under the contract, NIFT was to complete the printing and scanning of sheets for the Intermediate Part-I and Part-II annual examination 2012 and for the 2013 examination. Since both the examinations have been conducted and the results have been declared, the contract is complete and concluded. He argued that under the circumstances the prayer of the Petitioners to have a concluded contract declared as illegal is not maintainable. Learned counsel further argued that the contracts with NIFT were to implement the automated system introduced by the Government for the purposes of the Intermediate Examination and its checking. The Petitioners do not detail the fraud or so called illegality but simply stress on the fact that lot of money is being paid to the Respondent NIFT for its services. Learned counsel argued that a new system has been put into place and the results of 2012 and 2013 examinations have been issued without any major problem. Therefore no grievance is made out. Learned counsel further argued that the Petitioners have no locus standi and as such no interest of the Petitioners have been infringed upon. In any event he argued that main W.P. No.8158/2012 was argued and it was demonstrated in that petition that the 2012 examination was conducted as per the recommendations of the Judicial Commission dated 7.12.2011 and no major issue has been raised when the result was announced. Subsequently the 2013 result was announced and again there was no major issue. Under the circumstances he argued that there is no merit in these cases because the work of NIFT has concluded and no grievance has been made out by the Petitioners.

4. Heard the learned counsel for the parties and reviewed the record available on the file.

5. The basic grievance of the Petitioners is against the contract awarded to the Respondent No.10, NIFT. A review of the contract shows that the same was issued for the purposes of Intermediate Examinations 2012 and 2013. Both the examinations have concluded and at present there is no contract subsisting between the Respondent No.10 and the Respondent BISEs. It is also noted that in W.P. No.31493/2013 is the Pakistan Social Justice Party, who have also not appended any document to show under what provision of law the said Federation has been formed and who the competent authority is for the purposes of authorization. Furthermore on the question of maintainability, the Petitioners have no locus standi as they are not aggrieved persons. No right or interest of the Petitioners is adversely affected in any manner and any grievance that the Petitioners may have pleaded for the purposes of public interest stands negated by the declaration of the 2012 and 2013 results. As such no issue has been brought to the notice of the Court to show that the issues with the 2011 result have been repeated at the same level in 2012 or

2013, notwithstanding the report of the Commission dated 07.12.2011 and the recommendations made thereto. No instance of any loss has been detailed or brought on record. The main grievance is that the respondent No.1 could not enter into any contract with the respondent No.10. However learned counsel for Respondent No.10 has shown that it had eight separate contracts with the Respondents Nos.2 to 9 and there was no contract with the Respondent No.1.

6. Therefore in view of the aforesaid, these petitions are dismissed.

SL/P-39/L Petitions dismissed.

2016 P T D 483
[Lahore High Court]
Before Mrs. Ayesha A. Malik, J
K.B. ENTERPRISES
Versus
FEDERATION OF PAKISTAN and others
W.P. No.12664 of 2015, decided on 2nd June, 2015.

Sales Tax Act (VII of 1990)---
----Ss. 11(3) & 46---Constitution of Pakistan, Art. 199---Constitutional petition---Recovery of sales tax---Second show cause notice during pendency of appeal before Appellate Tribunal---Double jeopardy---Petitioner/taxpayer sought direction to set aside second show-cause notice issued to petitioner in respect of matter in which appeal of Department was pending before Appellate Tribunal---Validity---Appeal of the Department was pending in the same matter with respect to which second show cause notice was issued, therefore, no occasion existed to issue a fresh show cause notice to petitioner---High Court set aside impugned show-cause notice and directed Department to pursue appeal before Appellate Tribunal---Constitutional petition was allowed, accordingly.
Khubaib Ahmad for Petitioner.
Sarfraz Ahmad Cheema for Respondents.

ORDER
MRS. AYESHA A. MALIK, J.---Learned counsel for the Petitioner states that against the order of Commissioner Inland Revenue (Appeals) dated 28.11.2012, an appeal has been filed by the Respondent Department which is still pending. States that since the matter of the Respondent Department is pending before the Appellate Tribunal (Inland Revenue), Lahore, the Respondents cannot issue a fresh show cause notice on the same matter. States that any grievance that they may have with respect to the order passed by the Commissioner Inland Revenue (Appeals) should be raised before the Appellate Tribunal.
2. Learned counsel for the Respondents states that no decision has been taken on the appeal. Further states that Respondent No.3 may look into the matter and pass a speaking order on the issue.
3. I have heard both the learned counsel and find that admittedly an appeal is pending on the same matter with respect to the same allegations and the same amount of Rs.1,850,156/-. Since the appeal of the Respondent Department is pending, there is no occasion to issue a fresh show cause notice. Therefore, the impugned show cause notice is set aside and the Respondents should pursue their appeal before the Appellate Tribunal Inland Revenue.
4. Petition is allowed in the above terms.

KMZ/K-6/L Petition allowed.

PLJ 2016 Lahore 355 (DB)
***Present*: MRS. AYESHA A. MALIK AND FAISAL ZAMAN KHAN, JJ.**
MURDAN ALI ZAIDI, etc.--Appellants
versus
ELECTION COMMISSION OF PAKISTAN, etc.--Respondents
I.C.A. No. 1584 of 2015, heard on 23.11.2015.

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

----R. 35(5)--Punjab Local Government Act, (XVIII of 2013), Ss. 37 & 38--Civil Procedure Code, (V of 1908), S. 12(2)--Election for seat of chairman and V.C. union council--Recount of votes--Order of R.O. was challenged--Once consolidation order was issued, R.O. cannot entertain for recounting of votes--No fraud or misrepresentation--Question of--Whether Returning Officer's order was speaking order or not--Validity--No justification to interfere as Rules prohibit recount after consolidation of results--Election process would be concluded before challenges to election process begin--Pendency of an application for recount does not affect consolidation of results and consolidation order cannot be set aside on account of pendency of application--If R.O. does not entertain application, then applicant left without a remedy and will not be able to challenge result--Once name of returned candidate is published in official gazette, an election petition can be filed under Section 38 of Act r/w Rule 62 of Rules before election tribunal--All illegalities and irregularities committed by R.O. as alleged by election commission can be decided after declaration of results in an election petition--Remedy of appeal was not available as election tribunals have not been established--Remedy of appeal was provided in Act therefore, to require it to be available at that stage was premature since an election petition can only be filed once result was declared in official gazette. [Pp. 358, 359 & 361] A, B, C & E

Punjab Local Government Act, 2013 (XVIII of 2013)--

----S. 60--Corrupt practice--Recounting of votes--Conduct of officials--Consolidation order--Allegation of abuse of powers--Validity--Corrupt practice, bribery, undue influence, illegal practice, tampering and conduct of officials can also be tried under Section 60 of Act--Allegations of abuse of power can also be raised by way of a complaint under Act, 2013. [P. 360] D

2013 SCMR 1676 & PLD 2008 SC 487, *rel*.
Hafiz Muhammad Saleem, Advocate for Appellants.
Mirza Nasar Ahmad, DAG for Respondents.
Rai Akhtar Suleman, Advocate for Respondents No. 5 and 6.
Date of hearing: 23.11.2015.

JUDGMENT
Mrs. Ayesha A. Malik, J.--Through this Intra Court Appeal, the Appellant has impugned order dated 19.11.2015 passed in an application being C.M. No. 3 of

2015 filed by Respondents No. 5 and 6 under Section 12 (2) of the Code of Civil Procedure ("CPC") whereby the said application was dismissed and order dated 17.11.2015 by virtue of which W.P.No. 35350/2015 was accepted by learned Single Judge.

2. The facts of the case are that the Appellant and Respondents No. 5 and 6 contested Local Government Election for the seat of Chairman and Vice Chairman in U.C No. 198 Shadman Lahore held on 31.10.2015. The Appellants were the winning candidates for the seat of Chairman and Vice Chairman. Respondents No. 5 and 6 moved an application for recount of the votes on 01.11.2015. They filed W.P.No. 34053/2015 before this Court seeking a direction to Respondent No. 4, Returning Officer for U.C 198 to decide their pending application. This direction was issued by this Court on 06.11.2015. However, Respondents No. 5 and 6 concealed the fact that on 06.11.2015 notice for consolidation of result had been issued and that the result was consolidated on 07.11.2015. The Returning Officer of U.C No. 198 on the direction of the Court heard the application and rejected it on the ground that notice for consolidation of result had already been issued, hence no recounting could take place. This order of the Returning Officer was challenged by Respondents No. 5 and 6 through filing of W.P.No. 35350/2015. In terms of the order dated 17.11.2015 passed by the learned Single Judge the Returning Officer was obligated to decide the application for recounting before the consolidation of result. Hence the consolidation order of 07.11.2015 was set-aside and a direction was given to the Returning Officer to decide the application for recount of vote before proceeding with the consolidation. Against this order of 07.11.2015, the Appellants moved application C.M. No. 3/2015 under Section 12(2) of the CPC primarily on the grounds that on 17.11.2015 the result was consolidated and Respondents No. 5 and 6 misrepresented the facts to the Court in W.P. No. 34053/2015 and obtained an order directing the Returning Officer to recount the votes. The application of the Appellants was heard but dismissed on the ground that no fraud or misrepresentation by Respondents No. 5 and 6 has been brought before the Court. Hence this appeal.

3. Learned counsel for the Appellants argued that Respondents No. 5 and 6 obtained a direction from the Court on 06.11.2015 for a decision on their application for recount of votes when the consolidation process was underway and finalized on 07.11.2015. Learned counsel stated that Respondents No. 5 and 6 concealed the issuance of consolidation notice from the Court which consolidation was fixed for 06.11.2015 and then postponed to 07.11.2015. Learned counsel stated that consolidation process was completed on 07.1 1.2015 at 10.00 AM in the presence of all the parties. The Respondents No. 5 and 6 then challenged the decision of the Returning Officer rejecting their recount application on 07.11.2015 and the learned single Judge notwithstanding the consolidation order, directed the R.O. to decide upon the recount application and then consolidate the result. Learned counsel argued that once the consolidation order is issued the Returning Officer cannot entertain any application for recounting of votes as per Rule 35(5) of the Punjab Local Government (Conduct of Elections) Rules, 2013 ("Rules").

4. On the other hand, learned counsel for Respondents No. 5 and 6 argued that no case of fraud or misrepresentation has been made out. He stated that Respondents No. 5 and 6 moved application for recounting of votes well before beginning of the consolidation process and the Returning Officer failed to take notice of the application filed by Respondents No. 5 and 6. Hence they approached this Court in its constitutional jurisdiction for a simple direction on their application. Learned counsel argued that a direction was issued on 06.11.2015 in W.P.No. 34053/2015 whereafter the Returning Officer on 07.11.2015 rejected the application of Respondents No. 5 and 6. Learned counsel argued that the stated Respondents challenged the said order of rejection on the ground that at that time, the consolidation order had not been issued, hence the Returning Officer was obligated to decide their application.

5. Leaned DAG also supports the contention made by learned counsel for Respondents and supports the impugned order passed by learned Single Judge.

6. We have heard the learned counsel for the parties at length and gone through the available record. The order impugned dated 19.11.2015 before us has rejected the application of the Appellants filed under Section 12(2), CPC on the ground that no fraud or misrepresentation has been made out. The Appellants have also impugned the order of 17.11.2015 passed by learned Single Judge in WP No. 35350/2015 on the ground that the consolidation order could not have been set-aside simply on account of the fact that the application of Respondents No. 5 and 6 for recount of votes was pending. In this regard Rule 36(5) of the Rules provides that the Returning Officer may recount the valid ballot papers before consolidation of results if the Returning Officer is satisfied that the request or the challenge is reasonable. In terms of this Rule there is no obligation on the Returning Officer to decide every single application for recount that is placed before him. In the first instance, the Returning Officer must satisfy himself that the request for recount or the challenge is reasonable, whereafter he can order for recounting of the votes. As per Rule 36(5) of the Rules this entire exercise must be done before consolidation of results. Once the result is consolidated, the Returning Officer cannot entertain any application for recounting of votes.

7. In this case, WP No. 35350/2015 was filed on 16.11.2015 challenging the consolidation order of 07.11.2015 and an order was issued on 17.11.2015 requiring the Returning Officer to decide upon application for recount *after* the consolidation order had been issued on 07.11.2015. The record shows that it took Respondents No. 5 and 6 ten days to file the writ petition challenging the order of 07.11.2015. Given that the consolidation order had already been issued there was no justification to interfere as the Rules prohibit recount after consolidation of results. As we understand, the spirit of the law is that the entire election process should be concluded before the challenges to the election process begin. The pendency of an application for recount does not affect the consolidation of results and the consolidation order cannot be set aside on account of the pendency of the application. This is because Rule 36 (5) of the Rules is clear that the Returning

Officer may entertain an application for recount. In this context, it was argued that if the Returning Officer does not entertain the application, then the applicant left without a remedy and will not be able to challenge the result. We have considered this argument as well and find that it is also without any merit. As per the Rules, after consolidation of the result, the election result is declared under Section 37 of the Punjab Local Government Act, 2013 ("Act") read with Rule 38 of the Rules and in terms thereof the Election Commission publishes the results in the Official Gazette. Once the name of the returned candidate is published in the Official Gazette, an election petition can be filed under Sections 38 of the Act read with Rule 62 of the Rules before the Election Tribunal. Section 38 and 39 of the Act provide that an election of a returned candidate can only be called into question through an election petition before an Election Tribunal. The grounds for declaring the election of a returned candidate as void are provided in Section 42 of the Act, which reads as follows:--

"42. Ground for declaring election or returned candidate void.--

(1) The Election Tribunal shall declare the election of the returned candidate to be void if it is satisfied that--

(a) the nomination of the returned candidate was invalid; or

(b) the returned candidate was not, on the nomination day, qualified for or was disqualified from, being elected as a member; or

(c) the election of the returned candidate has been procured or induced by any corrupt or illegal practice; or

(d) corrupt or illegal practice has been committed by the returned candidate or his election agent or by any other person with the connivance of the candidate or his election agent.

(2) The election of a retuned candidate shall not be declared void if the Election Tribunal is satisfied that any corrupt or illegal practice was committed without the consent or connivance of that candidate or his election agent and that the candidate and the election agent took all reasonable precaution to prevent its commission."

Section 44 of the Act provides the ground on which the entire election can he declared void, which reads as under:--

44. Ground for declaring elections as a whole void.

The Election Tribunal shall declare the election as a whole to be void if it is satisfied that the result of the election has been materially affected by reasons of--

(a) the failure of any person to comply with the provisions of this Act or the rules; or

(b) the prevalence of extensive corrupt or illegal practice at the election.

Therefore, the spirit of the Act is that the election process should be completed whereafter the declared result can be challenged on several grounds including the ground that the provisions of the Act or the Rules were not complied with.

8. We also noted that corrupt practice, bribery, undue influence, illegal practice, tampering and conduct of officials can also be tried under Section 60 of the Act meaning thereby that allegations of abuse of power can also be raised by way of a complaint under the Act. In the case cited at *Muhammad Aslam Baro v. Sardar*

Muhammad Muqeen Khosa and others (2013 SCMR 1676) it was held that the High Court can issue a direction for deciding applications because a direction does not disenfranchise the petitioner and the bar under Article 225 of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution") would not be applicable. In the case cited at *Syed Nayyar Hussain Bukhari v. District Returning Officer, NA-49 Islamabad and other* (PLD 2008 SC 487) it was held that in election matters the High Court can interfere if no remedy is available to the petitioner. In the case before us remedy is available to the Appellants, however they seek interference before availing that remedy. Learned Single Judge set aside the consolidation order simply because the Returning Officer had not decided the application for recount of votes. The learned Single Judge issued a direction on 06.11.2015 to decide the application if the consolidation of result has already not taken place. When the matter came up again before him on 17.1 1.2015 he set aside the consolidation order because the recount order was not a speaking order, and the Appellants were not heard. We are of the opinion that irrespective of whether the Returning Officer's order was a speaking order or not, any decision on the application was subject to consolidated results. Once the consolidation of results was announced, the Appellants have to wait for the results to be published in the Official Gazelle. Thereafter they have remedy available to them to challenge the result or the process, as the case may be, before the Election Tribunal. All illegalities and irregularities committed by the Returning Officer, as alleged by the Respondents, can be decided after the declaration of results in an election petition. Therefore, to our minds interference in the election process only slows down or delays the declaration of results especially when the Act read with Rules enables the process as well as the results to be challenged by way of an election petition. It was also argued that the remedy of appeal is not available as the Election Tribunals have not been established. The learned DAG stated that as per practice and procedure once the results are declared the Election Tribunals will be notified. We note that the remedy of appeal is provided in the Act therefore, to require it to be available at this stage is premature since an election petition can only be filed once the result is declared in the Official Gazette.

7. Under the circumstances, the appeal is accepted and the orders dated 19.11.2015 and 17.11.2015 passed by learned Single Judge are set-aside and the order dated 07.11.2015 passed by Returning Officer U.C 198 Shadman, Lahore is maintained.

(R.A.) Appeal accepted

2016 P L C 44
[Lahore High Court]
Before Ayesha A. Malik, J
IZHAR CONSTRUCTION (PRIVATE) LTD. through General Manager
Versus
GOVERNMENT OF PUNJAB through Secretary and 6 others
Writ Petition No.23545 of 2015, heard on 5th October, 2015.

Provincial Employees' Social Security Ordinance (X of 1965)---

----Ss. 20, 23, 24, 28 & 46----Provincial Employees' Social Security (Contribution) Rules, 1966, R. 5---Provincial Employees' Social Security (Employers' Returns and Records) Regulations, 1967, Regln.3---Employees' social security fund---Amount and payment of contributions---Increase of unpaid and recovery of contributions etc. as arrears of land revenue---Safeguards to secured person's right in default of contributions by employer---Manner of providing medical care---'Local office' for deposit of contributions---Determination---Respondent-Institution, by way of letter, required petitioner to deposit contributions at its "local office" in its locality, where he carried on his projects of construction work---Question in the present case was as to whether petitioner was to make contributions in local area where he carried on his project or at local office where he was registered---Petitioner contended that he carried on construction work in various parts of the Province---Effect---Impugned letters had clarified that all establishments would pay contributions in respect of their existing and ongoing projects at Sub-Office concerned within territorial jurisdiction, where such works, projects or activities were being carried out---Said letters further provided that the concerned office and such establishment were required to get their employees registered with concerned Directorate or Sub-Office, so that their employees could be benefitted from nearby Directorate as their entitlement under the rules---Section 24 of Provincial Employees' Social Security Ordinance, 1965 provided that, in event of default in payment of contributions towards secured person by employer, the secured person was entitled to all benefits as if the default had not occurred---Secured person would be entitled to the benefits provided under Chapter V of Provincial Employees' Social Security Ordinance, 1965 and amounts, liable to be collected from employer, could be collected in terms of S.23 of Provincial Employees' Social Security Ordinance, 1965 as arrears of land revenue---Respondent-Institution, therefore, could not deny secured person the benefits that he was entitled to on pretext that contribution had not been paid---Understanding of respondent that contribution should have been made locally and that the petitioner should have registered its employees locally where he was carrying on his work was, therefore, totally misconceived---Mandate of law in question was that all contributions were centralized and paid towards the Fund, from which, all amounts were disbursed and paid out to all secured persons entitled under Provincial Employees' Social Security Ordinance, 1965---Respondent-Institution was required to set up its own verification mechanism to ensure that the employer registered all persons and paid required contribution for all secured persons---Under S.46 of Provincial Employees' Social Security Ordinance, 1965, no

reason existed to deny statutory benefit to the secured persons on ground that contribution was not made locally---Respondent-Institution was required under Provincial Employees' Social Security Ordinance, 1965 to provide requisite benefits to secured persons from the Fund and not to treat a contribution as a local payment for provision of benefits---High Court, setting aside the impugned letters, held that term 'local office', used in Regln.3 of Provincial Employees' Social Security (Employers' Returns and Records) Regulations, 1967, would be read as 'local office of the Institution at which it is registered'---Constitutional petition was accepted in circumstances.

Barrister Rafey Altaf for Petitioner.
Ch. Sultan Mehmood, A.A.-G.
Muhammad Nauman Aslam for Respondents Nos.2 to 6 along with Ayyaz Ahmad Farooqi, Deputy Director Legal.
Date of hearing: 5th October, 2015.

JUDGMENT

AYESHA A. MALIK, J.--- Through this petition, the Petitioner has impugned letter dated 24.4.2014 issued by Respondent No.2.

2. The case of the Petitioner is that it is a construction company. The Petitioner regularly pays its contribution under the Punjab Employees' Social Security Ordinance, 1965 ("Ordinance") in respect of its secured employees as defined under the Ordinance. The Petitioner is registered with the Directorate of Social Security, Model Town office of Respondent No.2 where monthly contributions are regularly deposited. The grievance of the Petitioner is that the Respondents through various different letters have required the Petitioner to deposit contributions at a local level in the localities where it carries on its projects of construction works. Learned counsel for the Petitioner stated that the Petitioner carries on construction works in various parts of the Province and the Respondents have required through its letters specifically through impugned letter dated 24.4.2014 to pay contribution to the local offices of the Respondent Punjab Employees Social Security Institution ("PESSI"). Learned counsel stated that in this regard, the Petitioner has been issued letters dated 18.7.2014, 27.8.2014, 9.9.2014, 25.11.2014, 10.12.2014 and 4.8.2015 by the Respondent PESSI. Learned counsel argued that the stated letters are contrary to the Ordinance and the Provincial Employee's Social Security (Contribution) Rules, 1966 ("Rules"). Learned counsel stated that Rule 5 of the Rules specifically provides as follows:-

"The employer shall submit to the local office of the Institution at which he is registered, the copies of pay rolls or contribution schedules referred to in rule 4(1) within fifteen days of the end of each month, or such extended period, not exceeding forty-five days, as the Institution may allow on good causes being shown for the extension, and at the same time shall pay, at the said local office, the total amount of the contribution shown thereon as due."

Learned counsel stated that therefore the impugned letter is against the Rules which specifically require the employer to pay contribution in the local office where the employer is registered. Learned counsel further submitted that the Petitioner is required to pay its contribution to the Respondents which goes to a Fund created under Section 28 of the Ordinance and as such the Respondents are obligated to provide all the prescribed benefits under Sections 35 to 46 read with Sections 47 and 48 of the Ordinance from the Fund. He stated that the Respondents are obligated to maintain lists of all hospitals, dispensaries and other facilities where the benefits should be made available for holders of Social Security Registration Cards.

3. Report and parawise comments have been filed on behalf of the Respondent PESSI. Learned counsel for Respondent PESSI places reliance on Regulation 3 of the Provincial Employees' Social, Security (Employers' Returns and Records) Regulations, 1967 ("Regulations") which provides:--
"An employer whose establishment has been brought within the scope of the Ordinance by Government Notification under the provisions of Section 1(3) shall complete an application to be registered on the appropriate form (Form Respondent-1 attached as Appendix III) obtainable from the nearest local office of the Institution, indicating thereon the appropriate number of his employees liable to become secured persons, and shall send to the local office within 10-days of the said Notification."
Learned counsel stated that therefore the contributions have to be made to the local office in order to ensure that the Petitioner is paying contribution with respect to all its employees working in different local areas of the Province.

4. Heard and record perused.

5. The basic issue before the Court is with respect to the manner in which the contribution is to be received from the Petitioner that is whether the Petitioner is to make contributions in the local area where it carries on its projects or whether it is required to make its contribution at the local office where it is registered. The scheme of the Ordinance is that PESSI shall provide benefits to employees or their dependents in the event of sickness, maternity, injury or death during employment. In terms of Section 2(5) of the Ordinance, contribution means:-
"The sum of money payable to the Institution by an employer in respect of an employee in accordance with the provisions of this Ordinance."
Employee in terms of Section 2(8) means:--
"Any person employed, whether directly or through any other person for wages or otherwise to do any skilled or unskilled, supervisory, clerical, manual or other work in, or in connection with the affairs of an industry or establishment, under a contract of service or apprenticeship, whether written or oral, expressed or implied."
In terms of Section 2(25):--
"Secured person means a person in respect of whom contributions are or were payable under this Ordinance."
The Respondent PESSI collects all contributions paid under the Ordinance and deposit them into a Fund established under Section 28 of the Ordinance called

Employee's Social Security Fund. The Fund is administered by the Institution for the purposes of the Ordinance. In terms of Section 35 of the Ordinance, a secured person who is certified, by a medical practitioner authorized by the Institution is entitled to sickness benefit, maternity benefit, death grant, medical care during sickness and maternity, medical care of dependents and injury benefits. In terms of Section 46 of the Ordinance, in order to provide the stated benefits, the Respondent Institution may with the approval of the Government, establish and maintain such hospitals, dispensaries and other facilities for providing the medical care in pursuance of the provisions of the Ordinance. In terms of Section 46, the Respondent Institution can enter into agreement with Government, any local authority, private body or individual with regard to the provisions of medical care to persons entitled to it under this Ordinance. The Respondent Institution can enter into an agreement for the benefit of its employees for the utilization of the hospital, dispensary or facility and the conditions under which the benefits should be provided, the extent of supervision which the Institution may exercise over the hospital, dispensary or other medical facility and the extent and manner of the imbursement to the employer. As per Section 48 of the Ordinance, all claims for benefits under the Ordinance are to be made within such times as may be prescribed and shall be based on such documents, information and evidence as to entitlement as may be provided in the regulations. Payments in respect of such benefits will also be made in such manner and at such times and places as may be provided in the regulations. The Regulations framed under Section 80 of the Ordinance provide that a secured person shall obtain a Secured Person's Registration Card in terms of Form Respondent-5, Appendix VI of the Ordinance from the local office of the Institution and thereafter a secured person can claim the benefits provided under the Ordinance for himself or for his dependents. The name and social security number of the employee shall be inserted in the Form B-2, B-2A as Appendix I and VIII together with all other particulars specified. On the basis of the given information, the secured person is entitled to claim all amounts due against the provisions of the medical facilities in terms of the agreement it has with the Respondent Institution under Section 46 of the Ordinance. Therefore on the basis of the stated provision, it is clear that an employer is required to deposit contributions for all secured persons with the Institution and on the basis of the centrally collected funds, the medical facilities must be provided to the secured persons.

6. The question that has arisen is whether the contributions under Section 20 of the Ordinance have to be made at the local office where the employee resides and are carrying on the employers works or is the contribution to be made at the local office where the employer is registered. Section 20 of the Ordinance provides that:
"Subject to the other provisions of the Chapter, the employer, shall in respect of every employee, whether employed by him directly or through any other person pay to the Institution a contribution at such times, at such rate [not more than six per cent] and subject to such conditions as may be described."
Rule 5 of the Rules provides that:
"The employer shall submit to the Local Office of the Institution at which he is registered, the copies of pay rolls or contribution schedules referred to in rule 4(1)

within fifteen days of the end of each month, or such extended period, not exceeding forty-five days, as the Institution may allow on good causes being shown for the extension, and at the same time shall pay, at the said Local Office, the total amount of the contribution shown thereon as due."
The issue is caused due to Regulation 3 of the Regulations which provides that:--
"An employer whose establishment has been brought within the scope of the Ordinance by Government Notification under the provisions of Section 1(3) shall complete an application to be registered on the appropriate form (Form Respondent-1 attached as Appendix III) obtainable from the nearest local office of the Institution, indicating thereon the appropriate number of his employees liable to become secured persons, and shall send to the local office within 10-days of the said Notification."
A bare review of the above shows that Regulation 3 has omitted the words 'the nearest local office of the Institution' where the employer is registered.

7. Local office is not defined in Section 2 of the Ordinance nor is it defined in the Rules or the Regulations. The impugned letter, however, has clarified that all establishments will pay contribution in respect of their existing and on going projects at the Sub-Office concerned within the territorial jurisdiction of such works, projects or activities are being carried out. It further states that the concerned office and such establishments are required to get their employees registered with the concerned Directorate or Sub-Office so that their employees can be benefitted from the nearby Directorate as per their entitlement under the rules. Learned counsel for the Respondent PESSI stated that the reason for the impugned letter is that the Petitioner carries on works throughout the province and in the event of any sickness or injury caused during the course of its employment for the benefit of the employee, the medical facilities available as per the Ordinance be made available locally. Therefore the impugned letter requires the Petitioner to deposit its contribution for its workers in the locality in which they are carrying on the works. Learned counsel stated that in this way the local office of the Respondent PESSI will be able to collect the contribution and ensure its payment to the secured persons of that area.

8. The spirit of the Ordinance is that under Section 28, Employee's Social Security Fund is established in which all contributions are made and from that Fund medical benefits are to be provided. Furthermore the Ordinance contemplates the verification process whereby the Respondent PESSI can check the books of the employer for the purposes of inquiring into the correctness of all contributions made for all its employees who are entitled to the benefits provided under the Ordinance. In terms of Section 22(3) of the Ordinance:-
"If an employer fails or maintain records or to submit returns as required by the regulations, or otherwise fails to comply with the provisions of subsection (1) and thereby makes it difficult to ascertain the identity of persons required to be secured or the amount of contribution payable, the contribution shall be assessed on the basis of such evidence as the Institution may find satisfactory for this purpose."

Furthermore Section 24 of the Ordinance provides in the event of default in payment of contribution to a secured person by the employer, the secured person is entitled to all the benefits as if the default has not occurred. This means that a secured person is entitled to its benefits under the Ordinance irrespective of the fact that the contribution has been paid by the employer. The secured person will be entitled to the benefits provided for in Chapter V of the Ordinance and the amounts liable to be collected from the employer can be collected from the employer in terms of Section 23 of the Ordinance as arrears of land revenue. This means that the Respondent PESSI cannot deny the secured person, the benefits it is entitled to on the, pretext that contribution has not been paid. Seen in this context, the understanding of the Respondent PESSI that contribution should be made locally and that the Petitioner should register its employees locally where it is carrying on its works is totally misconceived. The Petitioner is required to register its employees at the local office of the Respondent PESSI where it is registered and is required to pay all contributions for such employees at that local office where it is registered. The mandate of the law is that all contributions are centralized and paid towards the Fund and from the Fund all amounts are disbursed and paid out to all secured persons entitled under the Ordinance. In this regard, the Respondent PESSI is required to set up its own verification mechanism to ensure that the employer registers all persons and that it has paid the required contribution for all secured persons.

9. In this case, it is also necessary to note that it is not the grievance of the Respondent PESSI that the Petitioner is not making the requisite contributions for its employees. It is their case essentially that since the Petitioner carries on construction works throughout the Province it will be beneficial for its employees to avail medical facilities locally, hence contributions should be made locally. However, given the specific provisions of Section 46 of the Ordinance, there is no reason to deny the statutory benefits to the secured persons on the ground that the contribution was not made locally. The Respondent PESSI is required under the Ordinance to provide the requisite benefits to secured persons from the Fund and not treat a contribution as a local payment for availment of benefits.

10. In view of the aforesaid, this petition is allowed and impugned order dated 24.4.2014 passed by Respondent No.2 is set aside. For the purposes of reading Regulation 3 relied upon by Respondent PESSI, the context use of the word 'local office' in the Regulations shall be the same as given in the Ordinance and in the Rules, meaning that the `local office' shall be read as 'local office of the Institution at which it is registered'.

SL/I-39/L Petition allowed.

PLJ 2016 Lahore 491 (DB)
Present: **MRS. AYESHA A. MALIK AND FAISAL ZAMAN KHAN, JJ.**
USMAN TASSADAQ--Applicant
Versus
DISTRICT & SESSIONS JUDGE, LAHORE and 3 others--Respondents
I.C.A. No. 754 of 2012 and C.M. No. 1 of 2015, C.M. Nos. 1, 3/2013 and 2 of 2014, decided on 17.6.2015.

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

-----S. 151--Law Reforms Ordinance, 1972, S. 3--Intra Court Appeal--Withdrawal of applications--Restoration of ICA--Failed to record written judgment--Objection--Validity--Once I.C.A. was withdrawn on instructions, how could the same be resurrected and thereupon, interim orders can be passed--Applications were not competent yet the applicant managed to procure prohibitory orders which High Court was inclined to recall, however, as a request for withdrawal of application has been made--Review applications had been infructuous. [P. 493] A & B
Mr. Imtiaz Rasheed Siddiqui, Advocate for Applicants.
Sardar Faiz Rasool Khan Jalbani, Advocate for Respondents.
Date of hearing: 17.6.2015.

ORDER
C.M. 01-2015

This is an application under Section 151, CPC for consolidation of different applications pending before this Court.

2. Learned counsel appearing for respondent (who is counsel for the applicant in CM No. 1-2013 (filed for resurrection of Intra Court Appeal No. 754-2012, C.M.3-2013 and CM.2-2014) wishes to withdraw his applications.

3. With the concurrence of both the learned counsels, let afore-noted applications may be fixed for today; Office to do the needful.
4. CM. stands disposed of.
C.M. Nos. 1-2013, 3-2013 & 2-2014

C.M. No. 1-2013 is an application under Section 151, CPC for restoration of the Intra Court Appeal No. 754-2012 which was disposed of as having become infructuous on 05.06.2013. **C.M. No. 1-2013** is an application for stay of proceedings before the trial Court and CM. No. 2-2014 is an application for restraining the judgment debtors from alienating their properties.

2. The facts in brief are that a suit under Order 37, CPC was decreed in favour of the applicant to the tune of Rs. 70.638 million. He applied for a certified copy of the judgment & decree which was not provided, because of which, he filed W.P. No. 10415-2012 seeking a direction from this Court for the afore-noted purpose. A

report was called for by the learned Single Judge which was submitted by Member Inspection Team. Through this report, it was revealed that the learned Additional District Judge announced the judgment on 26.03.2012, however on the next dale, defendants Sifat Elahi etc. submitted a complaint before the Hon'ble Inspection Judge Lahore that learned Additional District Judge has failed to record written judgment in accordance with provisions of CPC. The Hon'ble Inspection Judge through a written order dated 27.03.2012 directed to take proper account, whereupon the office of District &. Session Judge Lahore immediately requisitioned the case file and sealed the same.

3. The report would further reveal that when the case file was taken in possession, it did not contain the judgment and decree; the Stenographer of the Court was busy in typing the judgment. It was also reported that on the next day i.e. 28.03.2012. the learned Additional District Judge after completion of judgment & decree has forwarded the same to the office for placing it in the relevant file, upon which, guidance was sought from this Court.

4. After perusal of the report, *vide* order dated 27.09.2012, writ petition was dismissed. Feeling aggrieved, applicant preferred Intra Court Appeal No. 754-2012 which was set down for hearing before the learned Division Bench of this Court. During the course of proceedings on 05.06.2012, following order was passed:

> "The learned counsel for the appellant submits, under instructions, that due to subsequent events the instant appeal has become infrucuous. The appellant, therefore, does not wish to press the appeal.
>
> 2. Disposed of as having become infrucluous "

5. After the aforenoted order, C.M. 01-2013 was filed in which on 18.06.2013, notices were issued to the respondents. In the meantime as no judgment and decree was available in the record of the trial Court, the record was de-sealed and proceedings commenced before the trial Court. Feeling aggrieved applicant preferred C.M. 03-2013 through which a prayer was made that proceedings pending before the trial Court may be suspended, which was allowed on 4.7.2013. Thereafter, C.M. 02-2014 was filed, through which, a prayer was made that the judgment debtors are alienating their properties in order to frustrate the decree, therefore, they may be restrained. *Vide* order dated 24.07.2014, respondent/judgment debtors were restrained from alienating the properties.

6. In the above back drop, on the last date of hearing, learned counsel for the applicants were confronted with the situation that once the Intra Court Appeal was withdrawn on instructions, how could the same be resurrected and thereupon, interim orders can be passed. Learned counsel at that point in time tried to justify the proceedings initiated, however, they sought an adjournment to assist this Court further. Today, Sardar Faiz Rasul Khan Jalbani Advocate, learned counsel for the applicant has entered appearance and submits that he has instructions, to withdraw the applications.

7. We are mindful of the fact that the applications were not competent yet the applicant managed to procure prohibitory orders which we were inclined to recall, however, in the peculiar circumstances as a request for withdrawal of application has been made, we asked the learned counsel for the respondents whether he has any objection to such withdrawal, his answer was in the negative.

8. In view of the afore-noted, these applications are dismissed as withdrawn.

9. As the main application has been withdrawn, therefore, Review Application No. 54-2014 has become infructuous therefore the same is also disposed of.

(R.A.) Application disposed of

2016 P T D 910
[Lahore]
Before Ayesha A. Malik, J
QAISAR ABBAS and others
Versus
MEMBER (TAXES) BOR, PUNJAB and others
W.P. No.15628 of 2015 and 130 other Petitions, heard on 26th October, 2015.

(a) Interpretation of statutes---

----Fiscal statute---Retrospective effect---Principle---Tax statute operates prospectively and not retrospectively unless clearly intended---Where the legislative intent is clearly provided to give retrospective effect to a statutory provision, tax can apply with retrospective effect.
Zila Council, Sialkot through Administrator v. Abdul Ghani Proprietor Iqbal Brothers, Sialkot and others PLD 2004 SC 425 and Muhammad Ilyas v. The State 2009 SCMR 1042 rel.

(b) Punjab Agricultural Income Tax Act (I of 1997)---

----Ss.3-B & 7---Punjab Agricultural Income Tax Rules, 2001, R.14---Agricultural income tax, charging of---Procedure---Retrospective effect---Petitioners were landowners and they were aggrieved of notices issued by authorities for recovery of agricultural income tax for assessment years 2012 and 2013, whereas the provision was applicable to assessment year beginning from 1-7-2014---Validity---Purpose of S. 3-B of Punjab Agricultural Income Tax Act, 1997, was to ensure that agricultural income was paid, at least, on the declared agricultural income---Provision of S. 3-B of Agricultural Income Tax Act, 1997, was to operate irrespective of powers provided to levy and assess tax under S. 3 of Agricultural Income Tax Act, 1997---Section 3-B of Agricultural Income Tax Act, 1997, did not override charging section but was a part of charging section which essentially required an owner to pay agricultural income tax on agricultural income he had declared---Intent of charging section to the extent of levy and assessment where agricultural income was declared in income tax return was clarified by S. 3-B of Agricultural Income Tax Act, 1997---Authorities simply declared amount of agricultural tax due over a period of one, two or three years without even showing breakup for each year---Such was contrary to the provisions of law as in the first instance under Agricultural Income Tax Act, 1997, a tax return must be filed by an owner of land chargeable to tax---Secondly there must be an assessment order for an assessment year as owner of land had a right to challenge assessment order under S. 7 of Agricultural Income Tax Act, 1997---Section 3-B, Agricultural Income Tax Act, 1997 provided that an assessment order was required as it would disclose basis of calculation of tax levied---Even if the amount was taken from income tax return of owner at the rate specified in Second Schedule, an assessment order must be issued by Collector---High Court set aside recovery notices issued by authorities, as the same were illegal

and in violation of mandatory provisions of law---Constitutional petition was allowed in circumstances.

Asif Khan vice Rai Muhammad Yasin, Malik Ejaz Ahmad Phulerwan, Rai Akhtar Suleman, Muhammad Nasir Khan, Mian Haseeb ul Hassan, Abdul Waheed Halib, Masood Ahmed, Ghulam Murtaza, Muhammad Bilal Pervaiz, Khan Muhammad Vehniwal, Rana Muhammad Afza, Imtiaz Hussain Khan Baloch, Saeed Akhtar Khan, Ch. Muhammad Pervaiz Jatala, Imran Maiken, Gul Shah, Muhammad Mohsin Virk, Rana Rashid Akram Khan, Rao Mujahid, Ishfaq Qayyum Cheema, Danish Ahmed Mukaram, Ch. Shahid Hussain, Zafar Iqbal Chohan, Abid Nazir Sial, Tariq Mahmood Ansari, M. Zafar Iqbal Mian, Malik Matee Ullah, Rai Barkhurdar Kharal, Mian Luqman, Rai Muhammad Shahbaz Bhatti for himself and vice Sh. Rasheed Ahmad, Ch. Muhammad Pervaiz Zia, Ms. Ummara Bashir, M. Arif Malhi and Khalid Mahmoud Ansari, M.A. Ghaffar ul Haq and Muhammad Waqas Latif for Petitioners.

Ch. Sultan Mahmood, AAG with Saif Ahmad Bhatti, Law Officer, BOR and Arif Mehdi, Deputy Secretary Recovery, BOR for Respondents.
Date of hearing: 26th October, 2015.

JUDGMENT

AYESHA A. MALIK J.---This common judgment decides upon the issues raised in the Writ Petitions detailed in Schedule "A", appended with the judgment.

2. The common facts in all these cases are that the Petitioners are farmers, who own agricultural land from which they derive agricultural income. Agricultural income is subject to the levy of agricultural income tax under the Agricultural Act, 1997 ("Act") and the rules framed there under namely, the Punjab Agricultural Income Rules, 2001 ("Rules"). By way of amendment in the Act, Section 3B was inserted through the Punjab Finance Act, 2013 ("Finance Act") notified on 29.06.2013. In terms of Section 1 of the Finance Act, it came into force on 01.07.2013. The Petitioners challenge the interpretation of Section 3B of the Act by the Respondents on the ground that they have sought to recover agricultural income tax with retrospective effect from the Petitioners. The other ground of challenge common in all these petitions is that the Respondents seek to recover agricultural income tax without following the mandatory procedure provided under the Act as well as under the Rules.

3. The case of the Petitioners is that Section 3B of the Act came into effect on the first day of July, 2013 and would apply to the assessment year which begins from the first day of July, 2014. In these cases, the Respondents have sought to recover agricultural income tax for the assessment years 2012, 2013 and in some cases for the assessment year 2014. Learned counsel argued that "assessment year" is a defined term under the Act, which means the period of twelve months beginning on the first day of July next following the income year. In terms of the definition,

Section 3B of the Act should be applied to the assessment year beginning from 01.07.2014 and not to the assessment year of 2012 or 2013. Learned counsel further argued that in terms of the mandatory process under the Act the Respondents levy, assess and collect agricultural income tax for a given assessment year. However, in these cases, they have not levied or assessed agricultural income tax but instead have issued recovery notices demanding the recovery of agricultural income tax. They argued that there is no assessment order and no explanation as to the manner in which the tax has been calculated. In some cases the period over which the amount has been calculated has not been disclosed. Learned counsel argued that the recovery notices all follow the same template and simply provide that the given tax is recoverable for the years 2012, 2013 and 2014. However, no detail has been provided as to the manner in which the amount has been calculated nor any details have been given for each assessment year. Learned counsel argued that by failing to issue an assessment order the Petitioners have been deprived of their right to challenge the assessment order under Section 7 of the Act as the Respondents have resorted to direct recovery without following due process. Learned counsel argued that the due process is provided under the Rules such that the Respondents have to issue an assessment order for a particular assessing year and in the event of non-filing of the agricultural income tax return under the Act the Respondents are required to issue notices to the Petitioner to furnish the return for the assessment year before any demand can be raised.

4. Report and para wise comments have been filed by the Respondents. Learned Law Officer argued that the levy of agricultural income tax has been directly linked with the declaration made for agricultural income in the income tax return filed by the taxpayer. Section 3B of the Act allows the Respondents to recover agricultural income tax at the rate prescribed in the first schedule under the Act on the basis of the income declared as agricultural income in the returns filed under the Income Tax Ordinance, 2001 ("Ordinance"). He further argued that on the basis of Rule 14 of the Rules when any agricultural income chargeable to tax under the Act has escaped assessment, the amount due to the Respondents become payable and no proceeding is required to be followed as the rate of tax per acre has been provided for in the first schedule and it is applied to the amount declared in the income tax returns. He further argued that so far as the issue of retrospective application is concerned, Rule 14(3) of the Rules allows the Respondents to recover all amounts due within a period of two years from which the total agricultural income was first assessable. In these cases, the Respondents are seeking to recover the amount due to the Respondents from the year 2012 onwards, which is within the two year limit. He further argued that most of the Petitioners have not filed their agricultural tax returns under the Act and have failed to pay the required tax, hence these amounts stand due and payable from the Petitioners immediately.

5. The first question before this Court is with respect to the applicability of Section 3B of the Act. The Respondents are seeking to recover agricultural income tax for the assessment years 2012, 2013 and 2014. Notices were issued under Rule 14 of the Rules, which require the Petitioners to produce proof of payment of agricultural

income within 15 days and in the event of failure the Respondents shall assess the tax payable under Rule 14 of the Rules. In terms of what has been argued on behalf of the Respondents, the notices under challenge were issued pursuant to the insertion of Section 3B of the Act through the Finance Act. The amendment reads as follows:--

"**Amendment in Act 1 of 1997.**---In the Punjab Agricultural Income Tax Act 1997 (1 of 1997), after Section 3A, the following section shall be inserted:--
3B. Tax on the basis of income tax return.- Notwithstanding the provisions of Section 3, where any person has declared agricultural income for any assessment year in the return filed under the Income Tax Ordinance, 2001 (XLIX of 2001), the person shall pay the tax on such income at the rate specified in the Second Schedule." (Emphasis supplied (sic))

The notification is dated 29.06.2013 and the Act came into force on 01.07.2013. The question that arises is whether the Respondents can recover agricultural income tax on the strength of Section 3B of the Act for the assessment years 2012, 2013 and 2014 given that it came into effect on 01.07.2013. A tax statute operates prospectively and not retrospectively unless clearly intended and it is only where the legislative intent is clearly provided to give retrospective effect to a statutory provision, then the tax can apply with retrospective effect. Reliance is placed on the cases titled "Zila Council, Sialkot through Administrator v. Abdul Ghani Proprietor Iqbal Brothers, Sialkot and others"(PLD 2004 SC 425) and "Muhammad Ilyas v. The State" (2009 SCMR 1042). In this case, there is no such intent. Hence the provisions of the Act will apply prospectively.

6. The Act defines "assessment year" in Section 2(ac) and income year in Section 2 (da) of the Act as follows:--

Assessment year "The period of twelve months beginning on the first day of July next following the income year".

Income year "The financial year next preceding the said assessment year."

On reading both definitions, it is clear that because Section 3B of the Act came into effect on 01.07.2013 it is applicable to the assessment year, which begins 01.07.2014 as it is the next assessment year following the income year which commenced on 01.07.2013. The Respondents have sought recovery for the assessment year starting 01.07.2012 and 01.07.2013. This tantamounts to retrospective application of Section 3B of the Act, which came into effect on 01.07.2013. Hence, recovery for the assessment years 2012 and 2013 cannot be made under Section 3B of the Act.

7. The next question is in relation to the process being followed by the Respondents to recover agricultural income tax under Section 3B of the Act. Notices under Rule 14 of the Rules were issued seeking the recovery of the tax amount within 15 days'

time. The notices state the amount due and also the tax years for which the amount is due. The Respondents have not been able to explain the basis on which this amount was calculated and from where the figures were taken. They have relied upon Section 3B of the Act to urge the point that the data was taken from the income tax returns filed by the Petitioner. However, they have failed to show the data or even confirm that every Petitioner has filed a tax return. Even otherwise, Section 3B of the Act does not allow the Respondents to recover agricultural income tax against the prescribed procedure under the Act.

8. Section 3 of the Act is the charging section which provides that agricultural income tax shall be levied, assessed and collected for each tax year in respect of agricultural income of a tax year of an owner at the rate specified in the First Schedule of the Act. Under the Act, tax is assessed for each assessment year in respect of the total agricultural income of that year. Notwithstanding the levy and assessment of agricultural income tax under Section 3, Section 3B of the Act provides that where a person has declared agricultural income in his income tax return then such person must pay agricultural income tax on the agricultural income declared in the tax income return at the rate specified in the Second Schedule. The purpose of Section 3B of the Act is to ensure that agricultural income tax is paid, at least, on the declared agricultural income. Hence Section 3B of the Act operates irrespective of the powers provided to levy and assess tax under Section 3 of the Act. In this way Section 3B of the Act does not override the charging section but is a part of the charging section which essentially, requires an owner to pay agricultural income tax on the agricultural income he/she has declared. Section 3B of the Act therefore, clarifies the intent of the charging section to the extent of levy and assessment where agricultural income has been declared in the income tax return. The rest of the provisions of the Act provide the mechanism for assessment and collection of tax. Assessment and collection of the tax are provided under Section 4 of the Act. Computation for assessment is under Sections 4A and 4B of the Act but when Section 3B of the Act is applied, the computation for assessment under Sections 4A and 4B of the Act will not apply. In cases falling under Section 3B of the Act the Collector assesses tax on the declared agricultural income by applying the rate given in the Second Schedule of the Act. This amount must be paid irrespective of any computation under Sections 4A and 4B of the Act. The thrust of the Respondent's case is based on the language of Section 3B of the Act which provides that notwithstanding the provisions of Section 3, where any person has declared agricultural income for any assessment year in the return filed under the Income Tax Ordinance, 2001 (XLIX of 2001), the person shall pay the tax on such income at the rate specified in the Second Schedule. As per their understanding the requirements of levy, assessment and collection have become subservient due to the non-obstante clause of Section 3B of the Act. Section 3 of the Act is the charging section of the Act which creates the charge of the tax on agricultural income at the rate specified in the First Schedule. The tax is then assessed and collected as provided under the Act. Section 3B of the Act also creates the charge of the tax on the declared agricultural income at the rate specified. Since both the sections state the incidence of the tax, the non-obstante clause of Section

3B of the Act shall be read in the context of Section 3 of the Act. Section 3B of the Act cannot override the machinery provisions of the Act which actualizes the assessment and collection of the tax. The procedure provided under the Act and the Rules for assessment and collection of tax is mandatory and shall be applicable for the recovery of tax. This means that the owners of agricultural land even under Section 3B of the Act must file an agricultural tax return and an assessment order is mandatory because the charging section of the Act stipulates when the tax is to be charged and who is to pay the tax. The manner in which the tax is to be assessed is under Section 4 of the Act, which provides that the tax shall be assessed and collected in the prescribed manner as provided under the Rules.

9. The procedure under the Rules is that every person who is liable to pay agricultural income tax must file an agricultural tax return as per Rule 5. In terms thereof an assessee shall deliver to the Collector his/her agricultural tax return, who shall issue an acknowledgment receipt as per Form B, which shall be entered in the Register of Returns for the assessment year as per Form C. Agricultural Income Tax is based on self-assessment meaning that once a return is filed under the Act the Collector will assess the tax to be paid on the basis of the information provided in the return filed. In the event that a person does not file his/her return then Rule 6 requires the Collector of the Tehsil to issue notice in writing requiring an owner of the agricultural land to file his/her return in terms of Rule 5 within 30 days. Once the return is filed, the Collector of the Tehsil shall assess the agricultural tax of the owner for the assessment year on the basis of the return filed and determine the tax payable. In this regard, the Collector can call the assessee or require production of books of accounts as per Rules 9, 10 and 11 of the Rules. Where an assessee fails to furnish the return, Rule 12 requires the Collector to pass an assessment order to the best of his judgment. Rule 14 is related to additional assessment in circumstances where agricultural income chargeable escapes assessment or if an assessment is too low or a wrong rate has been applied. In such cases the Collector will issue notice and proceed to make the additional assessment after giving the assessee an opportunity to show cause as to why additional assessment should not be made. Sub-Rule (2) of Rule 14 provides that for the purposes of additional assessment the Collector will only proceed if he has reliable information pertaining to the reasons given in Rule 14 (1) (a) or (b) of the Rules.

10. From the aforementioned, it is clear that in order to recover agricultural tax under the Act a return must be filed and an assessment order is required. The Respondents have admittedly not passed any assessment order in any of the cases before the Court. They have relied on Section 3B of the Act and seek to recover tax on the basis of information collected from the Federal Board of Revenue ("FBR") regarding declared agricultural income in the income tax return of the Petitioners. However, even in this regard they have not been able to show the information provided by the FBR nor have they been able to clarify whether every Petitioner has filed an income tax return. The Respondents have simply declared the amount of agricultural tax due over a period of one, two or three years without even showing the breakup for each year. This is contrary to the provisions of the law. In the first

instance under the Act a tax return must be filed by an owner of land chargeable to tax. Secondly, there must be an assessment order for an assessment year as the owner of land has a right to challenge the assessment order under Section 7 of the Act. With the insertion of Section 3B of the Act an assessment order is required as it will disclose the basis of the calculation of the tax levied. So even if the amount is taken from the income tax return of the owner at the rate specified in the Second Schedule, an assessment order must be issued by the Collector.

11. Therefore, these petitions are allowed and the impugned recovery notices issued by the Respondents are set aside being illegal and in violation of the mandatory provisions of law.

Schedule-A

Details of Writ Petitions mentioned in order dated 26.10.2015 passed in W.P. No.15628/2015

Sr.No.	W.P. Nos.	Parties Name	Notice for the tax year
1	**15628/15**	Qaisar Abbas etc. v. Member (Taxes) BOR, etc.	**2012/13**
2	**18376/15**	Adnan Khan v. Member (Taxes) BOR, etc.	**2012**
3	**20538/15**	Syed Ehsan ur Rehman Bukhari v. Province of Punjab, etc.	**2012**
4	**18438/15**	Mohsin Khan v. Member (Taxes) BOR, etc.	**2012**
5	**17968/15**	Khalid Mehmood etc. v. Province of Punjab, etc.	**2012/2013**
6	**15618/15**	Muhammad Arshad v. Member (Taxes) BOR, etc.	**2012/13**
7	**15614/15**	Syed Fakhar Riaz v. Member (Taxes) BOR, etc.	**2012/13**
8	**15621/15**	Khursheed Bibi v. Member (Taxes) BOR, etc.	**2012/13**
9	**16001/15**	Syed Javed Hasnain Shah v. Province of Punjab, etc.	**2012/13 and 2013/14**
10	**16643/15**	Abdul Razzaq v. Govt. of Punjab, etc.	**2012**
11	**17036/15**	Bilal Ahmad v. Province of Punjab, etc.	**2012/13**
12	**17176/15**	Ghulam Dastgir Lak v. Govt. of Punjab	**2012/13**
13	**17238/15**	Asghar Ali v. Govt. of Punjab, etc.	**2012**
14	**17241/15**	Walayat Ali v. Govt. of Punjab, etc.	**2012/13**
15	**17243/15**	Muhammad Ameen Khan v. Govt. of Punjab	**2013**
16	**17285/15**	Malik Zaheer Abbas v. Govt. of Punjab etc.	**2012**
17	**17379/15**	Muhammad Hayat v. Province of Punjab, etc.	**2012/13**
18	**17387/15**	Ch. Iftekhar Hussain Gondal v. Province of Punjab, etc.	**2012/13**

19	**17670/15**	Mian Faisal Shafi v. Province of Punjab, etc.	**2013**
20	**17386/15**	Imran Ahmad Maiken v. Province of Punjab, etc.	**2013/14**
21	**17526/15**	Muhammad Shoaib Shah v. Province of Punjab, etc.	**2013/14**
22	**17719/15**	Safdar Ali Wahla v. Govt. of Punjab, etc.	**2012**
23	**17768/15**	Muhammad Saeed Akhtar v. Province of Punjab, etc.	**2012**
24	**17836/15**	Mian Muhamad Ashraf Kalyar v. Province of Punjab, etc.	**2012**
25	**17841/15**	Safdar Bivi v. Province of Punjab, etc.	**2012**
26	**17970/15**	Zafar Abbas etc. v. Province of Punjab, etc.	**2012**
27	**30300/15**	Muhammad Arshad Naeem v. Government of Punjab etc.	**2012**
28	**18051/15**	Azmat Ali Malhi v. Government of Punjab etc.	**2012**
29	**18053/15**	Saif Ullah Mangat v. Government of Punjab etc.	**2012**
30	**18055/15**	Muhammad Asad Mangat v. Government of Punjab etc.	**2012/13**
31	**18081/15**	Muhammad Saeed Akhtar v. Province of Punjab etc.	**2012/13**
32	**18089/15**	Syed Nusrat Abbas Sherazi v. Province of Punjab etc.	**2013**
33	**18162/15**	Fahad Farooq v. Province of Punjab etc.	**2012/13/14**
34	**18164/15**	Ehtisham Suleman v. Province of Punjab etc.	**2013**
35	**18165/15**	Mubashir Farooq v. Province of Punjab etc.	**2012/13/14**
36	**18166/15**	Muhammad Musaddaq Farooq v. Province of Punjab etc.	**2012/13/14**
37	**18167/15**	Muhammad Qasim Farooq v. Province of Punjab etc.	**2012/13/14**
38	**18299/15**	Fahad Farooq v. Province of Punjab etc.	**2012/13/14**
39	**18301/15**	Muhammad Musaddaq Farooq v. Province of Punjab etc.	**2012/13/14**
40	**18302/15**	Haq Nawaz Malik v. Province of Punjab etc.	**2012**
41	**18303/15**	Rizwan ul Haq v. Province of Punjab etc.	**2012**
42	**18305/15**	Muhammad Qasim Farooq v. Province of Punjab etc.	**2012/13/14**
43	**18306/15**	Mian Muhammad Farooq v. Province of Punjab etc.	**2012/13/14**

44	**18307/15**	Abdul Khaliq v. Province of Punjab etc.	**2012**
45	**18309/15**	Abdul Wahid v. Province of Punjab etc.	**2012**
46	**18310/15**	Mubashir Farooq v. Province of Punjab etc.	**2012/13/14**
47	**18311/15**	Ahmad Suleman Zahid v. Province of Punjab etc.	**2012**
48	**18312/15**	Mian Muhammad Farooq v. Province of Punjab etc.	**2013**
49	**18353/15**	Tahir Mustafa v. Member (Taxes), BOR etc.	**2012/13**
50	**18379/15**	Muhammad Akbar Virk v. Government of Punjab etc.	**2013**
51	**18417/15**	Rameez Tariq etc. v. Government of Punjab etc.	**2012**
52	**18419/15**	Mubashar Nawaz v. Member (Taxes) BOR etc.	**2013-14**
53	**18439/15**	Anwar ul Haq v. Government of Punjab etc.	**2012**
54	**18441/15**	Abdul Latif v. Government of Punjab etc.	**2012**
55	**18626/15**	Muhammad Amin Warriach v. Government of Punjab etc.	**2013**
56	**18688/15**	Pervaiz Rashid etc. v. Province of Punjab etc.	**2012/13**
57	**18746/15**	Muhammad Shafi etc. v. Province of Punjab etc.	**2012/13**
58	**18681/15**	Muhammad Ahmad Samar Saleem v. Province of Punjab etc.	**2013**
59	**18790/15**	Muhammad Musharaf v. Government of Punjab etc.	**2013**
60	**18796/15**	Muhammad Akhtar v. Province of Punjab etc.	**2012/13**
61	**18853/15**	Muhammad Shakeel v. Province of Punjab etc.	**2013**
62	**18791/15**	Syed Nasir Jamal v. Govt. of Punjab, etc.	**2013**
63	**18793/15**	Syed Nasir Jamal v. Govt. of Punjab, etc.	**2012**
64	**18795/15**	Muhammad Yousaf Ali v. Govt. of Punjab, etc.	**2012**
65	**18834/15**	Mazhar Hussain Shah v. Govt. of Punjab, etc.	**2013**
66	**19022/15**	Javed Iqbal v. Govt. of Punjab, etc.	**2012/13**
67	**19044/15**	Mukhtar Ahmad v. Province of Punjab, etc.	**2013**
68	**19051/15**	Shahid Hayat etc. v. Govt. of Punjab, etc.	**2013**
69	**19257/15**	Asif Javed v. Govt. of Punjab, etc.	**2013**
70	**19285/15**	Rafique Ahmad Nafees v. Province of Punjab, etc.	**2012**

71	**19299/15**	Muhammad Aslam Shah v. Govt. of Punjab, etc.	**2013**
72	**19302/15**	Muhammad Aslam Shah v. Govt. of Punjab, etc.	**2012**
73	**19307/15**	Niaz Ahmad v. Member (Taxes) BOR, etc.	**2013**
74	**19310/15**	Anwaar Ahmad v. Member (Taxes) BOR, etc.	**2013**
75	**19323/15**	Bashir Ahmad v. Govt. of Punjab, etc.	**2012/13**
76	**19344/15**	Nazir Ahmad v. Member (Taxes) BOR, etc.	**2012/13**
77	**18352/15**	Tariq Mahmood v. Member (Taxes) BOR, etc.	**2012**
78	**18356/15**	Gul Muhammad Shah v. Province of Punjab, etc.	**2013/14**
79	**19369/15**	Fateh Sher v. Province of Punjab, etc.	**2012/13**
80	**19376/15**	Nauman Ullah Khan Chattha v. Govt. of Punjab, etc.	**2013**
81	**19379/15**	Hamid Rasool Hanjra v. Govt. of Punjab, etc.	**2013**
82	**19437/15**	Asad Zaman v. Govt. of Punjab, etc.	**2012**
83	**19510/15**	Muhammad Junaid Anwar Chaudhry v. Govt. of Punjab, etc.	**2012**
84	**19516/15**	Rana Muhammad Yousaf v. Province of Punjab, etc.	**2012/13**
85	**19517/15**	Rana Mushtaq Ahmad v. Province of Punjab, etc.	**2012/13**
86	**19550/15**	Abdul Hameed v. Govt. of Punjab, etc.	**2012**
87	**19555/15**	Ashifa Riaz v. Member (Taxes) BOR, etc.	**2012/13**
88	**19557/15**	Taashfeen Riaz v. Member (Taxes) BOR, etc.	**2012/13**
89	**19866/15**	Muhammad Younas v. Govt. of Punjab, etc.	**2013**
90	**19874/15**	Manzoor Ahmad Sajid v. Govt. of Punjab, etc.	**2012**
91	**19968/15**	Zahid Mahmood Khan v. Govt. of Punjab, etc.	**2013**
92	**19994/15**	Muhammad Riaz Khan v. Province of Punjab, etc.	**2011/12**
93	**20004/15**	Muhammad Ramzan v. Province of Punjab, etc.	**2012**
94	**20050/15**	Muhammad Saleem etc. v. Province of Punjab, etc.	**2012/13**
95	**20069/15**	Farooq Nazir v. Member (Taxes) BOR, etc.	**2013**
96	**20071/15**	Masood Anwar v. Member (Taxes) BOR, etc.	**2012**
97	**20075/15**	Iftikhar Ahmad v. Member (Taxes) BOR, etc.	**2012**
98	**20077/15**	Farooq Nazir v. Member (Taxes) BOR, etc.	**2012**
99	**20081/15**	Rana Muhammad Akram Khan v. Member	**2013**

		(Taxes) BOR, etc.	
100	**20097/15**	Muhammad Aslam v. Member (Taxes) BOR, etc.	**2012**
101	**20178/15**	Syed Muhammad Ali v. Province of Punjab, etc.	**2012/13**
102	**20283/15**	Ch. Inayat Ullah v. Govt. of Punjab, etc.	**2012**
103	**20379/15**	Haji Muhammad Younas v. Province of Punjab, etc.	**2013**
104	**20584/15**	Nasir Abbas Khan v. Govt. of Punjab	**2013**
105	**20587/15**	Ahmad Ejaz Khan v. Govt. of Punjab, etc.	**2012**
106	**20593/15**	Muhammad bin Naeem v. Govt. of Punjab, etc.	**2013**
107	**20616/15**	Muhammad Nawaz v. Govt. of Punjab, etc.	**2012/13**
108	**20629/15**	Aftab Iqbal Pannu v. Govt. of Punjab, etc.	**2013**
109	**20762/15**	Muhammad Saad Ullah Khan v. Govt. of Punjab, etc.	**2012/13**
110	**21189/15**	Khalid Mahmood Khan v. Member (Taxes) BOR, etc.	**2012**
111	**22003/15**	Syed Ali Kazmi v. Govt. of Punjab, etc.	**2013**
112	**24180/15**	Hafeez Ahmad Khan v. Govt. of Punjab, etc.	**2012**
113	**23734/15**	Ch. Sikandar Hayat v. Province of Punjab, etc.	**2013**
114	**27017/15**	Syed Farhat Mehdi Kazmi v. Member (Taxes) BOR, etc.	**2012/13**
115	**28156/15**	Rana Muhammad Bilal Farooq v. AC/Collector, etc.	**2012/13**
116	**28239/15**	Akhtar Hussain v. Province of Punjab, etc.	**2012/13**
117	**28814/15**	Safdar Ali v. Govt. of Punjab, etc.	**2012**
118	**23916/15**	Muhammad Afzal v. Province of Punjab, etc.	**2014**
119	**18831/15**	Sardar Hassan Mahmood v. Govt. of Punjab, etc.	**2013/14**
120	**20887/15**	Nasir Ali Khan v. Govt. of Punjab, etc.	**2013**
121	**22005/15**	Syed Afzzal Hussain v. Govt. of Punjab, etc.	**2013**
122	**24147/15**	Rana Muhammad Farooq Saeed Khan v. Assistant Commissioner, etc.	**2012/13**
123	**24813/15**	Haji Abdul Mateen Khan v. Province of Punjab, etc.	**2012/13**
124	**30758/15**	Zafar Ullah Khan v. Province of Punjab, etc.	**2014**
125	**30757/15**	Saif Ullah v. Province of Punjab, etc.	**2014**
126	**30756/15**	Ahmad Raza v. Province of Punjab, etc.	**2014**

127	**30759/15**	Ch. Zia Ullah Khan v. Province of Punjab, etc.	**2014**
128	**30761/15**	Bilal Zafar v. Province of Punjab, etc.	**2014**
129	**18304/15**	Mian Muhammad Ashfaq v. Province of Punjab, etc.	**2012/13**
130	**16465/2015**	Ch. Safder Ali v. Assistant Commissioner, etc.	**2014**

MH/Q-3/L Petition allowed.

PLJ 2016 Lahore 599 (DB)
Present: **MRS. AYESHA A. MALIK AND FAISAL ZAMAN KHAN, JJ.**
MUHAMMAD ALI--Appellant
versus
ELECTION TRIBUNAL/APPELLATE AUTHORITY DISTRICT KASUR and 9 others--Respondents
I.C.A. No. 1671 of 2015, heard on 15.12.2015.

Punjab Local Government Act, 2013--

----S. 38--Punjab Local Government (Conduct of Elections) Rules, 2013, R. 36--Law Reforms Ordinance, 1972, S. 3--Intra Court Appeal--Election of Local Government for seat of general councilor--Application for recount was allowed--Procedure was not followed--No misrepresentation before Court as R.O. could have informed about consolidation of results--Valid votes to be included--Validity--Application for recount was allowed recount was undertaken in his presence and thereafter, result was consolidated--Once result was consolidated, any grievance may have had with announcement of result can be challenged before election tribunal in election petition--I.C.A. was allowed. [P. 601] A

Mr. Munir Hussain Bhatti, Advocate for Appellant.
Mr. Muhammad Saleem Malik, Advocate for Respondent No. 10.
Mr. Nasir Javed Ghumman, Advocate for ECP with *Tariq Mehmood,* RO and *Najmul Arifeen,* PO for Respondents.
Date of hearing: 15.12.2015.

JUDGMENT

Mrs. Ayesha A. Malik, J.--Through this ICA, the Appellant has impugned the order dated 23.11.2015 passed by the learned Single Judge in WP Nos. 34418/2015.

2. The basic facts of the case are that the Appellant and Respondents No. 5 to 10 contested Local Government Election for the seat of General Councilor/General Member in Ward No. 4, U.C No. 26 Olakh Hathar Tehsil and District Kasur held on 31.10.2015. The Respondent No. 10 moved an application for recount of votes on 2.11.2015 which application was entertained by the Returning Officer ("RO") in the presence of all the parties and an order was issued on 2.11.2015. Thereafter the result was consolidated on Form XIII on 3.11.2015. The Respondent No. 10 filed WP No. 34418/2015 praying therein that the RO to receive his application and decide the same as per law. On this writ petition, an order was issued on 23.11.2015 requiring the RO to announce the result of the U.C after hearing the application for recount and including the valid votes.

3. Learned counsel for the Appellant submitted that Respondent No. 10 filed W.P. No. 34418/2015 for an order on his application for recount which had already been

allowed and was undertaken in his presence. Learned counsel submitted that Respondent No. 10 totally misled the Court by saying that his application had not been decided as the same was decided on 7.11.2015. Subsequently the result was consolidated and Form XIII was filed. Learned counsel argued that after issuance of Form XIII, the Respondent No. 10 could not have then called for a second recount of the votes after the consolidation of result.

4. Learned counsel for the Respondent No. 10 submitted that W.P. No. 34418/2015 was filed because Respondent No. 2 did not follow the procedure prescribed under Rule 36 of the Punjab Local Government (Conduct of Elections) Rules, 2013 ("Rules"). Learned counsel stated that Respondent No. 2 was bound to follow the law, hence the writ petition was filed. Further stated that the recount took place on 2.11.2015 which was not in accordance with law which the RO was obligated to follow. Learned counsel further stated that there was no misrepresentation before the Court as the R.O. could have also informed the Court about consolidation of results. He argued that in fact the result was never consolidated on 3.11.2015.

5. Learned counsel for the Respondent ECP produced the original record before us. In terms of the original record, the result was consolidated on 3.11.2015, Form XIII was filed along with Form XIV. Learned counsel for ECP stated that recount took place in presence of Respondent No. 10 which is evident from the attendance sheet of that day. In fact, Respondent No. 10 also gave a statement before the RO that the recount had taken place and that he had no grievance against the announced result.

6. We have heard the learned counsel for the parties and have gone through the original record. In terms of the original record, the consolidation of result took place on 3.11.2015. Prior to the consolidation of result, Respondent No. 10's application for recount was allowed and recount was undertaken by the RO on 2.11.2015. The original attendance sheet produced before us confirms the presence of Respondent No. 10. Learned counsel for Respondent No. 10 does not deny this fact. Thereafter, Respondent No. 10 filed W.P. No. 34418/2015 on 9.11.2015. The prayer in the said writ petition was simply that the RO had not entertained his application for recount which he was obligated to do so. An order was passed on 23.11.2015 in the writ petition for the recount application to be decided as per law and all valid votes to be included. In terms of the original record, Respondent No. 10 could not have prayed for a second recount before the Court on the ground that his application had not been decided. In fact his application for recount was allowed, recount was undertaken in his presence and thereafter the result was consolidated. Once the result was consolidated, any grievance that the Respondent No. 10 may have had with the announcement of the result can be challenged before the Election Tribunal in an election petition under Section 38 of the Punjab Local Government Act, 2013 read with Rule 62 of the Rules. We note that the tribunals have been notified *vide* notification dated 4.12.2015 issued by the Addl: Director General (Legal), Election Commission of Pakistan, Islamabad.

7. Under the circumstances, the appeal is accepted and the impugned order dated 23.11.2015 passed by learned Single Judge is set aside.

(R.A.) Appeal accepted

2016 C L D 902
[Lahore]
Before Ayesha A. Malik and Faisal Zaman Khan, JJ
JOINT REGISTRAR OF COMPANIES, SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN---Appellant
Versus
OMER IQBAL SOLVENT (PVT.) LTD. and another---Respondents
I.C.A. No. 4 of 2010 in C.O. No. 58 of 2009, heard on 24th November, 2015.

Companies Ordinance (XLVII of 1984)---

----Ss. 92, 284 & 287---Scheme of arrangement/amalgamation---Approval---Judge in Chambers of High Court approved scheme of arrangement for the merger of two companies and declared that authorized capital of transferor, which was transferred to, stood vested in the transferee---Plea raised by Registrar of Companies, Securities and Exchange Commission of Pakistan was that process for increasing authorized capital was provided in S. 94 of Companies Ordinance, 1984, and the same was to be followed---Validity---Company was given power under S. 284 of Companies Ordinance, 1984, to sanction compromise or arrangement between the companies and its members or its creditors---Provisions of Ss.284 & 287 of Companies Ordinance, 1984, were a complete code under which merger/amalgamation was sanctioned therefore there was no reasons for a separate application to be filed for such purpose---No illegality was found in the judgment passed by Judge in Chambers of High Court---Securities and Exchange Commission of Pakistan was unable to show that the issue of authorized capital stood outside the ambit of Ss. 284 & 287 of Companies Ordinance, 1984---Intra Court Appeal was dismissed in circumstances.

Tariq Bashir and Umair Mansoor for Appellant.
Nemo for Respondents.
Date of hearing: 24th November, 2015.

JUDGMENT

AYESHA A. MALIK, J.---Through this ICA, the Appellant has impugned judgment dated 6.9.2010 passed by the learned Single/ Company Judge in C.O. No.58/2009.

2. The basic facts of the case are that the Respondents moved a petition under section 284 read with section 287 of the Companies Ordinance, 1984 ("Ordinance") for merger of Respondent No.1 into Respondent No.2. The scheme of arrangement was approved and sanctioned by the learned Company Judge through his judgment dated 6.9.2010. The Appellant is aggrieved by the findings contained in paragraph 23 of the impugned judgment wherein it provides that since the authorized capital of the transferor which is transferred to and stands vested in the transferee has already been subject to payment of the prescribed fee, requiring the transferee to again seek

approval of the SECP or to pay fee all over again is neither logical nor appears to be the intent of the law. It is common ground between the parties that the transferor company paid the entire statutory fee payable on its authorized capital. After merger, the authorized share capital of the transfer will, therefore, be the aggregate of the authorized capitals of the transferor and the transferee company on which the required fee has already been paid by both companies.

3. Learned counsel for the Appellant argued that the process for increasing the authorized capital is provided in section 94 of the Ordinance which procedure must be followed. Where companies are merged, the surviving or transferee company must resolve to increase its authorized capital through a special resolution. If there is any increase in the authorized capital, it must be notified by the Registrar of Companies and is liable to the fee prescribed by the Securities and Exchange Commission of Pakistan ("SECP"). Learned counsel argued that by way of a petition under section 284 read with section 287 of the Ordinance, the authorized capital cannot be transferred or increased. It is his contention that if the authorized capital of the merged entity is to increase, it can only be done by following the procedure under section 94 of the Ordinance and as such cannot be done through an order of the court sanctioning a scheme of arrangement under section 284 read with section 287 of the Ordinance.

4. Despite notice and citation in newspaper, no one has appeared on behalf of the Respondents, hence they were proceeded against ex parte on 29.9.2015.

5. The relevant facts are that Omer Iqbal Solvent (Pvt.) Ltd. (Respondent No.1) with its authorized capital of Rs.200 million divided into 2,000,000 ordinary shares of Rs.100 each, merged into Tahir Omer Industries (Pvt.) Ltd. (Respondent No.2) by virtue of the impugned judgment dated 06.09.2010. The authorized capital of Tahir Omer Industries (Pvt.) Ltd. was Rs.200 million divided into 2,000,000 ordinary shares of Rs.100 each. As per clause vi(7) of the scheme of arrangement the authorized capital of Omer Iqbal Solvent (Pvt.) Ltd. merges into the authorized capital of Tahir Omer Industries (Pvt.) Ltd. The SECP raised an objection on the scheme of arrangement to the effect that if the authorized capital of Tahir Omer Industries (Pvt.) Ltd. is to be increased, it must be done as per sections 92 and 94 of the Ordinance. This objection was decided in the impugned judgment against the Appellant. Hence this appeal.

6. The basic question is whether the authorized capital of the company can be merged and thereby increased vide an order of the court in a petition under section 284 read with section 287 of the Ordinance? Authorized share capital essentially is a notional value which denotes the upper limit for the paid up capital of a company. It does not reflect any investment or actual money put into the company but prescribes a limit on the investment that can be made. At the time of incorporation, the company fixes its authorized capital in the Memorandum of Association and a fee is charged by the SECP on this amount for the purposes of incorporation. The first question is whether the authorized capital of the transferor company merges or

gets added to the authorized capital of the transferee company? And that the authorized capital of the transferor company is reflected in the authorized capital of the transferee company? As per the Appellant the authorized capital cannot be added on or merge into the transferee company's authorized capital without following the process under section 92 read with section 94 of the Ordinance.

7. The Respondents applied for sanction of its scheme of arrangement for merger of two companies. Merger or amalgamation is the absorption of one company into another. Sanction of a scheme of arrangement by the Court under section 287 of the Ordinance means that the property of the transferor company transfers into the transferee company. "Property" as per section 287 of the Ordinance includes rights and powers of every description. Authorized capital represents the total share capital which a company is authorized to maintain. The shareholders have agreed on this upper limit to which their paid up capital can reach. At the time of incorporation a registration fee is paid on the value of the authorized capital of the company which is provided in the Memorandum of Association of the Company. To increase the authorized share capital, the company has to pass a special resolution and once approved registration fee is paid to the SECP on the revised value of the authorized share capital. Therefore the authorized share capital is the notional value which represents the ability of the shareholders to invest in the company. This value is approved by the SECP and a fee is paid on it. It is thus the right of a shareholder to subscribe to the share capital of the company. Hence it is not the notional value which is being transferred or merged but the 'right' to subscribe to the share capital of the company. This right to subscribe is covered under section 284 read with section 287 of the Ordinance which can be transferred to the transferee company. Furthermore we are of the opinion that for the purposes of section 284 of the Ordinance, an aggregate sum of the authorized capital of both companies is calculated which is reflected in the transferee company's authorized capital. As such there is no increase in the authorized share capital which is liable to a fee from the SECP. We are also of the opinion that this fee cannot be charged because it has already been paid by each company and would impose an unnecessary burden on the surviving company.

8. The next question is does the merger of authorized capital require a separate process under section 92 of the Ordinance or is it accomplished under section 287 read with section 284 of the Ordinance. Section 284 of the Ordinance gives the company power to sanction compromise or arrangement between the companies and its members or its creditors. Section 284 read with section 287 is a complete code which sanctions a merger/amalgamation, therefore, there is no reason for a separate application to be filed for this purpose. The whole process of section 284 read with section 287 of the Ordinance is to reconstitute the company without making several applications under the Ordinance for effectuating the merger. Section 284 of the Ordinance itself provides for the process to compromise in a summary way by an order of the Court, which order becomes effective when it is filed with the Registrar within 30 days. Hence section 284 read with section 287 of

the Ordinance does not require a separate application to be filed for the merger of authorized share capital.

9. The arguments of learned counsel for the Appellant that in fact the merged entity has a new authorized capital and must seek approval of the same through a special resolution is baseless. This contention of the Appellant has been dealt with in great deal through the impugned judgment which finds that when a scheme is sanctioned by the Court, it would automatically result in the merger of the authorized capital of the merging company without the need of enhancement of the authorized capital for the transferee company. Further that section 287 of the Ordinance is a complete code in the form of a single window clearance system which ensures that the parties are not put to unnecessary procedure for making applications for authorized changes on account of the merger. We find no illegality with this finding of learned Company Judge.

10. Therefore, we do not find any illegality in the impugned judgment, as the Appellant has not been able to show how the issue of the authorized capital stands outside the ambit of section 284 read with 287 of the Ordinance. Under the circumstances, the instant appeal is dismissed and judgment dated 6.9.2010 passed by the learned Single Judge is maintained.

MH/J-1/L Appeal dismissed.

2016 P T D 1328
[Lahore High Court]
Before Ayesha A. Malik, J
HONDA ATLAS CAR PAKISTAN LTD.
Versus
FEDERATION OF PAKISTAN and others
W.P. No.9491 of 2006, decided on 22nd January, 2016.

Federal Excise Act (VIII of 2005)---

----Ss. 2(3), 2(12a), 3 & First Sched.---Federal Excise General Order No. 4 of 2006, dated---Imposition of Federal Excise Duty on franchise services---"Franchise services"---Definition, nature and scope---Petitioner, engaged in the business of manufacture and sale of automobiles, challenged levy of federal excise duty for franchise services provided to the petitioner under a Licence and Technical Assistance Agreement with a foreign automobile manufacturer---Contention of petitioner, inter alia, was that it did not receive "franchise services", in terms of the definitions of the words "franchise" and "services" under Ss. 2(23) & 2(12a) of the Federal Excise Act, 2005, respectively---Validity---Franchising was a business relationship between the parties where the franchisor serviced and facilitated the business of the franchisee within defined parameters---In the present case, perusal of the agreement between petitioner and the foreign automobile manufacturer revealed that the petitioner ran its business in accordance with the foreign automobile manufacturer's model and the petitioner essentially purchased a business package from the foreign automobile manufacturer which entailed provisions of services aimed at guaranteeing a uniform operation and style of the product and for such services, the petitioner paid a fee and royalty---Fact that technical assistance and know-how under the agreement remained the proprietary right of the foreign automobile manufacturer did not mean or suggest the same was not a service provided by the foreign automobile manufacturer; and furthermore, the fact that the petitioner manufactured the automobiles did not take the ambit of the agreement out of franchise services, as the petitioner manufactured and sold said automobiles in Pakistan and also proved after sale services---Franchise services provided by the foreign automobile manufacturer were for manufacture, sale and all related services provided by the petitioner and the same fell within the ambit of "franchise" and "services" under the Federal Excise Act, 2005---Agreement between the parties in fact provided a way of doing business to the petitioner, which tantamount to a service provided by foreign automobile manufacturer and therefore, since the same was a service provided to the petitioner which originated outside Pakistan but was rendered in Pakistan, petitioner was liable to pay federal excise duty under S.3 of the Federal Excise Act, 2005---Constitutional petition was dismissed, in circumstances.
Dr. MB Ankalsaria v. Commissioner of Wealth Tax, Karachi 1992 SCMR 1755; Diamond Food Industries Limited v Joseph Wolf GmbH & Co. and another 2004 CLD 343 and Amin Textile and others v. Federation of Pakistan and others 2002 CLC 1714 ref.

(b) Franchise---
----Franchise agreement---Connotation---'Franchisor' and 'franchisee'---Rights and obligations---Franchise agreement allowed the franchisee the right to use the mark or patent of a franchisor for a royalty or fee and the franchisee must ensure that the goods or services maintained the uniformity and standard of the franchisor's goods or services----Franchisor provided technical assistance and know-how to protect its mark or patent so as to ensure uniformity in quality and therefore, a franchisor shared its business model with all relevant details so that the franchisee could use the patent, logo or mark of the franchisor and maintain the standard, style, quality and look of the product or services provided, as if it was given by the franchisor itself---Franchisor must grant the franchisee the right to use its patent or mark or logo, that was its intellectual property, to the extent necessary to operate the franchisee business---Franchisor also provided the assistance and know-how in support of the business and helped solve problems along the way.
Waleed Khalid and M. Shoaib Rashid for Petitioner.
Muhammad Zikria Shikh, DAG for Pakistan.
Sarfraz Ahmad Cheema and Shahzad Ahmad Cheema for Respondents.
Date of hearing: 22nd January, 2016.

JUDGMENT

AYESHA A. MALIK, J.---Through this petition, the Petitioner has challenged the levy of federal excise duly on the Petitioner for the franchise services provided to the Petitioner under its License and Technical Assistance Agreement dated 01.04.1994 between the Petitioner and Honda Japan.

2. Briefly the facts of the case are that the Petitioner is engaged in the business of manufacture and sale of Honda automobiles. The Petitioner entered into a License and Technical Assistance Agreement ("Agreement") with Honda Motor Company Japan, a corporation registered under the laws of Japan, with its principal office in Tokyo Japan. In terms of the Agreement, the Petitioner has been granted a license to assemble, manufacture and sell automobiles using the Honda patent. The Petitioner also receives technical assistance to use the Honda patent to manufacture and sell Honda automobiles in Pakistan. The Respondents have levied federal excise duty under the Federal Excise Act, 2005 ("Act") on the franchise services received by the Petitioner under the Agreement. The Petitioner is aggrieved by this levy, hence this Petition.

3. Learned counsel for the Petitioner argued that the Petitioner does not receive any franchise services under the Agreement, hence is not liable to tax under the Act. Learned counsel explained that "franchise" is defined under Section 2(12a) of the Act whereas "services" is defined under Section 2(23) of the Act. He argued that in terms of the definition of the two words, the Petitioner does not receive any franchise service which can be taxed under the Act. He argued that there is a contractual arrangement with Honda Japan whereby the Petitioner has been granted a license to assemble and sell Honda automobiles using the Honda patent and its

Know How. He argued that in terms of Section 3(1)(d) of the Act no services are being provided to the Petitioner by Honda Japan which are subject to the levy of Federal Excise Duty. It is the case of the Petitioner that the use of a patent under the Agreement is not a service but is use of a movable property which cannot be called a service. He argued that Honda Japan is the owner of the patent and merely shares its technical knowledge so as to protect its patent and ensure standardization of its product. Further argued that the Agreement is not an agreement for services but in fact is an agreement for permission to use the patent of Honda Japan which is not a taxable service. Hence, the levy of federal excise duty on the so called services provided by Honda Japan to the Petitioner is ultra vires to the Constitution, the Excise Rules and General Order No.4. Reliance has been placed on Dr. MB Ankalsaria v. Commissioner of Wealth Tax, Karachi (1992 SCMR 1755), Diamond Food Industries Limited v Joseph Wolf GmbH & Co. and another (2004 CLD 343) and Amin Textile and others v. Federation of Pakistan and others (2002 CLC 1714).

4. On behalf of the Respondents it was argued that under the Agreement, the Petitioner is provided franchise services which are subject to federal excise duty under Section 3 of the Act. It is their case that the relationship between Honda Japan and the Petitioner is such that the Petitioner is allowed to use the patents, design and other proprietary rights of Honda Japan to manufacture and sell Honda automobiles in Pakistan. Under the Agreement, Honda Japan provides the Petitioner all its secret technical information, its Know How, data, formulae including designs, drawings, standards, specifications, technical record, manuals, material lists and direction maps. The grant of this technical assistance is a service for the purposes of the Act and without this service the Petitioner cannot manufacture Honda automobiles in Pakistan. Further argued that furnishing of all technical assistance and Know How is a service which is subject to the tax. He argued that it is not movable property of the business of the Petitioner as Honda Japan's provision of technical Know How and assistance to the Petitioner is a service which enables the Petitioner to manufacture, assemble and sell vehicles.

5. Heard and record perused.

6. The Petitioner has challenged the levy of federal excise duty on the franchise services provided under the Agreement on the ground that it does not receive franchise services from Honda Japan. Section 3(1)(d) of the Act levies federal excise duty on services provided in Pakistan, including services which originate outside of Pakistan but provided in Pakistan. Franchise services are provided in Table II of the First Schedule of the Act as item No.11. Franchise is defined in Section 2(12a) of the Act as follows:--

"Franchise" means an authority given by a franchiser under which the franchisee is contractually or otherwise granted any right to produce, manufacture, sell or trade in or do any other business activity in respect of goods or to provide service or to undertake any process identified with franchiser against a fee or consideration including royalty or technical fee, whether or not a trade mark, service mark, trade

name, logo, brand name or any such representation or symbol, as the case may be, is involved."

Services have been defined in Section 2 (23) of the Act as follows:--

"Services" means services, facilities and utilities leviable to excise duty under this Act or as specified in the First Schedule read with Chapter 98 of the Pakistan Customs Tariff, including the services, facilities and utilities originating from Pakistan or its tariff area or terminating in Pakistan or its tariff area."

The Respondents FBR then issued General Order No.4/2006 which provided the manlier in which assessable value of the franchise services could be determined for levy of excise duty on the franchise fee or technical fee or on royalty. In terms of the definition given the word "franchise services" means the services facilities and utilities provided in the First Schedule. Franchise is the right to produce, manufacture, sell or deal in any product or business or service for a fee or consideration including a technical fee or royalty. Therefore, a franchise agreement will grant the franchisee the right to operate its business in the name and style of the franchisor's business. So in essence it is a way to do business. A franchise agreement allows the franchisee the right to use the mark or patent of a franchisor for a royalty or fee. The franchisee must ensure that the goods or services maintain the uniformity and standard of the franchisor's goods or services. The franchisor provides the technical assistance and the Know How to protect its mark or patent so as to ensure uniformity in quality. Therefore, a franchisor shares its business model with all relevant details so that the franchisee can use the patent, logo or mark of the franchisor and maintain the standard, style, quality and look of the product or services provided, as if it is given by the franchisor itself. The franchisor must grant the franchisee the right to use its patent or mark or logo, that is its intellectual property, to the extent necessary to operate the franchisee business. In addition to this the franchisor also provides the assistance and Know How in support of the business and helps to solve problems along the way. Therefore, franchising is a business relationship between the parties where the franchisor services and facilitates the business of the franchisee within defined parameters.

7. The Agreement between the Petitioner and Honda Japan is a license technical assistance agreement. The Petitioner under this agreement is granted a license by the franchisor to assemble, manufacture and sell automobiles in terms of the specific models and types listed in Exhibit I of the Agreement by using the patent and design of Honda Japan, the licensor. In terms of Article 1 of the Agreement, the licensor will provide the Petitioner/licensee all secret and technical information, data, formulae, designs, drawing, standards, specifications, technical records, material lists, processing etc., which are necessary for the manufacture, testing, inspection, sale, maintenance, repair and service of the automobiles. The Know How is also necessary for the construction and operation of the plant which will manufacture the automobiles. This technical assistance and Know How provided by Honda Japan is for the purposes of setting up a plant and its manufacturing facilities as and when desired by the Petitioner/licensee. In terms of Article 3 the Petitioner also receives technical guidance and technical training from the licensor as and when required. As per Article 12 of the Agreement, in consideration for the

technical assistance and Know How and use of the patent, the Petitioner pays a license fee and a royalty to the Honda Japan. The Petitioner is therefore, provided the business model of Honda Japan to manufacture Honda automobiles. For this service the Petitioner pays a fee to Honda Japan. The nature of the relationship between the Petitioner and Honda Japan is governed by the Agreement. The Petitioner runs its own business in accordance with, Honda Japan's model. The Petitioner essentially purchases a business package from Honda Japan which entails the provisions of services aimed at guaranteeing a uniform operation and style of the product. In this package Honda Japan services the business of the Petitioner by providing it the use of its intellectual property rights, technical assistance and Know How for manufacturing and sale of Honda automobiles. For the services rendered the Petitioner pays a fee and also pays royalty. The Petitioner is given the specifications of the automobiles which have to be manufactured in Pakistan under the Agreement along with Know How and technical assistance, guidance and training as and when it is required. These are all in the form of services provided by Honda Japan to the Petitioner for the consideration stipulated in Article 12 of the Agreement. The fact that the technical assistance and Know How is the proprietary right of Honda Japan does not mean or suggest that it is not a service provided by Honda Japan. Also the fact that the Petitioner manufactures the automobiles does not take the ambit of the Agreement out of franchise services as the Petitioner manufactures and sell automobiles in Pakistan and also provides after sale services to its customers. The franchise services provided by Honda Japan are for manufacture, sale and all related services provided by the Petitioner. These all fall within the ambit of franchise and services under the Act. As per the Agreement Honda Japan is the owner of all technical assistance and Know How provided by it and the Petitioner merely enjoys its permission to use the same for a price agreed between the parties. The Agreement in fact provides a way of doing business to the Petitioner, which tantamount to a service provided by Honda Japan. Therefore, since this is a service provided by Honda Japan to the Petitioner which originates outside Pakistan but is rendered in Pakistan, it is liable to pay federal excise duty under Section 3 of the Act.

8. Under the circumstances no case for interference by this Court is made out. Petition dismissed.

KMZ/H-10/L Petition dismissed.

P L D 2016 Lahore 393
Before Ayesha A. Malik, J
KAINAT AKHTAR---Petitioner
Versus
REGIONAL HEADQUARTER NADRA and 2 others---Respondents
Writ Petition No.855 of 2014, heard on 26th February, 2014.

(a) National Database and Registration Authority Ordinance (VIII 2000)--

----S. 9---Constitution of Pakistan, Art. 199---Constitutional petition---Issuance of Computerized National Identity Card---Scope---Adopted child---Contention of respondent-NADRA was that petitioner was adopted child and she did not have a mother or father---Validity---Guardianship certificate had been issued in favour of petitioner by the court of competent jurisdiction---Petitioner had provided the name of her guardian and no contradiction existed in her documents---Every citizen in or out of Pakistan who had attained the age of eighteen years should get himself registered and a parent or guardian of every citizen who had not attained such age should not later than one month after birth of such citizen get such citizen registered in accordance with the provisions of the Ordinance---National Identity Card was a document for identification of a citizen---Issuance of National Identity Card would mean that the information contained therein was valid and correct--- Application form issued by the NADRA had contemplated the category of guardian and same also inquired the relationship with the family head to be explained---Petitioner was entitled to registration with the NADRA and for issuance of her Computerized National Identity Card---Constitutional petition was accepted and respondents were directed to issue Computerized National Identity Card to the petitioner forthwith.
Muhammad Salah-ud-Din v. NADRA PLD 2012 Lah. 378 ref.

(b) National Database and Registration Authority Ordinance (VIII 2000)--

----Preamble---Object---National Database and Registration Authority Ordinance, 2000, was promulgated to facilitate the registration of all the persons and for establishment and maintenance of database, data warehouses, networking, interfacing of databases and related facilities---Purpose of Ordinance and Authority was to register persons and classes thereof including citizens.

Nadeem Ahmad Sheikh for Petitioner.
Jamil Khan, Law Officer for NADRA.
Date of hearing: 26th February, 2014.

JUDGMENT

AYESHA A. MALIK, J.--Through this petition, the Petitioner seeks a direction to the Respondent NADRA for issuance of her computerized National Identity Card (CNIC).

2. The case of the Petitioner is that she is a citizen of Pakistan by birth. She was adopted by Shamim Akhtar who has obtained a guardianship certificate on 23.5.2005 from the court of Mrs. Lubna Ali, Guardian Judge-I, Lahore vide Guardian Case No.39/GC of 2005. After obtaining the guardianship certificate, the guardian applied for B-Form which was issued by the Respondents on 6.6.2006. Thereafter the Petitioner applied for a passport which was also issued to the Petitioner on 12.2.2011 in which the father's name is shown as Guardian Shamim Akhtar. The Petitioner applied for her CNIC where she clearly stipulated that her guardian's name is Shamim Akhtar. However the Respondents have denied the Petitioner the issuance of her CNIC essentially on the ground that she did not have the required information under the parentage column as she was an adopted child.

3. Learned counsel for the Petitioner argued that the B-Form has been issued which clearly provides in the column of father's name that the Petitioner is 'Lay Palik'. In the column of the mother's name it provides the name of the guardian Shamim Akhtar. Similarly he argued that on the passport it provides that she has a guardian by the name of Shamim Akhtar. He further argued that no information has been withheld from the Respondents yet despite the same the Petitioner has not been issued her CNIC. He argued that the basis for issuance of the CNIC is the B-Form and that the Respondents have denied the Petitioner her fundamental right as the citizen of Pakistan. Learned counsel further argued that on 22.3.2006 A/Director General of the Respondents issued a letter to the Headquarters NADRA (SRC Dte), Islamabad requiring a policy to be formulated with respect to adopted children under guardianship. However he argued that despite the same no such policy has been made rendering the Petitioner without any remedy against the Respondents.

4. Report and parawise comments have been filed on behalf of the Respondents. Learned Law Officer on behalf of the Respondents argued that the Petitioner has been granted guardianship certificate on 18.5.2005 from the court of Mrs. Lubna Ali, Guardian Judge-I, Lahore. The Petitioner is still a minor and under the Majority Act, 1875 until she attains the age of 21 years she cannot file the instant petition. He further argued that the B-Form shows that the father's name is 'Lay Palik' whereas the mother's name is shown as Shamim Akhtar. He argued that Shamim Akhtar is the name of the guardian and not the name of the mother of the Petitioner. Further argued that even on the Secondary School Certificate her parentage is mentioned as Shamim Akhtar whereas Shamim Akhtar is the guardian of the Petitioner. He argued that the record of the Petitioner is contradictory, hence she has been denied the issuance of the CNIC. He argued that the record does not clearly stipulate that the Petitioner is an adopted child because in the B-Form in column of mother it says Shamim Akhtar and in the passport under the father's name it says Guardian Shamim Akhtar. He argued that the petitioner should rectify her status as 'adopted child' on her Secondary School Certificate, on the B-Form as well as on the passport after which the Respondents will consider her cases for the purposes of issuance of the CNIC.

5. I have heard the learned counsel for the parties and reviewed the record available on the file.

6. The preliminary objection raised by the learned Law Officer for Respondent NADRA is with respect to the maintainability of the instant writ petition on the ground that the Petitioner had not attained majority, hence she is not entitled to file the instant writ petition. The record shows that the Petitioner's date of birth is 22.7.1995 making her 18 years 6 months and 7 days. The Petitioner is pursuing the instant writ petition for her fundamental right to be issued a CNIC as a citizen of Pakistan. This petition is maintainable and there is no substance in the objection raised by the learned Law Officer.

7. The basic reason for denying the Petitioner her CNIC is that she is an adopted child. A guardianship certificate has been issued by the court of competent jurisdiction on 23.5.2005. This is not denied by the Respondents. The objection of the Respondents is that she does not have a mother or father and that she is adopted by Shamim Akhtar, hence she cannot show the name of Shamim Akhtar as her mother or her father. Specifically the Respondents have objected to the fact that on her Secondary School Certificate it says "son/daughter of Shamim Akhtar". On her Intermediate Part-1 and Part-II Annual Examination it says "Father's name-Shamim Akhtar" and on the passport it says "Father's name-guardianship Shamim Akhtar". The Respondents case is that the record of the Petitioner is contradictory and it is unclear from the record as to whether Shamim Akhtar is the mother or the father or the guardian. The Respondents have also raised the objection that the Petitioner should change her documentation to show her status as an 'adopted child' under the guardianship of Shamim Akhtar. I have heard the learned Law Officer at length and find that the arguments raised by the Respondents are without any merit or legal justification. The Petitioner applied for her CNIC. A review of the form filed by the Petitioner shows that it clearly mentions the name of her guardian as Shamim Akhtar. Column No.11 of the CNIC Form specifically asks for 'Guardian Name' which the Petitioner has provided. Serial No.9 asks for relationship with family head and the Petitioner has written adopted child against that question. Therefore there is no contradiction in the record of the Petitioner with respect to the fact that she is under the guardianship of Shamim Akhtar by virtue of Guardianship Certificate dated 23.5.2005.

8. National Database and Registration Authority Ordinance, 2000 (NADRA Ordinance 2000) preamble stipulates that it is an Ordinance to provide for the establishment of the National Database and Registration Authority so as to facilitate the registration of all persons and the establishment and maintenance of multipurpose database, data warehouses, networking, interfacing of databases and related facilities. Section 9 of the NADRA Ordinance 2000 provides that every citizen in or out of Pakistan who has attained the age of eighteen years shall get himself and a parent or guardian of every citizen who has not attained that age shall, not later than one month after the birth of such citizen, get such citizen registered in accordance with the provisions of this Ordinance. The primary purpose of this

Ordinance and the authority thereunder is to register persons or classes thereof including citizens. It has already been held by this Court in the case titled 'Muhammad Salah-ud-Din v. NADRA' (PLD 2012 Lahore 378) that a national database is to be maintained by the respondent. This database record maintains all the required data regarding a citizen, thus establishing a database or information base known as the citizen database. Every citizen is required to be registered with the respondent and to effectuate the registration every citizen is issued a national identity card. The national identity card is a legal document for identification of a citizen. Its issuance means that the information contained therein is valid and correct. Every citizen who has attained the age of eighteen years is entitled to get himself registered with the Respondent No.3. Section 9 of the NADRA Ordinance 2000 specifically addresses every citizen who has attained eighteen years to get himself registered and every parent or guardian of every citizen to register the birth of such citizen. The application form of the Respondents which seeks the details of the applicant for the CNIC contemplates the category of 'Guardian' and also inquires the relationship with the family head to be explained. The Petitioner is under the guardianship of Shamim Akhtar as issued by the Guardian Court on 23.5.2005. She is entitled to registration with the Respondents and for issuance of her CNIC. Under the circumstances there is no justification to deny the Petitioner issuance of her CNIC.

9. In view of the aforesaid, this petition is allowed. The Respondents are directed to issue the CNIC to the Petitioner forthwith.

ZC/K-16/L Petition allowed.

2016 C L D 1267
[Lahore]
Before Ayesha A. Malik, J
COLONY SUGAR MILLS LTD.---Petitioner
Versus
D.G. ENVIRONMENTAL PROTECTION AGENCY and others---Respondents
W.P. No. 5168 of 2014, decided on 26th February, 2014.

Punjab Environmental Protection Act (XXXIV of 1997)---

----Ss. 16 & 21(3)(a)---Punjab Local Government Act (XVIII of 2013), Ss. 138 & 143---General powers of Inspector---Power to seal property---Scope---Environmental Protection Order---Jurisdiction and power of Environmental Protection Tribunal---Petitioner had undertaken not to throw the polluted water in the drain and ensured safe disposal thereof---Petitioner, therefore, had fair warning of the situation---Distillery plant of the petitioner had been sealed after notice and opportunity, to rectify the (environmental) issues---Power to seal provided under S. 138 of Punjab Local Government Act, 2013 was to be exercised in cases of threat to public health, safety or welfare of the public, and the same was an independent power---Pendency of (Environmental) appeal or complaint against the petitioner could not prevent the Inspector from taking notice of the serious threat to the public health and safety---Remedy of appeal against the impugned order being available to the petitioner under S. 143 of Punjab Local Government Act, 2013, constitutional petition was dismissed.

Mrs. Jawad Hassan and Ch. Imtiaz Elahi for Petitioner.
Samia Khalid, A.A.-G. with Sharjeel Haider, A.D. Legal, Rizwan Bashir T.O. (R) and Zamir Hussain A.C. Phalia for Respondents.

ORDER

AYESHA A. MALIK, J.---Through this petition, the Petitioner has impugned the sealing of distillery plant by the Respondent No.2 for being illegal and contrary to law.

2. The case of the Petitioner is that the Petitioner runs a distillery plant, which is environment friendly and does not cause any adverse environmental effect nor any pollution. The Petitioner received a notice on 21.10.2008 requiring the Petitioner to appear before the Director (North/P&C), EPA Punjab with respect to a complaint issued that its distillery plant was generating water waste, which is exceeding the NEQS limits. The Petitioner filed a reply to the notice wherein it explained the steps that had been taken to remain within the NEQS limits. On 12.02.2009 an Environmental Protection Order (EPO) was issued under section 16 of PEPA, 1997. It was found that the liquid effluents released by the distillery plant exceed the NEQS limits. Against this order, the Petitioner filed an appeal before the

Environmental Protection Tribunal, Lahore which appeal is still pending. Thereafter, a complaint was filed under section 21(3)(a) of PEPA, 1997 (Act of 1997) by Director General, Environmental Protection Agency, Lahore on the ground that the locals of the area of the distillery plant have raised a protest against the toxic effluents being discharged into the water and damaging public property, adversely affecting the crops, the land and the health of the people. The complaint is also pending before Environmental Tribunal, Lahore. In the meanwhile, on 15.02.2014 a notice was issued to the Petitioner essentially on the same grounds as contained in the EPO dated 12.02.2009 and the complaint under section 21(3)(a) of the Act of 1997, directing the Petitioner to appear before the Respondent No.4. On the said date, the Petitioner appeared and filed his reply on 17.02.2014. The Petitioner explained that the matter is sub-judice before the Environmental Tribunal and that the matter is governed by a special law, therefore, the Respondents did not have jurisdiction under the Punjab Local Government Act, 2013 (Act of 2013). After issuing the said notice and without passing any order, the Respondent No.2 sealed the distillery plant of the Petitioner on 24.02.2014. The grievance of the Petitioner is that the act of sealing is illegal as the Respondents do not have jurisdiction under the Punjab Local Government Ordinance, 2001 (Ordinance of 2001) or the Act of 2013. Learned counsel argued that the Act of 1997 is a special law specifically made for the protection and improvement of the environment and for the prevention and control of pollution. Therefore, he argued that since there is a special law the Respondents cannot exercise general powers under the Act of 2013. Learned counsel further argued that the Respondents did not follow any procedure, did not give the Petitioner an opportunity to rectify the defect, did not impose any penalty, did not give the Petitioner any hearing and yet directly went and sealed the distillery plant. Learned counsel further argued that no written order has been passed, hence the act of sealing by the Respondent No.2 is illegal. Further argued that no adequate, efficacious and alternate remedy is available to the Petitioner, hence this writ petition has been filed.

3. Report and parawise comments have been filed by the Respondents. Learned Law Officer argued that on 13.02.2014 an application was submitted before the Respondent No.3 stating therein that the distillery plant of the Petitioner was emitting liquid effluents into the water as a result of which the people of the locality were suffering from various health issues. She argued that the matter became so serious and that the complainant being farmers and other people of locality threatened to protest on the streets against the pollution being caused by the Petitioner if no action was taken against them by the competent authority. The matter was brought to the notice of the Respondent No.2, who convened a meeting of the stakeholders on 15.02.2014. The meeting was attended by the DSP Headquarter on behalf of the DPO, XEN Drainage, District Officer (Environment), the representative of the Kissan Board and Kissan Itehad (the complainants) and a large number of the inhabitants of the area including the management of the Petitioner. The Petitioner was informed that the effluents of the units had hazardous effect on the people of the locality. Mr. Rizwan Niaz, Adman Manager of the Petitioner was directed to stop the discharge of effluent of the distillery. On

17.02.2014 the management of the Petitioner produced an agreement with the Drainage Department and others that they would stop the discharge of the polluted water into the drains and assured that the polluted water of the distillery would be thrown into the drain only when it was treated as per the standards of the Environment Department. Notwithstanding this agreement, the Petitioner continued to drain out the polluted water without any regard to the hazard it was causing. Again a meeting was held on 24.02.2014 when the management of the Petitioner was present and it was decided that the plant should be visited to ascertain the real situation. The representatives of the complainants along with others visited the distillery plant of the Petitioner where it was found that the polluted water of the distillery was still being thrown in the drain without proper care. Learned Law Officer argued that several warnings were given to the Petitioner yet it continued to drain out the polluted water. Therefore, the Respondent No.2 was compelled to take necessary action by sealing the distillery plant of the Petitioner. Learned Law Officer further argued that the Petitioner was well aware that some action will be taken, as it was given fair warning and notice of the same. She argued that they gave an undertaking to correct the situation, however they failed to rectify the issue. Further argued that the DCO under section 138 of the Act of 2013 can seal the premises where it is considered that there is a serious threat to public safety or welfare or danger to life and liberty. She argued that the Petitioner has a remedy available against the sealing order under Section 143 of the Act of 2013, which is the appropriate remedy for the Petitioner to avail.

4. I have heard the learned counsel for the parties and reviewed the record available on the file.

5. The act of sealing the distillery plant was done after giving notice to the Petitioner and after giving it an opportunity to rectify the issue. The original record produced before the Court shows that the Petitioner participated in the meetings and undertook that it will not throw the polluted water into the drainage and shall ensure its safe disposal. Therefore the record shows that the Petitioner had fair warning of the situation at hand. As to the act of sealing the distillery plant by the Respondent No.3, the power to seal is under Section 138 of the Act of 2013 which is to be exercised in cases of threat to public health, safety or welfare of the public. This power is an independent power and the pendency of the appeal or complaint against the Petitioner cannot prevent the Respondents from taking notice of a serious threat to public health and safety. Furthermore, it is noted that remedy of appeal is available under Section 143 of the Act of 2013.

6. Therefore, under the circumstances, no case for interference is made out. Petition Dismissed.

SL/C-9/L Petition dismissed.

2016 P T D 1470
[Lahore High Court]
Before Ayesha A. Malik, J
TAHIR ABBAS and others
Versus
GOVERNMENT OF PUNJAB and others
W.P. No.4406 of 2016 with others connected petitions, heard on 16th March, 2016.

(a) Punjab Agricultural Income Tax Act (I of 1997)---

----Ss. 3, 4 & 2---Punjab Agricultural Income Tax Rules, 2001, Rr. 5, 6, 12 & 13---Assessment of agricultural income tax---Procedure---Filing of Return of income---Scope---Limitation for assessment---Best judgment assessment---Assessment orders by the Collector for several different assessment years---Validity---First assessment order passed by the Collector was for the assessment year 2012-13 i.e. 01-07-2012 to 31-06-2013---Said order was passed on 12-01-2016 which was time barred as more than two years had passed from the date of impugned order---No assessment or recovery could be made for said assessment year---Assessment order was to be passed at the end of the assessment year and thereafter the tax be collected---Assessment year would start from July and end twelve months thereafter---Authorities were directed to ensure to follow the requirements of law and pass assessment orders for each assessing year at the prescribed time---Collector had to determine as to which tax was higher to be paid on cultivated land or on agricultural income---Collector must pass speaking order to show as to how he calculated and assessed the tax from the owner of the property---Nothing was on record to explain and justify the impugned assessment orders which were not a speaking order---Assessment orders did not give any detail on the basis of which the figures had been calculated and tax had been assessed---Agricultural income tax return filed by the owner of the land must be taken into consideration for assessment of agricultural income tax---Every owner of the land had to file a return on or before 30th of December following income year---Collector could extend the date for filing of returns but no extension of time could be given beyond 30 days---Where no return was filed, notice must be issued to the owner by the Collector requiring the return to be filed---If no return was filed, then the Collector could pass assessment order based on his "best judgment assessment"---Impugned assessment orders passed by the Collector were set aside and cases were remitted for passing fresh order after following the required process of law---Constitutional petition was allowed in circumstances.

(b) Administration of justice---

----Mandate of the law must be strictly followed.

Saeed Akhtar Khan, Ch. Muhammad Idrees, Intizar Hussain, Mian Abdul Aziz, Iqbal Khurshid Mughal, Mian Kashif Abbas, Muhammad Shafique Anjum, Ch. Zulfiqar Ali, M.A. Ghaffar ul Haq, Ch. Irfan Sadiq Tarrar, Muhammad Kamran ur

Rashid Meo, Sh. Muhammad Akram, Ghulam Rasool Sail and Mian Tariq Husain for Petitioners.

Ch. Sultan Mahmood, AAG, with M. Khalid, AC Kamalia and Rizwan Nazir, Deputy Secretary (Recovery Board of Revenue, Punjab for Respondents.
Date of hearing: 16th March, 2016.

JUDGMENT

AYESHA A. MALIK, J.---This common judgment decides upon the issues raised in the Writ Petitions detailed in Schedule "A", appended with the judgment.

2. All the Petitioners are land owners in Tehsil Kamalia, District Toba Tek Singh. They have been issued assessment orders by Assistant Commissioner, Kamlia ("AC") who is the Collector of the Tehsil in terms of the Punjab Agricultural Income Tax Act, 1997 ("Act"). The assessment orders pertain to the years 2012-13, 2013-14 and 2014-15. The case of the Petitioners is that they have paid agricultural income tax as per Section 3(1) of the Act-read with the First Schedule, hence they are not liable to pay agriculture income tax on second time as demanded by the AC. The other contention of the petitioners is that a relief package in terms of letters dated 22.9.2015 issued by the Director General, Directorate General Agriculture (Ext. & AR), Punjab and 5.8.2016 issued by the Additional Secretary (Admn), Government of Punjab, Agriculture Department, Lahore was given to the farmers for losses occurred in the previous years which has not been considered by the AC while passing assessment orders. Moreover the orders passed by the AC have failed to take into consideration the process provided under the Act for the purposes of assessment of agricultural income tax. It is their case that without issuance of notices and hearing the parties, the impugned orders have been passed for different assessment years. More importantly the orders are not speaking orders and have failed to follow the procedure laid down under the Act and the Punjab Agricultural Income Rules, 2001 ("Rules"). In this regard, they have relied upon the two judgments of this Court dated 26.10.2015 passed in W.P. No.15628/2015 and 3.2.2016 passed in W.P. No.87/2016 to urge that this matter has been repeatedly decided by this Court. However the Collector of Tehsil has issued the assessment orders in absolute disregard of this Court's judgments as well as in violation of the Act and the Rules.

3. Learned counsel for the Petitioners argued that the assessment orders raise a demand for agriculture income tax without making any assessment as required under Sections 3 and 4 of the Act. Learned counsel further argued that the orders failed to show on which date they have decided what formula has been applied and how the amounts have been calculated. They argued that the figures on the assessment order appear to be random figures as no basis have been given as to from where these amounts have been taken and how they have been calculated. They have also pointed out item No.7 of the order to show that income tax has already been paid and this has not been taken into consideration. It has been argued

that the Act as well as the Rules provide a limitation for assessment to be made whereas the assessment orders pertaining to the year 2012-13 are time barred order as no assessment can be made after the expiry of two years from the end of the assessment year in which agriculture income was first assessable. Learned counsel argued that without following the process and without making a proper assessment, the so called assessment orders are in absolute violation of the law prescribed for the levy, assessment and collection of agricultural income tax.

4. Report and para wise comments have been filed in W.P. No.4406/2016 which have been relied upon for all the petitions. Learned Law Officer at the very outset, explained that this is the first year in which an effort has been made by the Respondents to levy, assess and collect agriculture income tax from the land owners as provided under the Act and the Rules. Learned Law Officer further stated that the orders passed by the AC provide the heads under which the amounts have been calculated and prior to the issuance of the assessment orders, notices were issued to the Petitioners. However, the Petitioners did not respond to any of the notices. He further argued that a comprehensive effort has been made to levy the tax as per the law.

5. Assistant Commissioner/Collector Tehsil Kamalia is also present in Court along with the original record pertaining to the cases of the Petitioners. He stated that he issued the notices to the Petitioners in December 2015 and thereafter passed the assessment orders on 12.1.2016. When questioned that there are three different assessment orders for three different assessment years, he clarified that all assessment orders for the different assessment years were issued on 12.1.2016. With respect to the process followed by him, he stated that notices under Rule 6 of the Rules were issued to the Petitioners for filing of returns. Since they did not comply with the said notices, the assessment orders were passed in January 2016. With regard to the calculations made and the figures provided in the impugned orders, the AC while relying upon the original files stated that he has looked at the girdawiries for calculation of tax on cultivated land and that his calculations are evident from the case files as he has taken the information from the relevant documents of the Petitioners. He further explained that guidelines have been issued on the procedure for assessment and collection of agricultural income tax which has been followed by him.

6. Heard and record perused.

7. All the cases pertain to Tehsil Kamalia, District Toba Tek Singh and have been assessed by the AC who is present in Court. At the very outset, the Respondents were confronted with two judgments of this Court which provide detail procedure to be followed under the Act and the Rules which have not been followed. The Respondents have no response to this query. It appears that the entire exercise of passing assessment orders was carried out without implementing the judgments of this Court.

8. The first issue before the Court is with respect to the question of limitation. Admittedly, all the assessment orders were passed on 12.1.2016. The assessment orders pertain to the assessment years 1.7.2012 to 30.6.2013, 1.7.2013 to 30.6.2014 and 1.7.2014 to 30.6.2015. The Act defines "assessment year" in Section 2(ac) and income year in Section 2 (da) of the Act as follows:--

Assessment year "The period of twelve months beginning on the first day of July next following the income year".

Income year "The financial year next preceding the said assessment year."

According to Section 2(j) of the Act "tax year" means the agricultural year as defined in the Punjab Land Revenue Act, 1967. "Agricultural year" means the year commencing on the first day of July or on such other date as the Board of Revenue, with the approval of Provincial Government, may by notification appoint for any specified area. Thereafter the assessment year starts from first of July and ends twelve months thereafter. Rule 13 of the Rules provides that no assessment shall be made after the expiry of two years from the end of the assessment year in which total agricultural income was first assessable. The first assessment order is for the assessment year 2012-13, meaning from 1.7.2012 to 31.6.2013. Given that the order was passed on 12.1.2016, the assessment order for the 2012-13 is clearly a time barred order as more than two years have passed from the date of the impugned order issued on 12.1.2016. Hence no assessment or recovery can be made for this assessment year by the Respondents.

9. The next question that arises is with respect to the assessment years 2013-14 and 2014-15. Admittedly, the assessment orders were all passed on the same date being 12.1.2016, meaning that assessment for the year 2013-2014 and the assessment for the year 2014-15 were made in January 2016. The only justification offered for this wrong practice is that an effort has been made to streamline the process and start assessing agricultural income tax as required under the Act and the Rules so as to recover revenue due to the Petitioners. In this regard, the law clearly requires that at the end of the assessment year, an assessment order shall be passed and thereafter the tax shall be collected. The assessment year starts in July and ends twelve months thereafter. Instructions to this effect are also provided in the form of guidelines issued by the Respondents, however, it was clearly not followed by the AC. The mandate of the law must be strictly followed. The Respondents are directed to ensure that they follow the requirements of the law and pass assessment orders for each assessing year at the prescribed time as required under the Act and the Rules, so that at the end of the every assessing year the tax pertaining to that particular tax year can be collected. Furthermore in future the practice of passing assessment orders for several different assessment years in one go should be avoided by the Respondents.

10. The other challenge to the assessment orders is that these are not speaking orders and that the prescribed process was not followed. Section 3(i) of the Act provides that agricultural income tax shall be levied, assessed and collected in respect of agricultural income of the owner, at the rate specified in the First Schedule to the Act. The explanation provides that the tax calculated under the First

Schedule is based on the cultivated land for a tax year. Subsection (3) of Section 3 provides that agricultural income tax shall be levied, assessed and collected for each assessment year on the total agricultural income at the rate specified in the Second Schedule and subsection (4) provides that out of the two taxes assessed under subsections (1) and (3) to Section 3 of the Act, the assessee shall be liable to pay the tax, whichever of the two shall be greater. This means that the AC was required to make an assessment of tax year under Section 3(1) and (3) of the Act. He has to determine which tax is higher, meaning thereby the Petitioners have to pay tax on cultivated land or on agricultural income and he could only then raise the demand for agricultural income tax. The impugned orders have not carried out this exercise and are not issued in accordance with Section 3 of the Act as there is no assessment under Section 3(1) or (3). It also appears that in some cases demand for tax on cultivated land and agricultural income has been raised.

11. The AC has totally misunderstood the function of assessment of agricultural income tax and the order to be passed thereunder. For the purposes of assessment and collection of tax Sections 4, 4-A, 4-B, 4-C and 4-D of the Act provides the mechanism to be followed on the basis of which an assessment has to be made by the Collector of the Tehsil. While adopting the procedure, a speaking order must be passed by the Collector of the Tehsil to show how he calculated and assessed the tax from the owner of the property. The order must detail everything and reliance on the record is misconceived. The assessment order is an appealable order, hence it must provide the details on the basis of which an appeal can be filed. For taxing purposes, the Respondents cannot rely on the record to explain and justify an assessment order. The orders impugned before the Court are not speaking orders and do not give any detail on the basis of which the figures have been calculated and ultimately tax has been assessed. The concept of assessing tax requires an application of mind by the adjudicating officer. The Collector of the Tehsil must document the basis of his calculations, the documents relied upon and show his calculations. Assessment to tax is made on an annual basis and must take into consideration the returns filed by the owner of the land as required under Section 4 of the Act read with Rule 5 of the Rules. Every owner of land is required under the Act to file a return in terms of Form-A on or before 30th day of December following income year. The Collector of the Tehsil can extend the date for filing of returns to facilitate the taxpayer but no extension of time can be given beyond 30 days. Where no return is filed notice must be issued to the owner by the Collector of the Tehsil requiring the return to be filed. If no return is filed he can pass an assessment order based on his best judgment in terms of Rule 12 of the Rules. Depending on the best judgment assessment order must be a speaking order wherein the Collector of the Tehsil must show the basis of his calculation for the purposes of assessing the total agricultural income of the assessee and explaining how he has determined the amount of tax that is payable.

12. In these petitions, the AC stated that the impugned orders are based on his best judgment under Rule 12 of the Rules as no returns were filed by any of the Petitioners. He further states that he issued notices in December; 2015 and passed the assessment orders in January, 2016. Learned counsel for the Petitioners admitted

that the Petitioners have not filed their tax return as required under the Act. In this regard, it has already been held that filing of agricultural tax returns is mandatory and the assessing officer that is the Collector of the Tehsil must consider the returns filed by the owners of the land before passing the assessment orders.

13. With respect to W.Ps. Nos.6376, 6377, 6378, 6379 and 6677 of 2016, it is stated that these Petitions raise the common question of law as stated in the preceding paragraphs, however, these Petitions pertain to Tehsil Sargodha, District Sargodha, hence are decided in the same terms thereof.

14. In W.Ps. Nos. 7602, 8239 and 8392 of 2016 challan forms have been issued to the Petitioners along with notices requiring the amounts to be paid within seven days. In these cases, the Petitioners have not filed any return and there is no assessment orders. Every owner of land is required under the Act to file returns in terms of Form-A on or before 30th day of December following income year. He is liable to pay tax with respect to agricultural income in one income year. He may by means of a challan make payment and also furnish his return so that the liability can be assessed. Rule 4 of the Rules when read with Section 3 of the Act clearly provides that the tax that is required to be paid by the taxpayer is either based on the assessment made under Section 3(1) or based on the assessment made under Section 3(3) whichever is higher on a taxpayer who has declared the agricultural income in the income tax returns filed under the Income Tax Ordinance, 2001 at the rate specified in the Second Schedule as per the challan issued. However, notwithstanding the same the returns will still have to be filed and an assessment order will still have to be made on the basis of which it can be determined whether any balance tax is due from the owner of the land. It is noted that as per the earlier judgments of this Court dated 26.10.2015 and 3.2.2016, it has already been stated that filing of returns and issuance of assessment orders is mandatory even under Section 3(b) of the Income Tax Ordinance, 2001 and amounts can only be recovered from the owners of the land after an assessment order has been issued. The Respondents have developed a wrong practice of seeking recovery of agricultural income based on the issuance of challan without issuance of an assessment order.

15. In view of the aforesaid, these petitions are allowed. The impugned assessment orders passed by the AC are set aside and the cases are remitted to the AC concerned for passing fresh orders after following the required process of law.

Schedule - A

Details of Writ Petitions mentioned in judgment
Dated 16.3.2016 passed in W.P. No.440/2016

Sr. No.	W.P. Nos.	Parties Name
1.	4406/16	Tahir Abbas v. Government of Punjab etc.
2.	6315/16	Muhammad Akram v. Commissioner etc.
3.	6316/16	Saeed Khan v. Commissioner etc.

4.	6317/16	Zafar Iqbal v. Commissioner etc.
5.	5224/16	Mian Khurshid Ahmad v. Commissioner etc.
6.	5214/16	Syed Farhat Mehdi Kazmi v. Commissioner etc.
7.	4419/16	Murid Abbas v. Government of Punjab etc.
8.	4421/16	Mst. Shireen Fatima v. Government of Punjab etc.
9.	4423/16	Mian Chaman Hussain v. Government of Punjab etc.
10.	4452/16	Mushtaq Ahmad v. Government of Punjab etc.
11.	5520/16	Ali Raza v. Government of Punjab etc.
12.	5218/16	Mian Aftab Ahmad v. Government of Punjab etc.
13.	5216/16	Naseer Ahmad v. Government of Punjab etc.
14.	5222/16	Qurban Ali v. Government of Punjab etc.
15.	4455/16	Ahmad Ali v. Government of Punjab etc.
16.	4473/16	Mumtaz v. Government of Punjab etc.
17.	4481/16	Muhammad Ameer v. Government of Punjab etc.
18.	4486/16	Khalid Nawaz v. Government of Punjab etc.
19.	4488/16	Rai Nadeem Abbas v. Government of Punjab etc.
20.	4489/16	Muhammad Hussain v. Government of Punjab etc.
21.	4499/16	Salamat Bibi v. Government of Punjab etc.
22.	4502/16	Muhammad Hameed v. Government of Punjab etc.
23.	4501/16	Bashir Hussain v. Government of Punjab etc.
24.	4503/16	Ghulam v. Government of Punjab etc.
25.	4512/16	Mushtaq Ahmad v. Government of Punjab etc.
26.	5108/16	Aown Abbas v. Government of Punjab etc.
27.	5110/16	Ghulam Habib v. Government of Punjab etc.
28.	5120/16	Muhammad Ameer v. Government of Punjab etc.
29.	5134/16	Jamal v. Government of Punjab etc.
30.	5136/16	Iftikhar Ahmad v. Government of Punjab etc.
31.	5138/16	Muhammad Arshad v. Government of Punjab etc.
32.	5174/16	Sardar Ali v. Government of Punjab etc.
33.	5118/16	Azmat Khan v. Government of Punjab etc.
34.	5182/16	Sher Muhammad v. Government of Punjab etc.
35.	5184/16	Abdul Waheed Khan v. Government of Punjab etc.
36.	5186/16	Falak Sher v. Government of Punjab etc.
37.	5192/16	Muhammad Yaqoob v. Government of Punjab etc.
38.	5196/16	Ali Hassan v. Government of Punjab etc.
39.	5188/16	Sheeren Akhtar v. Government of Punjab etc.
40.	4440/16	Ghulam Muhammad Murtaza Ali v. Government of Punjab etc.

41. 5211/16 Maqbool Ahmad v. Government of Punjab etc.
42. 5163/16: Zulfiqar Ali Hassan v. Government of Punjab etc.
43. 5235/16 Talat Mehmood v. Government of Punjab etc.
44. 5111/16 Muhammad Rafique v. Government of Punjab etc.
45. 5169/16 Muhammad Bashir v. Government of Punjab etc.
46. 5187/16 Zeeshan Haider v. Government of Punjab etc.
47. 5177/16 Ghulam Muhammad v. Government of Punjab etc.
48. 5181/16 Akbar Khan v. Government of Punjab etc.
49. 5171/16 Maqsood Ahmad v. Government of Punjab etc.
50. 5137/16 Ameeran Bibi v. Government of Punjab etc.
51. 5131/16 Abdul Hameed v. Government of Punjab etc.
52. 5221/16 Nazir Ahmad v. Government of Punjab etc.
53. 5117/16 Muhammad Ashraf v. Government of Punjab etc.
54. 5161/16 Wali Dad v. Government of Punjab etc.
55. 5121/16 Khalid Mehmood v. Government of Punjab etc.
56. 4579/16 Muhammad Fazal v. Member Tax etc.
57. 5525/16 Ahmad Sher etc. v. Government of Punjab etc.
58. 5410/16 Imran Khan etc. v. Commissioner etc.
59. 5248/16 Sheraz Hussain v. Government of Punjab etc.
60. 5234/16 Muhammad Afzal v. Government of Punjab etc.
61. 5232/16 Hamza Khan v. Government of Punjab etc.
62. 5230/16 Muhammad Anwar v. Government of Punjab etc.
63. 5228/16 Muhammad Ramzan v. Government of Punjab etc.
64. 6045/16 Zubair Khan v. Government of Punjab etc.
65. 5624/16 Naubahar v. Member Tax etc.
66. 6107/16 Muhammad Ameer v. Government of Punjab etc.
67. 4517/16 Munir Hussain Shah v. Government of Punjab etc.
68. 6046/16 Jamshaid Khan v. Government of Punjab etc.
69. 6047/16 Muhammad Saeed Jaffer v. Government of Punjab etc.
70. 6104/16 Gada Hussain v. Government of Punjab etc.
71. 6105/16 Haq Nawaz v. Government of Punjab etc.
72. 6108/16 Khyber Zaman Khan v. Government of Punjab etc.
73. 6111/16 Umer Hayat v. Government of Punjab etc.
74. 6118/16 Muhammad Zafar Iqbal v. Government of Punjab etc.
75. 6289/16 Khizar Abbas v. Commissioner etc.
76. 6290/16 Muhammad Rafique Zahid v. Government of Punjab etc.
77. 6295/16 Sagheer Ahmad v. Member Tax etc.

78. 6298/16 Iqrar Hussain Shah v. Member Tax etc.
79. 6299/16 Muhammad Naveed Anjum v. Member Tax etc.
80. 4456/16 Muhammad Hussain v. Government of Punjab etc.
81. 4484/16 Muhammad Younas v. Government of Punjab etc.
82. 4500/16 Hameed v. Government of Punjab etc.
83. 4506/16 Riaz Ahmad v. Government of Punjab etc.
84. 4779/16 Muhammad Shahid Sohail v. Assistant Commissioner etc.
85. 4508/16 Hira Fatima v. Government of Punjab etc.
86. 4490/16 Barkat Ilahi Mjaz v. Government of Punjab etc.
87. 5183/16 Ghulam Shabbir v. Government of Punjab etc.
88. 5213/16 Muhammad Iqbal v. Government of Punjab etc.
89. 4470/16 Muhammad Hayat v. Government of Punjab etc.
90. 4482/16 Wali Muhammad Khan v. Government of Punjab etc.
91. 5219/16 Ali Muhammad v. Government of Punjab etc.
92. 5115/16 Muhammad Hayat v. Government of Punjab etc.
93. 4492/16 Noor Muhammad v. Government of Punjab etc.
94. 4510/16 Raj Bibi v. Government of Punjab etc.
95. 4448/16 Bashir Ahmad v. Government of Punjab etc.
96. 5620/16 Muhammad Iqbal Hussain v. Member Board of Revenue etc.
97. 6116/16 Sohail Anjum Nazir v. Government of Punjab etc.
98. 6102/16 Raza Ullah Khan Rai v. Government of Punjab etc.
99. 6307/16 Munawar Ali Shah v. Member Tax etc.
100. 6312/16 Irfan Khan v. Commissioner etc.
101. 6310/16 Atta Ullah Shah v. Member Tax etc.
102. 6305/16 Hameed Ullah Shah v. Member Tax etc.
103. 6303/16 Muhammad Ishtiaq Akbar v. Member Tax etc.
104. 6302/16 Ghulam Abbas v. Member Tax etc.
105. 5684/16 Zafar Abbas v. Member Tax etc.
106. 6028/16 Aown Muhammad Khan v. Government of Punjab etc.
107 6029/16 Muhammad Umar v. Government of Punjab etc.
108. 6030/16 Saif ur Rehman v. Government of Punjab etc.
109. 6039/16 Mamraz Khan v. Government of Punjab etc.
110. 6044/16 Muhammad Siddique v. Government of Punjab etc.
111. 4480/16 Ghulam Moeen-ud-Din v. Government of Punjab etc.
112. 4462/16 Liaqat Ali v. Government of Punjab etc.
113. 4424/16 Rai Zahoor Ahmad v. Government of Punjab etc.
114. 4422/16 Habib Ullah v. Government of Punjab etc.

115. 4412/16 Muhammad Tufail v. Government of Punjab etc.
116. 5119/16 Kausar Bibi v. Government of Punjab etc.
117. 5133/16 Waqar Ahmad v. Government of Punjab etc.
118. 5167/16 Lal Din v. Government of Punjab etc.
119. 5227/16 Muhammad Hussain v. Government of Punjab etc.
120. 5205/16 Shahid Nawaz v. Government of Punjab etc.
121. 5189/16 Shaukat Ali Khan v. Government of Punjab etc.
122. 5173/16 Bahadar Ali v. Government of Punjab etc.
123. 5109/16 Muhammad Abdullah v. Government of Punjab etc.
124. 4435/16 Muhammad Sarfraz v. Government of Punjab etc.
125. 5159/16 Niamat Ali v. Government of Punjab etc.
126. 5179/16 Azam Hassan v. Government of Punjab etc.
127. 5193/16 Nawaz v. Government of Punjab etc.
128. 5199/16 Fida Muhammad v. Government of Punjab etc.
129. 5195/16 Muhammad Jawad v. Government of Punjab etc.
130. 8734/16 Rajab Ali v. Member Board of Revenue etc.
131. 8736/16 Miraj Khalid v. Member Board of Revenue etc.
132. 8748/16 Noor Ahmad v. Member Board of Revenue etc.
133. 8749/16 Ghulam Dastgir v. Member Board of Revenue etc.
134. 8110/16 Sadat Hussain v. Government of Punjab etc.
135. 8112/16 Ghulam ul Sadain Khan v. Government of Punjab etc.
136. 6376/16 Muhammad Ibrahim v. Member Tax etc.
137. 6377/16 Azmat Khan v. Member Tax etc.
138. 6378/16 Mushtaq Jelani v. Member Tax etc.
139. 6379/16 Syed Muratab Ali Shah v. Member Tax etc.
140. 6677/16 Nadir Ali v. Province of Punjab etc.
141. 7602/16 Sheikh Masood Akhtar v. Government of Punjab etc.
142. 8239/16 Zulqarnain alias Zulfiqar Ali v. Province of Punjab etc.
143. 8392/16 Muhammad Sarwar etc. v. Government of Punjab etc.
144. 4707/16 Muhammad Nawaz v. Assistant Commissioner etc.
145. 5178/16 Azmat Khan v. Government of Punjab etc.
146. 5190/16 Ali Hassan v. Government of Punjab etc.

ZC/T-8/L Petition allowed.

2016 P T D 2058
[Lahore High Court]
Before Ayesha A. Malik, J
SUPREME TUBE INDUSTRIES (PVT.) LIMITED
Versus
FEDERATION OF PAKISTAN and others
Writ Petition No. 3479 of 2013, heard on 16th March, 2016.

(a) Sales Tax Act (VII of 1990)----

----Ss.2(14) & 2(20)----'Input tax'/'output tax'----Meaning and scope---Input tax, as defined in S. 2 (14) of Sales Tax, 1990, is a tax levied under the Act on the supply of goods to the persons, which means that input tax is paid by the registered person on purchase of goods in the course of or in furtherance of his business---Sales tax being a value added tax, the input tax is the value added to the price of the goods purchased by the registered person---Output tax, on the other hand, as defined in S. 2 (20) of Act, is the tax levied under the Act on supply of goods, made by the person, thus, the tax is levied on the sale of goods made by the registered person during the course of or in furtherance of his business, and the same is the value added to the price of the goods sold by the registered person---Taxable supplies are, therefore, subject to sales tax when the same are bought and sold in the course of business, through different transactions, executed by the registered person---Levy of tax is an ongoing process in a series of transactions where every registered person in the supply chain pays sales tax---Difference between the sales tax paid at the time of purchase (input tax) and the tax paid at the time of sale (output tax) is the amount chargeable to sales tax under Sales Tax Act, 1990.

(b) Sales Tax Act (VII of 1990)----

----Ss. 3, 7, 8, 8B & 73----Scope of tax---Determination of tax liability---Tax credited not allowed---Adjustable input tax---Certain transactions not admissible---Scope---Section 3 of the Act levies sales tax and S.7 subject to Ss. 8 & 8 B of the Act determines the tax liability---Section 7(1) of the Act makes the registered person entitled to deduct input tax from output tax for the purpose of determining its tax liability---Section 7(2) of the Act mandates the requirement, on the basis of which the entitlement of the registered person to claim adjustment would be made---Section 73 of the Act imposes a further condition requiring the registered person to make all payments through proper banking channel in order to claim input tax adjustment---Section 8 of the Act relates to tax credit and sets out when the registered person will not be entitled to claim adjustment of input tax---Section 8 B of the Act restricts the adjustments of input tax in a tax period to 90%.

(c) Sales Tax Act (VII of 1990)----

----Ss.7 & 8 B----Determination of tax liability---Adjustable input tax---Basic right to seek input tax adjustment is provided for in S. 7 of the Act, which determines the

tax liability of the registered person---Entitlement of the registered person for adjustment of input tax is based on documented record or invoices pertaining to the purchases and sales made during a tax period; hence, the adjustment claimed and its admissibility has to be assessed by the authorities to establish the tax liability---Section 8 B of the Act does not grant the right to claim adjustment, as the same only quantifies the extent of the adjustment which would be allowed in a tax period.

(d) Sales Tax Act (VII of 1990)----

----S. 8 B----Constitution of Pakistan, Art. 23---Adjustable input tax---Constitutionality---'Unreasonable restriction', principle of---Applicability---Fundamental right as to provision of property---Petitioners challenged the show cause notice, which provided that the petitioner had claimed excessive input tax adjustments for amounts which were not admissible as per S. 7 read with Ss. 8 & 8 B of Sales Tax Act, 1990---Petitioners also challenged the vires of S. 8 B of the Act on ground that the provisions of the section, being confiscatory, were ultra vires the provisions of Art. 23 of the Constitution, as the department granted input tax adjustment up to 90% of the output tax for every tax period and retained 10% of the adjustable amount to be carried forward each month, and consequently, at the end of each year, any amount pending on account of that 10% was refunded to the petitioners on their application---Petitioners contended that retention of the 10% adjustable amount each accumulated into large amounts of money at the end of each tax years, and thus, the petitioners were deprived of their money throughout each tax year, which they would otherwise invest into their business to prevent financial constraints, and that retention of 10% adjustable amount fell within the ambit of unreasonable restriction on their right to input tax adjustment as guaranteed under Art. 23 of the Constitution---Validity---Fact that S. 8B of SalesTax Act, 1990 allowed the department to retain 10% of the adjustable amount meant that the department was confiscating the property of the petitioners resulting in unjust enrichment---Petitioners, in the present case, however, had not shown that what amounts they were entitled to, which had been retained by the department for each month, nor had any of them, except one petitioner, quantified their proprietary right, that was being confiscated---Petitioners, without demonstrating the actual confiscation and deprivation, had challenged the vires of S. 8 B of the Act---Legislature, in its wisdom, had legislated S. 8 B of Act for the efficacious fulfillment of the objects and purposes of Sales Tax Act, 1990---In determining reasonableness of the restriction imposed under the law, the Court must bear in mind the competing interest so as to serve the public purpose---Basic purpose of S. 8B of the Act was to recover tax and to encourage the taxpayers to document its transactions, so that a tax activity could be charged with the required tax---Section 8 B of the Act, therefore, had a rational nexus with the purpose of Sales Tax Act, 1990 and with the scheme thereof, which required adjustment of input tax to determine the tax liability and a refund of excessive amounts to the registered persons---Petitioner had failed to establish infringement of any fundamental right; therefore, question of proportionality did not arise---Restriction imposed in terms S. 8 B of the Act was reasonable, and as such, the same did not deprive the registered

persons of any property or amounts due to them---Clear violation of a fundamental right must be evident when a law was challenged---Cases in hand had been built on conjectures and presumptions, as no particulars or financial implications had been provided---Petitioners were obliged to show as to how their proprietary right was being infringed and what amounts they were entitled to for the purposes of input tax adjustment; without the same, strong presumption of constitutionality, legality and reasonableness was attached to S. 8 B of the Act---Petitioner should have filed their respective replies to the impugned show cause notices to show that they had not claimed any excessive adjustment---Constitutional petition could not be filed against a show cause notice, since only a notice had been served, for which a reply must be submitted---Case of one of the petitioners, who showed that some amounts due to him from the audited accounts, being a case of personal hardship, did not justify a challenge to the constitutionality of S.8B of the Act---Constitutional petition was dismissed in circumstances.

D.G. Khan Cement Company Ltd. through Chief Financial Officer v. Federation of Pakistan through Secretary Ministry of Law and 3 others PLD 2013 Lah. 693 and Muhammad Nasir Mahmood and another v. Federation of Pakistan through Secretary Ministry of Law, Justice and Human Rights Division, Islamabad PLD 2009 SC 107 ref.

All Pakistan Newspapers Society and others v. Federation of Pakistan and others PLD 2012 Sindh 129; Mst. Ummatull ah through Attorney v. Province of Sindh through Secretary Ministry of Housing and Town Planning, Karachi and 6 others PLD 2010 Kar. 236 and Federation of Pakistan through Secretary, Ministry of Finance and others v. Haji Muhammad Sadiq and others 2007 CLD 1 = 2007 PTD 67 rel.

Khurram Shahbaz Butt, Muhammad Ajmal Khan, Hashim Aslam Butt, Naveed Zafar Khan, Zahid Ateeq Chaudhary, H. M. Majid Siddiqui, Javed Iqbal Qazi, M.M. Akram, Muhammad Nauman Yahya, Muhammad Mohsin Virk, Abdul Waheed Habib, Sami Ullah Zia, Muhammad Amir Qadeer, Muhammad Shahid Baig, Muhammad Rehman and Muhammad Asif Rana for Petitioners
Muhammad Zikria Sheikh, DAG and Muzammil Akhtar Shabbir, DA G. for Respondents
Muhammad Yahya Johar for Respondent FBR/Commissioner.

Ch. Muhammad Zafar Iqbal, Sarfraz Ahmad Cheema, Muqtedir Akhtar Shabbir, Ch. Imtiaz Ali, Ibrar Ahmad, Ahmad Hassan Khan, Imran Rasool, Kunwar Riaz Ahmad Khan, Mrs. Kausar Parveen, Ehsan ur Rehman Sheikh, Saeed ur Rehman Dogar, Liaqat Ali Chaudhary, Shahid Sarwar Chahil, Mian Qamar-ud-Din, Muhammad Asif Hashmi, Raza Ashfaq Sheikh, Secretary (IR) Operations, FBR. Zulqarnain Tirmazi, Commissioner Zone-I, LTU for Inland Revenue.
Dates of Hearing: 4th, 11th December, 2015, 27th January, 10th and 16th March, 2016.

JUDGMENT

AYESHA A. MALIK J.---This common judgment decides upon the issues raised in the Writ Petitions detailed in Schedules "A" and "B", appended with the judgment, as all Petitions challenge the vires of Section 8B of the Sales Tax Act, 1990 ("Act") and raise common questions of law and facts.

2. Petitions mentioned in Schedule "A", challenge the vires of Section 8B of the Act on the ground that it is in violation of Article 23 of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution") being confiscatory in nature as it restricts adjustment of input tax to 90% of the output tax and the remaining 10% of the adjustable amount is illegally retained by the Respondents and carried forward into the next tax period. Petitions detailed in Schedule "B" in addition to the challenge to the vires of Section 8B of the Act, have impugned show cause notices calling for an explanation from the Petitioners with respect to adjustment of input tax in excess of the 90% of the output tax.

3. The Petitioners before the Court are involved in various sectors of business such as the chemical industry, plastic industry, polypropylene industry and the textile industry. Some are involved in the manufacturing business of steel pipes and of foot wear. It is the case of all the Petitioners that Section 8B of the Act, promulgated through the Finance Act, 2007, is illegal and unconstitutional as the Respondents grant input tax adjustment up to 90% of the output tax for every tax period and retain 10% of the adjustable amount, which amount should be refunded to the Petitioners. This 10% of the adjustable amount is carried forward in each tax period that is every month and ultimately at the end of the year, any amount pending is refunded to the Petitioners on an application seeking refund. Learned counsel for the Petitioners argued that the provisions of Section 8B of the Act are confiscatory in nature as the FBR retains the 10% adjustable amount which they are not entitled to. This amount belongs to the Petitioners and is the property of the Petitioners. Since the Petitioners are deprived of their property it causes great financial hardship to the Petitioners as the money can be invested in the business and will prevent financial pressure on the business. Learned counsel explained that on account of the 10% adjustable amount retained by the Respondents a certain portion of input tax adjustment is carried forward each month and consequently large amounts are retained by the Respondents over the year which is then refunded to the Petitioners at the end of the tax year. They argued that this amounts to unjust enrichment and is an unreasonable restriction imposed on the registered person. They also argued that it is confiscatory in nature and violative of Article 23 of the Constitution as they are deprived of their property. Learned counsel explained that under the previous regime, the Petitioners were given 100% tax adjustment for each tax period and certain businesses were excluded from the ambit of Section 8B under SRO No.644(1)/2007 dated 27.6.2007. Learned counsel argued that several efforts have been made to resolve this issue by the Respondents, however, no positive response was given to the Petitioners, hence the instant Petitions have been filed.

4. This Court vide order dated 5.11.2015 issued notice to the learned Attorney General for Pakistan under Order XXVII-A of the Civil Procedure Code, 1908 and also directed to file report and parawise comments on behalf of the Respondent Federation. Whereupon the Respondent Federation has filed report and parawise comments. Parawise comments have also been filed on behalf of the Respondent FBR. Today Raza Ashfaq Sheikh, Secretary (IR) Operations, FBR and Zulqarnain Tirmazi, Commissioner Zone-I, LTU, Lahore have appeared before the Court on behalf of the Respondents to assist the Court.

5. The Federal Government in its report and parawise comments and in response to the notice under Order XXVII-A of the Civil Procedure Code, 1908 has stated that they will rely upon the reply filed by the Respondent FBR for the purposes of defending the law and explaining the intent of Section 8B of the Act. Raza Ashfaq Sheikh, Secretary (IR) Operations, FBR and Zulqarnain Tirmazi, Commissioner Zone-I, LTU, Lahore present before this Court have filed their written reply in which they have explained the intent and working of the law.

6. In terms of what has been argued on behalf of the Respondents the purpose of Section 8B of the Act is to collect the tax due and encourage correct declaration of taxable supplies by registered persons. This in turn discourages misdeclaration which has become a serious problem for the FBR and hampers the collection of tax. By retaining 10% of the adjustable amount for each tax period, the registered person is compelled to file proper documents to get its refund. It is their case that lack of proper documents in the business of the registered persons allows a registered person to claim 100% refund of amounts it is not entitled to. The Respondents have to wait until an audit is conducted or inquiry is made before it can recover excessive amounts claimed by the registered person under the garb of input tax adjustment. It is their case that Section 8B of the Act ensures that the liability to pay sales tax is satisfied and the registered person is encouraged to document its sales and purchases. It is the FBR's experience that when a registered person claims a refund in each tax period it is based on misdeclarations and the State is deprived of the tax it is entitled to collect under the Act. Section 8B of the Act has assured that this practice be abandoned. The data from 2007 onwards shows that frivolous refund claims have reduced substantially. They also argued that no loss is caused to any of the Petitioners and there is no case before the Court where the adjustable 10% is retained throughout the year such that it could be labeled as causing financial loss to the Petitioners. To the contrary the practice of misdeclaration is being checked and controlled and sales tax is recovered. Learned counsel have also argued that in case there is individual hardship, it cannot become a ground to challenge the vires of the law or urge deprivation. It is their case that the question of refund under Section 8B of the Act is a concession granted to the registered person which cannot be claimed as of right. The legislature in its wisdom required that the law ensure that tax was duly paid and by virtue of a refund application the registered person should not avoid payment of tax due. In any event, if at all any amounts are carried forward in a month it will be refunded to the registered person in the next tax period. It has also

been argued that there is a presumption in favour of the law of its constitutionality and the scheme of law is not confiscatory. Both the officers have categorically stated that there is no case where 10% of the adjustable amount is carried forward each month, ultimately resulting in a major refund at the end of the year.

7. The basic issue raised in the Petitions is the vires of Section 8B of the Act, which reads as follows:

"8B Adjustable input tax.---(1) Notwithstanding anything contained in this Act, in relation to a tax period, a registered person shall not be allowed to adjust input tax in excess of ninety per cent of the output tax for that tax period:

[Provided that the restriction on the adjustment of input tax in excess of ninety per cent of the output tax, shall not apply in case of fixed assets or capital goods:]

Provided further that that the Board may, by notification in the official Gazette, exclude any person or class of persons from the purview of subsection (1).

(2) A registered person, subject to subsection (1), may be allowed adjustment [or refund] of input tax not allowed under sub-section (1) subject to the following conditions, namely:-

(i) In the case of registered persons, whose accounts are subject to audit under the Companies Ordinance, 1984, upon furnishing a statement along with annual audited accounts, duly certified by the auditors, showing value additions less than the limit prescribed under sub section (1) above; or

(ii) In case of other registered persons, subject to the conditions and restrictions as may be specified by the Board by notification in the official Gazette.

(3) The adjustment or refund of input tax mentioned in sub-section (2), if any, shall be made on yearly basis in the second month following the end of the financial year of the registered person.

(4) Notwithstanding anything contained in subsections (1) and (2), the Board may, by notification in the official Gazette, prescribe any other limit of input tax adjustment for any person or class of persons.

(5) Any auditor found guilty of misconduct in furnishing the certificate mentioned in subsection (2) shall be referred to the Council for disciplinary action under section 20D of Chartered Accountants, Ordinance, 1961(X of 1961)].

In order to appreciate the case of the Petitioners it is necessary to understand the meaning of input tax and output tax in the context of Section 8B of the Act. Input tax as defined in Section 2(14) of the Act is tax levied under the Act on the supply

of goods to the person, meaning that it is sales tax paid by the registered person on the purchase of goods in the course of or in furtherance of its business. Since sales tax is a value added tax, input tax is the value added to the price of the goods purchased by the registered person. Output tax as defined in Section 2(20) of the Act is the tax levied under the Act on a supply of goods, made by the person so it is the tax levied on the sale of goods made by the registered person during the course of or in furtherance of its business. It is the value added to the price of the goods sold by the registered person. In this way taxable supplies are subject to sales tax when they are bought and sold in the course of business, through different transactions, executed by registered persons. It is an ongoing process in a series of transactions where every registered person in the supply chain pays sales tax. The difference between the sales tax paid at the time of purchase (input tax) and the tax paid at the time of sale (output tax) is the amount chargeable to sales tax under the Act. While Section 3 levies sales tax, Section 7 of the Act, subject to Sections 8 and 8B, determines the tax liability. In terms of Section 7(1) the registered person is entitled to deduct input tax from output tax for the purpose of determining its tax liability. Section 7(2) of the Act mandates the requirements on the basis of which the entitlement of the registered person to claim adjustment shall be made. Section 73 of the Act imposes a further condition requiring the registered person to make all payments through proper banking channel in order to claim input tax adjustment. In this way the registered person files its tax returns and claims refund under Section 7 of the Act. The application is processed and the refund claim is decided upon by the competent person. Section 8 relates to tax credit and sets out when the registered person shall not be entitled to claim adjustment of input tax and Section 8B restricts the adjustment of input tax in a tax period to 90%.

8. The Petitioners case is that once they have satisfied the requirements of Section 7 read with Section 8 of the Act and established their entitlement for input tax adjustment they have a proprietary right under Article 23 of the Constitution to receive the refund amount. The fact that Section 8B of the Act allows the Respondents to retain 10% of the adjustable amount means that the Respondents are confiscating the property of the Petitioners resulting in unjust enrichment. In support of this argument interestingly the Petitioner in WP No.3479/2013 is the only Petitioner who has relied upon its audited accounts to show that some amounts are due to it from the Respondents in the form of a refund under Section 8B of the Act. No other Petitioner has shown what amounts it is entitled to, which are retained by the Respondents each month, nor has any Petitioner quantified the proprietary right that is being confiscated. Without demonstrating the actual confiscation and deprivation of property the Petitioners have challenged the vires of the law on the ground that their right to property under Article 23 is denied by Section 8B of the Act. Furthermore, the Petitions mentioned in Schedule "B? have challenged show cause notices wherein it is alleged that they have claimed excessive input tax adjustment for amounts they were not entitled to and which amounts were not admissible as per Section 7 read with Sections 8 and 8B of the Act. Even these Petitioners have not shown through any document how the law is confiscatory and which amounts they are entitled to which are carried forward under the 10%

adjustable amount which is retained by the Respondents. With reference to these Petitioners since it is just a show cause notice, the Petitioners should have filed their respective replies to show that they have not claimed excessive adjustment. In this regard it is settled law that a constitutional petition cannot be filed against a show cause notice since only a notice has been served for which a reply must be submitted. Even otherwise it has been held in the case titled All Pakistan Newspapers Society and others v. Federation of Pakistan and others (PLD 2012 Sindh 129) that a heavy burden is cast on a person challenging the validity or vires of any law. A clear violation of a fundamental right must be evident when challenging the law. This burden has not been discharged by the Petitioners before the Court as they have not shown what amounts have been confiscated or what amounts they were entitled to under Section 7 which has been retained consequent to the 10% restriction under Section 8B of the Act. It appears that the all the cases are built on conjectures and presumptions as no particulars or financial implications have been provided. The Petitioners were obligated to show how their proprietary right is being infringed and what amounts they are entitled to for the purposes of input tax adjustment. Without the same, a strong presumption of constitutionality, legality and reasonableness is attached to Section 8B of the Act. An onerous burden is cast on the Petitioners, who have to show that their fundamental right has actually been infringed. Reliance is placed on the case titled Mst. Ummatull ah through Attorney v. Province of Sindh through Secretary Ministry of Housing and Town Planning, Karachi and 6 others (PLD 2010 Karachi 236).

9. The other argument of the Petitioners is that retaining the 10% adjustable amount is an unreasonable restriction on the right to input tax adjustment. Even though I have already held that the Petitioners have failed to make out their case that the Respondents have retained 10% of the adjustable amount the argument of reasonable restriction must be seen. The basic right to seek input tax adjustment is provided for in Section 7 of the Act which determines the tax liability of the registered person. The entitlement of the registered person for adjustment of input tax is based on documented record or invoices pertaining to the purchases and sales made during a tax period. Hence the adjustment claimed and its admissibility have to be assessed by the authorities to establish the tax liability. Section 8B of the Act does not grant the right to claim adjustment. It only quantifies the extent of the adjustment which will be allowed in a tax period. Hence the Petitioners argued that it places an unreasonable restriction on their proprietary right guaranteed under Article 23 of the Constitution. Reliance has been placed on the cases titled D.G. Khan Cement Company Ltd. through Chief Financial Officer v. Federation of Pakistan through Secretary Ministry of Law and 3 others (PLD 2013 Lahore 693) and Muhammad Nasir Mahmood and another v. Federation of Pakistan through Secretary Ministry of Law, Justice and Human Rights Division, Islamabad (PLD 2009 SC 107). The question which needs to be answered is whether the restriction of 90% is an unreasonable restriction on the right to the adjustable amount.

10. The right to claim adjustment under Section 7 has been made subject to Section 8B of the Act. This means that any entitlement under section 7 will be refunded up to 90% and 10% of the adjustable amount will be carried forward into the next month. The Petitioners have relied upon PLD 2013 Lahore 693 (supra) which has deliberated on the term reasonable restriction and finds that the law on reasonable restriction must uphold the constitutional theme of democracy, freedom, equality, tolerance, social justice and advance the principles of policy. It finds that where the vires of law are challenged the Court must examine the right and the restriction imposed and thereafter determine if the restriction is necessary and proportionate, has a proper purpose and a rational connection to the underlying act. In the case cited at PLD 2009 SC 107 (supra) it was held that a reasonable restriction cannot arbitrarily or excessively invade the fundamental right. That the law cannot be arbitrary, excessive or beyond what is required in the public interest. In this regard Raza Ashfaq Sheikh, Secretary (IR) Operations, FBR and Zulqarnain Tirmazi, Commissioner Zone-I, LTU, Lahore have categorically stated that the biggest problem in the way of recovering sales tax is the lack of documentation. They explained that the sales tax regime is based on self assessment hence without proper documentation and whilst relying on fake invoices and seeking adjustment on inadmissible amounts registered persons are able to claim excessive amounts which hampers the recovery of tax. Section 8B of the Act was legislated to ensure refund of admissible claims of input tax. The refund is given up to 90% allowing the registered person to claim refund of 10% in the next tax period so that the registered person is discouraged from claiming excessive adjustment. In order to recover input tax adjustment amounts the registered person claims amount which are due to it which means that the 10% restriction discourages wrong claims. They also stated that in most cases the adjustable amount is fully paid within two successive tax periods meaning that if there is a 10% adjustment it is fully recovered in the next tax period. Hence the wisdom of the legislature was to ensure recovery of the sales tax, such that the restriction is in furtherance of the objective of the Act that is to recover sales tax. I have already held that the Petitioners have failed to establish that any fundamental right has been infringed therefore the question of proportionality does not arise. It is the case of the Respondents that the 90% restriction was required to ensure that the tax is collected and the registered person documents its transactions so as to reduce misdeclarations and fake invoicing. In terms of what has been stated, it was a policy decision of the Legislature to impose a restriction to ensure that the tax is recovered. This restriction is reasonable and as such does not deprive the registered person of any property or amounts due to it. It has been held in the case titled Federation of Pakistan through Secretary, Ministry of Finance and others v. Haji Muhammad Sadiq and others (2007 CLD 1 = 2007 PTD 67) by the august Supreme Court of Pakistan that the only consideration for a Court, when a statute is challenged, is whether the legislation under challenge is permissible under the Constitution. Reasonableness or otherwise is a matter of legislative policy and it is not for the Courts to adjudicate on the policy. It has also been held in this case that when a Court interprets fiscal statutes and laws relating to economic activities, the judicial approach should be to give the legislatures maximum flexibility to fulfill its purpose. In these cases although the Petitioners have challenged the vires

of Section 8B of the Act on the ground that it deprives them of their fundamental right to property under Article 23 of the Constitution, they have failed to show what property they have been deprived of by way of Section 8B of the Act. They have also not been able to convince this Court that the objective of recovering and collecting tax through Section 8B imposes an unreasonable restriction on any proprietary rights of the Petitioners. The legislature in its wisdom legislated Section 86 of the Act for the efficacious fulfilment of the objects and purposes of the Act. In determining reasonableness of the restriction imposed under the law the Court must bear in mind the competing interests so as to serve the public purpose. The basic purpose is to recover the tax and to encourage the tax payer to document its transactions so that the taxable activity can be charged the required tax. Section 8B of the Act therefore has a rational nexus with the purpose of Act and with the scheme of the Act which requires adjustment of input tax to determine the tax liability and a refund of excessive amounts to the registered person. In terms of the mechanism provided under Section 7 of the Act, the Petitioners have not been able to show that when practically applying Section 8B of the Act, they have claimed amounts pending with the Respondents which they are entitled to. So far as the Petitioner in W.P. No.3479/2013 it has shown some amounts due to it from the audited accounts. However, if any amounts are due to it, then this amounts to a case of personal hardship and does not justify a challenge to the constitutionality of Section 8B of the Act.

11. In view of the aforesaid, no case for interference is made out. All the Petitions are dismissed.

SL/S-53/L Petitions dismissed.

2016 P T D 2171
[Lahore High Court]
Before Ayesha A. Malik, J
FAISALABAD ELECTRIC SUPPLY COMPANY LIMITED (FESCO)
through Director
Versus
FEDERATION OF PAKISTAN through Secretary Finance and 4 others
Writ Petition No.14247 of 2014, decided on 5th January, 2016.

Income Tax Ordinance (XLIX of 2001)---

---S. 235---Electricity consumption---Collection of advance tax on the amount of electricity bill---Scope---Federal Board of Revenue issued clarification that advance tax had to be collected on the gross amount of electricity bill---Contention of petitioner was that advance tax must be collected on the electricity consumed and not on the total electricity bill---Validity---Advance tax was to be charged on the electricity consumed and not on the total billed amount which would include sales tax, income tax and in some cases further tax and extra tax---Advance income tax could not be levied on sales tax---Impugned clarification of Federal Board of Revenue was set aside---Constitutional petition was allowed in circumstances.
Deputy Collector of Customs, Railway Station, Lahore v. Messrs Abdul Ghaffar Abdul Rehman and others 2005 PTD 194 and 1994 PTD 848 rel.
Mian Ashiq Hussain for Petitioner.
Syed Muhammad Haider Kazmi vice Miss. Kausar Parveen for Respondents.
Mirza Nasar Ahmad, D.A.G.

ORDER

AYESHA A. MALIK, J.---The Petitioner seeks a clarification with respect to the charging of advance tax under Section 235 of the Income Tax Ordinance, 2001 ("Ordinance") on the electricity bill.

2. Learned counsel for the Petitioner submits that Respondent FBR issued a clarification on 08.06.2013 in terms of which income tax under Section 235 of the Ordinance was to be charged and collected on the electricity bill which includes the amount of sales tax paid on the said bill. Learned counsel states that this clarification issued by the FBR is contrary to Section 235 of the Ordinance and the respondents have served a notice to the Petitioner dated 08.05.2014 seeking an explanation with respect to the collection of advance tax under Section 235 of the Ordinance. Learned counsel argued that advance income tax cannot be charged on the sales tax that has been paid. Reliance has been placed upon the case titled Deputy Collector of Customs, Railway Station, Lahore v. Messrs Abdul Ghaffar Abdul Rehman and others (2005 PTD 194). He further stated that Section 235 of the Ordinance itself is clear that tax must be collected on the electricity consumed and not on the total electricity bill, which include sales tax, income tax and in some cases further tax and extra tax.

3. Report and parawise comments have been filed on behalf of the Respondents. It was argued on behalf of the Respondents that on the basis of a clarification issued by the FBR dated 08.06.2013 advance tax under Section 235 of the Ordinance has to be collected on the gross amount of the electricity bill, which will include sales tax. It has also been argued that since a show cause notice has been impugned, the instant petition is not maintainable. The case of the Respondents is that the Petitioner is the withholding agent of the Respondents, who is required to collect tax in terms of the clarification dated 08.06.2013 issued by the FBR.

4. The basic issue is with respect to the collection of advance tax under Section 235 of the Ordinance. Section 235 of the Ordinance provides that advance tax should be collected at the rate specified in Part IV of the First Schedule on the amount of electricity bill of a commercial or industrial consumer. The question before the Court is what amount should be considered in the electricity bill for the purposes of advance tax. The Respondents have required the Petitioner to include all amounts in the electricity bill including the amount paid as sales tax, income tax and in some cases further tax and extra tax. Subsection (2) of Section 235 of the Ordinance provides that a person preparing electricity consumption bill shall charge advance tax under subsection (1) in the manner electricity consumption charges are charged. This means that advance tax is to be charged on the electricity consumed and not on the total billed amount. Therefore, a bare reading of Section 235 makes it clear that advance tax shall be paid on the electricity consumed and not on the total billed amounts which will include sales tax, income tax and in some cases further tax and extra tax. Furthermore, advance income tax cannot be levied on sales tax as has been held in 1994 PTD 848 and 2005 PTD 194 as well as PTR No.137/2006.

5. In view of the aforesaid, this petition is accepted and the impugned clarification dated 8.6.2013 issued by FBR is set aside.

ZC/F-4/L Petition allowed.

PLJ 2016 Lahore 740
Present: **MRS. AYESHA A. MALIK, J.**
MUHAMMAD ALI--Petitioner
versus
PUNJAB LABOUR APPELLATE TRIBUNAL, etc.--Respondents
W.P. No. 7748 of 2016, decided on 18.3.2016.

Constitution of Pakistan, 1973--

----Art. 199--Labour Court appeal, dismissal of--Time barred--Suspended from service--Grievance petition--Validity--Delay was apparent from record and admitted by petitioner--Justification provided by petitioner was not supported by any document or medical certificate, which explains delay of more than one year--There is no reason to interfere in impugned orders, which had dismissed case of petitioner being, barred by time. [P. 741] A

Mr. Yousaf Naseem Chandio, Advocate for Petitioner.
Date of hearing: 18.3.2016.

ORDER

C.M. No. 2 of 2016
The prayer made in this application for early hearing of the titled petition is allowed with a direction to the office to list out the titled petition for today. CM stands disposed of.
Main Case.

2. Through this petition, the Petitioner has impugned orders dated 23.04.2014 and 19.01.2016 passed by Respondents No. 1 and 2.

3. The appeal of the Petitioner was dismissed by the Labour Appellate Tribunal on the ground of being time barred. In terms of the order of the Labour Court, the Petitioner was suspended from service on 19.07.2008. He filed grievance petition on 05.03.2009, which was dismissed by the Labour Court on 05.03.2009 and again dismissed by the Labour Appellate Tribunal on 19.01.2016. Learned counsel for the Petitioner states that the Petitioner was unwell and remained bed ridden due to back ache problems, therefore, he could not file his grievance petition within time. Learned counsel states that any delay on the part of the Petitioner could have been condoned and his grievance petition against a suspension order could not have been dismissed.

4. Heard and record perused.

5. The delay is apparent from the record and is admitted by the learned counsel for the Petitioner. The justification provided by the Petitioner is not supported by any document or medical certificate, which explains the delay of more than one year. As

such there is no reason to interfere in the impugned orders, which have dismissed the case of the Petitioner being, barred by time. As far as the argument of learned counsel for the Petitioner that it could not have been dismissed on account of the fact that it was an interim order as the Petitioner has been suspended and not terminated from service. The said argument has no basis as the Petitioner filed the grievance petition against the suspension order and his grievance petition was dismissed by the Labour Court for being barred by time. Therefore, under the circumstances, no case for interference is made out.

(R.A.) Petition dismissed

2016 C L C 1708
[Lahore]
Before Ayesha A. Malik and Faisal Zaman Khan, JJ
MUHAMMAD MAMOON TARAR----Appellant
Versus
ELECTION COMMISSION OF PAKISTAN and others----Respondents
I.C.As. Nos.1692 and 1689 of 2015, heard on 9th December, 2015.

(a) Punjab Local Government Act (XVIII of 2013)---

----Ss. 38 & 44---Punjab Local Government (Conduct of Elections) Rules, 2013, Rr.36, 46 & 62---Election for local government---Recounting of votes after consolidation of result---Scope---Single Judge of High Court had set aside the consolidation of result directing the Returning Officer to recount the valid ballot papers and thereafter consolidate the result in accordance with law---Validity---Decision on application for recount of votes would be subject to consolidation of result---Once result was consolidated the Returning Officer should have waited for declaration of result in the official gazette---Any procedural impropriety could be challenged before the Election Tribunal---Impugned order of Single Judge of High Court was set aside by Division Bench in intra-court appeal.
Multiline Associate v. Ardeshir Cowasjee and others 1995 SCMR 362; Vice Chancellor/Chairman Admission Board University of Health Science, Lahore v. Breeha Zainab and another 2011 MLD 1652; Muhammad Riaz v. Province of Punjab and others 2014 CLC 817; Syed Nayyar Hussain Bukhari v. District Returning Officer, NA-49, Islamabad and others PLD 2008 SC 487 and Mst. Karim Bibi and others v. Hussain Bakhsh and another PLD 1984 SC 344 ref.

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

----R. 78(b)---Constitution of Pakistan, Arts.140-A & 218(3)---Review of order by the Election Commission---Scope---Power to review an order under R.78 (b) of Punjab Local Government (Conduct of Elections) Rules, 2013 was executive function of Election Commission to reorganize and conduct local government election so as to ensure that they were being carried out honestly, justly, fairly and in accordance with law.

Batha Ram v. Lala Mehar Bheel and another 1995 SCMR 684 and Dr. Raja Aamer Zaman v. Omar Ayub Khan and another 2015 SCMR 1303 rel.
Muhammad Ahsan Bhoon for Appellant.
Azam Nazir Tarar and Khalid Ishaq for Respondents.
Nasir Javed Ghumman for ECP with Allah Ditta Warraich RO UC 8 Hafizabad.
Date of hearing: 9th December, 2015.

JUDGMENT
AYESHA A. MALIK, J.--- Through this judgment, we have decided upon the matters raised in ICA Nos.1692 and 1689 of 2015 as both the ICAs arise out of a

consolidated order of the learned Single Judge dated 26.11.2015 passed in WP Nos.36004 and 36384 of 2015.

2. The facts of the case are that the Appellants and Respondents Nos.5 to 6 contested Local Government Election for the seats of Chairman and Vice Chairman in U.C. No.8 Kolo Tarar, District Hafizabad held on 19.11.2015. As per the unofficial result, the Appellants were announced as successful candidates. Thereafter, Respondent No.5 moved an application for recount of votes on 19.11.2015. On this application, the District Returning Officer ("DRO") issued an order dated 20.11.2015 while allowing the application and required immediate action from the Returning Officer ("RO") of U.C. No.8. This order of 20.11.2015 was challenged by the Appellants in W.P. No.36004/2015 filed on 21.11.2015. The main grievance of the Appellants in the writ petition was that the DRO has no jurisdiction to order recount of votes and as such he could not have allowed the application moved by Respondent No.5 nor ordered for recount of votes. In the meanwhile, Form XIII was filed on 20.11.2015 with a note attached to it stating therein that Form XIII is subject to the recount of ballot papers made at the request of' the contesting candidate Mian Muhammad Afzal Hussain Tarar. The DRO on 22.11.2015 recalled his order of 20.11.2015 allowing the application for recount and placed the same before the RO to decide it as per law. The RO decided the application on the same date i.e. 22.11.2015 whereby he allowed the recount and deputed Muhammad Arshad, Superintendent, Zila Council Secretariat, Hafizabad/Assistant Returning Officer UCs 1-8, District Hafizabad to conduct the recount. The Appellants then moved an application under Order VI, Rule 17 of the Code of Civil Procedure, 1908 ("C.P.C.") for amendment in their petition enabling them to challenge the order of 22.11.2015 passed by the RO of U.C. No.8. The amendment in the petition was allowed and subsequently, on 26.11.2015 writ petition of the Appellants was dismissed and writ petition of Respondents Nos.5 and 6 were allowed. Hence, ICA Nos.1692 and 1689 of 2015.

3. Learned counsel for the Appellants argued that W.P. No.36384/2015 was filed on 25.11.2015 by Respondents Nos.5 and 6 challenging Form XIII issued on 20.11.2015 on the ground that the RO could not consolidate the result subject to any decision on their application. It was their case that the recount had to be decided first before consolidation of result could be carried out. Learned counsel argued that the impugned order has allowed this writ petition set aside the consolidation order of 20.11.2015 and directed the RO to proceed with the recount of the valid ballot papers. Learned counsel argued that in terms of the order dated 26.11.2015, the RO in a hurried manner recounted the votes and filed a fresh Form XIII on 28.11.2015. Learned counsel argued that essentially the DRO could not have allowed the application for recount filed by Respondent No.5 and that is why on realization of this fact, the DRO himself withdrew his order of 20.11.2015 and placed the application before the RO. Therefore, for all intents and purposes, the application for recount was moved before the RO on 22.11.2015 after the consolidation of result on 20.11.2015. Learned counsel argued that the result has admittedly been consolidated and the note attached to the consolidation is of no consequence, when

the order allowing the recount application was withdrawn by the DRO. Learned counsel argued that filing of W.P. No.36384/2015 by Respondents No.5 itself testifies to the fact that the consolidation of result was made on 20.11.2015 by filing Form XIII, hence he argued that the recount application could not have been subsequently decided by the RO on 22.11.2015.

4. Learned counsel for Respondents Nos.5 to 6 first raised an objection on the maintainability of both the ICAs. His basic contention is that Rule 78(b) of the Punjab Local Government (Conduct of Elections) Rules, 2013 ("Rules") provides statutory remedy of review before the Election Commission. Therefore, in view of the fact that the remedy of review is provided, both the ICAs are not maintainable in terms of the proviso to Section 3(3) of the Law Reforms Ordinance, 1972 ("Ordinance"). In support of his arguments, learned counsel has placed reliance on the cases titled "Multiline Associate v. Ardeshir Cowasjee and others" (1995 SCMR 362), "Vice Chancellor/Chairman Admission Board University of Health Science, Lahore v. Breeha Zainab and another" (2011 MLD 1652) and "Muhammad Riaz v. Province of Punjab and others" (2014 CLC 817). Learned counsel argued that the Appellants have a remedy available to them under Rule 78 (b) of the Rules for review of the order passed by the RO under the Punjab Local Government Act, 2013 ("Act") including the rejection of ballot papers. Learned counsel argued that since the remedy of review is available to the Appellants and in fact they have availed the remedy of review, therefore, both the ICAs are not maintainable.

5. On merits the learned counsel for Respondents Nos.5 and 6 argued that the RO was obligated in terms of Rule 36 of the Rules to decide upon the application for recount pending before him. Learned counsel argued that admittedly this application was received by the RO on 19.11.2015, hence the result could not have been consolidated without a decision on the application of Respondent No.5. In this regard, the RO hastily consolidated the result as he was under the tremendous pressure exerted by the Appellants. Further argued that the impugned order itself records the statement of the RO in paragraph No.14 wherein he admits that he did not follow the proper process for consolidation of the result and that he did not follow the procedure given in Rule 36 of the Rules for the purposes of consolidation of result. Learned counsel argued that the RO has admitted that he received the application on 19.11.2015 meaning thereby that he was obligated to decide the same and without a decision on the application, the result could not have been consolidated. Reliance is placed upon the cases titled "Syed Nayyar Hussain Bukhari v. District Returning Officer, NA-49, Islamabad and others" (PLD 2008 SC 487) and "Mst. Karim Bibi and others v. Hussain Bakhsh and another" (PLD 1984 SC 344).

6. The learned counsel for the Election Commission produced the original record before us. He stated that Form XIII was filed on 20.11.2015 and therefore the result was duly consolidated under Rule 36 of the Rules. Subsequently pursuant to a recount by the RO another Form XIII was filed on 28.11.2015.

7. The first question to address is that of maintainability. It is the case of the Respondents that both the ICAs are not maintainable as the remedy of review is available under Rule 78 of the Rules, which provides as follows:--

"78. Powers of Election Commission.- Save as otherwise provided, the Commission may:

(a) stop the polls at any stage of election if it is convinced that it shall not be able to ensure the conduct of the election justly, fairly and in accordance with law due to large scale malpractices, including coercion, intimidation and pressures, prevailing at the election.

(b) review an order passed by an officer under the Act or the rules, including rejection of a ballot paper; and

(c) issue such instructions and exercise such powers, and make such consequential orders, as may in its opinion, be necessary for ensuring that an election is conducted honestly, justly and fairly and in accordance with the provisions of the Act and the rules."

The relevant words used in Rule 78 of the Rules "save as otherwise provided" have been interpreted by the august Supreme Court of Pakistan in a case titled "Batha Ram v. Lala Mehar Bheel and another (1995 SCMR 684). In the said judgment, the word "save as otherwise provided" were considered in the context of Section 103 of the Representation of the People Act, 1976 ("ROPA"). It is noted that Rule 78 of the Rules is para materia of Section 103 of the ROPA. In this regard, the august Supreme Court of Pakistan held that "the words "Save as otherwise provided" used in Section 103 of the Act will show that if something otherwise is provided in the Act, then this section will not apply. Furthermore, the reading of Clauses (a) to (c) of this section will show that this section deals with the power of the Commission at the time of election". This means that the power of review given in Rule 78 of the Rules is not statutory remedy available to the Appellants as contemplated in the proviso to Section 3(3) of the Ordinance. It is a special power for a specific purpose. The powers and functions of the Election Commission of Pakistan as provided in Rule 78 of the Rules essentially are administrative in nature for the purposes of conducting election. The august Supreme Court of Pakistan held in a case titled "Dr. Raja Aamer Zaman v. Omar Ayub Khan and another" (2015 SCMR 1303) that the provisions of Section 103 of the ROPA enable the Election Commission to carry out its administrative and policing functions for the purposes of conducting elections honestly, justly, fairly and in accordance with law. These administrative powers are not judicial in nature and are exercisable without any deep probe of facts. The issue may be ascertainable on the face of the record or after a summary inquiry, if deemed necessary by the Commission. Therefore, Rule 78 of the Rules is an administrative power resulting in an executive order and not a judicial order.

8. Furthermore, the Election Commission of Pakistan derives its power to carry out local government elections under Article 140-A of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution"), which provides as follows:-

"140A. (1) Each Province shall, by law, establish a local government system and devolve political, administrative and financial responsibility and authority to the elected representatives of the local government.

(2) Elections to the local governments shall be held by the Election Commission of Pakistan. (Emphasis added)."
Article 218 (3) of the Constitution is also relevant which provides as under:-

218. Election Commission

"(3) It shall be the duty of the Election Commission to organize and conduct the election and to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against."

Therefore, Rule 78 of the Rules when read with Articles 140-A and 218(3) of the Constitution suggests that the power to review under Rule 78(b) of the Rules is essentially and executive function related to the functions of the Election Commission to organize and conduct local government elections so as to ensure they are carried out honestly, justly, fairly and in accordance with law. Based on the aforesaid, it is our opinion that both the ICAs are maintainable.

9. On the merit, the basic grievance of the Appellants is that the impugned order of 26.11.2015 set aside the consolidation order of 20.11.2015 and allowed recount of votes. Admittedly, the election in this case was held on 19.11.2015, consolidation took place on 20.11.2015 and application for recount of votes was filed by Respondent No.5 before the RO on 19.11.2015, which was allowed by the DRO on 20.11.2015. Thereafter, on 22.11.2015 the DRO withdrew his order of 20.11.2015 and placed the application for recount of votes before the RO, who on the said date allowed the recount application after the order of consolidation dated 20.11.2015. By way of the impugned order dated 26.11.2015, the learned Single Judge set aside the consolidation of result directing the RO to recount the valid ballot papers and thereafter, to consolidate the results in accordance with law.

10. Essentially the reason for interference which prevailed with the learned Judge was procedural impropriety. The learned Single Judge relied upon the statement of the RO, who admitted that he did not follow the prescribed procedure under Rule 36 of the Rules. We are of the opinion that any decision on the application for recount was subject to consolidation of results. Once the result is consolidated, the Respondents Nos.5 and 6 have to wait for the declaration of the result in the Official Gazette under Rule 46 of the Rules. Thereafter they have remedy available to them to challenge the result or the process, as the case may be, before the Election

Tribunal in an election petition under Section 38 of the Act read with Rule 62 of the Rules. We note that the remedy of appeal is provided in the Act for which the Election Tribunals have been constituted by the Election Commission of Pakistan vide notification dated 04.12.2015. Furthermore the failure of the RO to comply with the process given under the Rules should be challenged before the Election Tribunal in terms of Section 44(a) of the Act. The Section reads as follows:---

44. Ground for declaring elections as a whole void:---

The Election Tribunal shall declare the election as a whole to be void if it is satisfied that the result of the election has been materially affected by reasons of:

(a) the failure of any person to comply with the provisions of this Act or the rules; or

(b) the prevalence of extensive corrupt or illegal practice at the election.

Consequently any procedural impropriety can be challenged before the Election Tribunal in terms of Section 44 of the Act.

11. The learned counsel for Respondents Nos.5 and 6 has relied upon PLD 2008 SC 487 (supra) to argue the point that the remedy of filing a constitution petition is available to the Respondents to challenge the consolidation of result which was not done in accordance with the present Rules. In that case, the orders of the Election Commission and the RO were challenged before the Islamabad High Court with a request for recount of ballot papers in the general election. The august Supreme Court of Pakistan held that the power of judicial review of the High Court is certainly not available as an alternate remedy in the election matter but if the aggrieved person has no other remedy, the bar of jurisdiction contained in Article 225 of the Constitution, may not affect the jurisdiction of the High Court to entertain a petition involving question of law or interpretation of law in respect of an election dispute. It was further held that it is difficult to agree with the proposition that in all election matters at all stages, the jurisdiction of the High Court under Article 199 of the Constitution or that of Election Commission of Pakistan, a Constitutional forum is completely ousted by virtue of Article 225 of the Constitution. We therefore, hold that Election Commission of Pakistan can conveniently take notice of an irregularity/ illegality committed during the process of election in an appropriate case in exercise of its powers under Section 103 read with Section 103-AA of the Representation of the People Act, 1976. Similarly the High Court in a suitable case can interfere in the order passed by the election authorities during the election process in its constitutional jurisdiction under Article 199 of the Constitution. Therefore, the august Supreme Court of Pakistan held that where the election process had come to an end appropriate remedy was before the Election Tribunal or before the Election Commission under Section 103-AA of the ROPA. In the present case, the election process came to an end with the consolidation of result by filing Form XIII. Any challenge thereafter to the process could only be made before the Election Tribunal in terms of Section 44 of the Act. Hence this case does not support the contentions of Respondents Nos.5 and 6.

12. We have also gone through the complaint pending before the Election Commission filed by the Appellants. The said complaint relates to the conduct of the RO and tampering of the election result and does not specifically challenge the orders impugned in the writ petitions. Even otherwise, the order impugned before us is a consolidated order in two petitions, one filed by the Appellants (WP No.36004/2015) and the other by Respondents Nos.5 and 6 (WP No.36384/2015). Therefore, its pendency will not bar the Appellants from challenging the impugned order of 26.11.2015.

13. Under the circumstances, both the ICAs are accepted and the impugned order dated 26.11.2015 passed by learned Single Judge is set aside.

ZC/M-158/L Appeal allowed.

Lahore High Court
Judge(s)
Ayesha A. Malik,
M/S. Macca Sugar Mills (Pvt) Limited
VS
The District Labour Officer, Dlo Office, Kasur, Etc
Writ Petition No, 18171/2014 accepted on 24.7.2014
24/07/2014

Reported As [NLR 2016 Labour 96]
Result: Writ Issued

Practice Area: Civil Procedure, Constitutional Law, Corporate Law, Criminal Law, Criminal Procedure, Industrial, Land Law, Specific Relief, Transfer of Property Tagged Statutes: PUNJAB INDUSTRIAL RELATIONS ACT 2010 [Section 33, Section 33], Code of Civil Procedure, 1908 [Section, Section 12, Section 12], Code of Criminal Procedure, 1898 [Section, Section 35, Section 382, Section 35, Section 382], Constitution of Pakistan, 1973 [Article, Article 199, Article 199, Article 199, Article 199*], Specific Relief Act, 1877 [Section, Section 42], Transfer of Property Act, 1882 [Section, Section 43]

Cited In: 0Cited By: 0

ORDER

AYESHA A. MALIK, J. -Through this petition, the Petitioner has impugned the proceedings initiated by the Respondents No,. 1 and 2 on an application moved by the Respondent No, 5.

2. The case of the Petitioner is that it is a private limited company. The Respondent No, 5 was an employee of the Petitioner and was terminated after following due process. The Respondent No, 5 has challenged the order of dismissal from service before the Respondents No, 1 and 2 instead of moving the proper forum., The Respondent No, 2 on receipt of the application from the Respondent No, 5 has initiated an inquiry against the Petitioner. Learned counsel argued that any grievance that the Respondent No, 5 may have with respect to his termination from service should be pleaded before the Court of competent jurisdiction and also in terms of Section 33 of the Punjab Industrial Relations Act, 2010 a worker can bring his grievance the notice of his employer. Learned counsel for the Petitioner argued that the Respondents No, 1 and 2 have no jurisdiction in the matter and cannot initiate proceedings against the Petitioner on an application of the Respondent No, 5.

3. Report and parawise comments have been filed by the Respondents No, 1 to 4. In terms of the report and parawise comments admittedly, the matter is under inquiry by the Respondents No, 1 and 2 on an application filed by the Respondent No, 5

regarding the redressal of his grievance against the Petitioner. However, they have denied the verbal order of 21.6.2014 in which as per the contention of the Petitioner, they threatened the Petitioner to reinstate the Respondent No, 5 or else to face dire consequences.

4. Heard the learned counsel for the parties and have gone through the record available on the file.
5. The basic issue before this Court is whether against the termination of the Respondent No, 5 by the Petitioner, the Respondent No, 2 can initiate any action against the Petitioner. Admittedly, an application was moved by the Respondent No, 5 before the Respondents No, 1 and 2 for reinstatement in service. Admittedly, in terms of the report and parawise comments filed by the Respondents No, 1 to 4, the matter is being inquired into by the Respondents No, 1 and 2. However, the report does not provide any law on the basis of which the Respondents No, 1 and 2 have exercised jurisdiction in the matter. The learned Law Officer was also unable to point out any law on the basis of which the Respondents No, 1 and 2 have exercised jurisdiction in the matter. The Respondent No, 5 was terminated from service by the Petitioner and any grievance that he may have with respect to his termination from service should be pleaded before the competent forum. Admittedly, in terms of the report and the noting on Respondent No, 5's application, the Respondents No, 1 and 2 are inquiring into the matter even though they have no power to do so. Therefore, any inquiry that they have commenced in this matter is illegal and contrary to law.

6. In view of the above, this petition is accepted and the Respondents No, 1 and 2 are restrained from initiating any proceedings against the Petitioner on the application of the Respondent No, 5 for reinstatement.

P L D 2017 Lahore 68
Before Ayesha A. Malik, J
JDW SUGAR MILLS LTD. and others---Petitioners
Versus
PROVINCE OF PUNJAB and others---Respondents
Writ Petitions Nos.37, 35, 61, 76, 78 and 23145 of 2016, decided on 10th October, 2016.

(a) Punjab Industries (Control on Establishment and Enlargement) Ordinance (IV of 1963) ----

----Ss. 3, 4 & 11---Constitution of Pakistan, Art. 199---Government of Punjab Notifications No. AEA-III-3-5/2011 (Vol-III) dated 04.12.2015 and No.AEA-III- 3-3/03 (VOL-III) dated 6.12.2006; (issued under S.11 of the Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963)---Object, scope and interpretation of the Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963---Restrictions on establishment/enlargement of industrial undertakings---Exemptions---Public interest considerations---Relocation of existing sugar mills to a new location---Nexus between ban on establishment of new sugar mills and relocation of existing sugar mills---Considerations of relocation policy and scheme of the law were location-specific and not production-capacity specific---Judicial review of Government policy---Judicial estoppel---Scope---Petitioners, which were operating various sugar mills, impugned issuance of Notification No.AEA-III-3-5/2011 (Vol-III) dated 04.12.2015 ("impugned notification") whereby existing sugar mills were allowed to relocate within the Province---Contention of the petitioners, inter alia, was that under the garb of shifting/relocating of an existing sugar mill, respondents were in fact establishing new sugar mills despite the ban imposed on establishment of new sugar mills under S. 3 of the Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963 read with Notification No. AEA-III- 3-3/03 (VOL-III) dated 06.12.2006---Validity---Question to be determined was whether relocation of sugar mills fell within ambit of establishment of new sugar mills as provided under Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963, read with the ban imposed by notification dated 06.12.2006---Impugned notification reiterated the ban imposed by the earlier notification dated 06.12.2006, meaning thereby that the ban on establishment or enlargement of new sugar mills continued by way of policy of the Government and bare reading of clauses of the impugned notification revealed that relocation must be considered in context of the ban on establishment of new sugar mills as well as public interest---Impugned notification therefore, created a direct nexus between relocation of a sugar mill and establishment of a new sugar mill---Relocation of a functional sugar mill meant that the mill would close its operations in one area and relocate to another area and in the present case, relocation was without increasing the production capacity of sugar mills, so essentially relocating the sugar mill meant moving from one location to another, based on the licensed production capacity of the sugar mill---Key element for the purposes of relocation was the location to which the functional sugar mill

would shift to and for the purposes of the new location, the sugar mill will establish itself in that area as a new sugar mill in the local area---Establishment and relocation of sugar mills, were correlated when seen in the context of the ban and public interest, as the key element for both was the location of the sugar mill and hence, relocation of a sugar mill was the establishment of a new sugar mill in the local area, and provisions of Ss.3 to 12 of the Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963 were therefore applicable to it and thus "relocation" fell within the ambit of establishment of a new sugar mill---Establishment of a new sugar mill was not to be justified simply on basis of production capacity but was also to be seen in the context of its location and factors relevant to the local area, and there could be no relocation of a functional sugar mill without due consideration of the new location---Argument that "relocation" was different from establishment of a new sugar mill was without merit, as factors considered at time of grant of permission for establishment or relocation of a sugar mill would have to be identical since both were location-specific---Objective of the Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963 and notifications issued thereunder; was to control the location where the sugar mill was to carry out its business and to protect national interest---Impugned notification failed to set out the guidelines on the basis of which an application for relocation should be considered and did not provide for any of the conditions or factors on the basis of which a recommendation could be made---Basic objective of the policy which was to make relocation subject to the ban on establishment of new sugar mills and public interest was therefore not achieved in the impugned notification and could not be given effect to---Purpose of the various notifications issued under S.11 of the Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963 from time to time, evidenced the need to protect the national interest, that was cotton growing areas, and all such notifications had been location-specific, and intended to control the location of the sugar mill, therefore the contention that production capacity was the key factor controlling relocation was against the record and public interest---Record further revealed that the Provincial Government has in the past, held the view that relocation and establishment were synonymous and that relocation effectively meant to establish at a new location---Contention that relocation policy was necessary to protect the capital investment of the owners of sugar mills and to respond to change in market conditions was not tenable as said reasons did not justify making relocation a way to shift into cotton growing areas because the policy of imposing the ban on new sugar mills meant that national interest overrode the capital investment requirements of any sugar mill and the need to respond to market conditions---Section 3 of the Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963 mandated that individual requirements had to be weighed against national interest, general health of the people and causes of nuisance in the local area and notifications issued under S.11 of the Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963 especially notification dated 6.12.2006 meant that a sugar mill could not establish in a cotton growing area, therefore while the long standing policy of the ban prevented setting up mills in cotton growing areas, the relocation policy created a way to defy the ban and thus impugned notification did not benefit

the public interest nor did it protect the national interest but on the contrary facilitated sugar mills to bypass the requirements of S.3 of the Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963---Provincial Government had also taken a contradictory stance on the matter in the present case, than the one taken by it before the Supreme Court, to which the doctrine of judicial estoppel was applicable and as such the position taken before the Supreme Court, wherein the Provincial Government supported the ban on establishing of new sugar mills---High Court observed that the decision making process in the present case, leading to the issuance of the impugned notification, was not initiated in the national or public interest and the process was initiated to protect certain business interests at the expense of public interest---High Court directed that the respondent sugar mills be restrained from carrying out the business in the relocated premises, and that show-cause notices be issued to the same for establishment of new sugar mills without seeking permission from the competent authority under the law---High Court further struck down the Provincial government's policy to the extent of the "relocation"---Constitutional petitions were allowed, accordingly.

Civil Appeals Nos.1242 to 1245 of 2013; Engineer Iqbal Zafar Jhagra and others v. Federation of Pakistan and others PLD 2013 SC 224; Dr. Akhtar Hassan Khan and others v. Federation of Pakistan and others 2012 SCMR 455; Muhammad Aslam v. Government of the Punjab through Secretary Industries Department and another PLD 2013 Lah. 528; Madina Sugar Mills v. Secretary, Ministry of Industries and others PLD 2001 Lah. 506; Messrs Al-Raham Travels and Tours (Pvt.) Ltd. and others v. Ministry of Religious Affairs, Hajj, Zakat and Ushr through Secretary and others 2011 SCMR 1621; Asaf Fasihuddin Khan Vardag v Government of Pakistan and others 2014 SCMR 676; Dossani Travels Pvt. Ltd. and 4 others v. Messrs Travels Shop (Pvt.) Ltd. and others 2013 SCMR 1749; Arkison v. Ethan Allen 160 Wn.2d 535 (Wash.2007); New Hampshire v. Maine 532 U.S.742 (2001); Habiba Kassam and others v. Habib Bank Ltd. 1989 CLC 1433; Sheikh Gulzar Ali & Co. Ltd. and others v. Special Judge, Special Court of Banking and another 1991 SCMR 590; Noor Muhammad, Lambardar v. Member (Revenue), Board of Revenue, Punjab, Lahore and others 2003 SCMR 708; Overseas Pakistanis Foundation and others v. Sqn. Ldr. (Retd.) Syed Mukhtar Ali Shah and another 2007 SCMR 569; Amrital N. Shah v. Alla Annapurnamma (Andhra Pradesh) 1959 AIR (A.P) 9:1958(2) An.WR 447:1958 ALT 584:1958 ILR (Andhra Pradesh) 509; Cornell Law Review, Volume 89 Issue 1 November, 2003, Article 3, titled Judicial Estoppel and Inconsistent Positions of Law Applied to Fact and Pure law by Kira A. Davis and Pir Imran Sajid and others v. Managing Director/General Manager (Manager Finance) Telephone Industries of Pakistan and others 2015 SCMR 1257 rel.

(b) Punjab Industries (Control on Establishment and Enlargement) Ordinance (IV of 1963)---

----Ss. 7 & 11---Constitution of Pakistan Art. 199---Constitutional jurisdiction of High Court---Efficacious alternate remedy---Scope---Maintainability of Constitutional petition in presence of alternate remedy under S. 7 of the Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963---

Petitioners impugned notification issued under S.11 of the Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963, granting permission for sugar mills to relocate---Question before the High Court was "whether the Constitutional petition was maintainable in presence of availability of alternate remedy of revision and appeal under S.7 of the Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963"---Held, that petitioners had challenged Government policy on relocation of functional sugar mills and had also challenged intent behind issuance of such policy on the ground that same was mala fide and intended to benefit the respondent sugar mills---Under such circumstances, any remedy before a government functionary in the form of an appeal or revision would not be proper and efficacious as a government functionary could not deliberate on the vires of the impugned policy nor was it likely that such government functionary would comment on the allegations of collusion and mala fide intent---Availing of alternate remedy under the Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963 would therefore be an exercise in futility since a government functionary was not likely to take a decision contrary to government policy---Constitutional petition was held to be maintainable, in circumstances.
Civil Appeals Nos.1242 to 1245 of 2013 rel.

(c) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction of High Court---Judicial Review of administrative action---Public interest and national interest---Exercise of executive authority---Judicial review of Government policy---Scope---Where Government policy was stated to be against public and national interest, High Court could look into the reasonableness of such policy and review the manner in which the executive exercised its powers to ensure that the rights of citizens were protected---Power of judicial review could also be exercised to ensure that the decision making process was reasonable and not arbitrary or tainted with mala fide---Government notification or policy was not immune from challenge if it was demonstrated that such notification was issued for reasons against public or national interest---While exercising its Constitutional jurisdiction, High Court could look into the reasons for issuance of a policy where there were serious allegations of flouting transparency and good governance---Government could exercise its executive authority and formulate policies necessary for governance and Courts generally did not interfere in such policy matters, however, where there were elements of abuse of power, arbitrariness and violation of the process, High Court could look into the legality of the policy.
Engineer Iqbal Zafar Jhagra and others v. Federation of Pakistan and others PLD 2013 SC 224; Dr. Akhtar Hassan Khan and others v. Federation of Pakistan and others 2012 SCMR 455; Messrs Al-Raham Travels and Tours (Pvt.) Ltd. and others v. Ministry of Religious Affairs, Hajj, Zakat and Ushr through Secretary and others 2011 SCMR 1621; Asaf Fasihuddin Khan Vardag v. Government of Pakistan and others 2014 SCMR 676 and Pir Imran Sajid and others v. Managing

Director/General Manager (Manager Finance) Telephone Industries of Pakistan and others 2015 SCMR 1257 rel.

(d) Judicial estoppel, doctrine of---

----Integrity of the judicial process---Nature of, and rationale for the principle of judicial estoppel---Estoppel by inconsistent positions taken before judicial forums---Approbate and reprobate---Application of judicial estoppel---Scope---Fundamental duty of court to protect the integrity of the judicial process and a party could not approbate and reprobate at the same time---When a party took an inconsistent position in the same case or in a prior case, the principle of judicial estoppel should be applied---Judicial estoppel was an equitable doctrine, which precluded a party from taking inconsistent positions before the court and protected the integrity of the judicial system and not of the litigant---Principle of judicial estoppel sought to ensure respect for judicial proceedings and to avoid inconsistency and abuse of process---Under the doctrine of judicial estoppel, court could stop a party from taking up contradictory stances if it was clearly inconsistent with the previous position taken by that party before another Court---Application of judicial estoppel depended upon the facts and circumstances of each case and when a party put forth a position, as a matter of fact in one case and was successful in such an assertion, then that party was estopped from asserting a different position on the same facts in a second case---Party, who was to be estopped in the second case had to be the same party in the earlier case meaning thereby the party is the same in both cases---Issue for which the party was estopped from asserting its facts must have had some nexus in both proceedings and it was imperative that such equitable principle be applied so that a judicial process functions properly and effectively---Litigants must approach the Court in a truthful manner especially if the litigant party was the government---Party could always vigorously assert its position, but could not misrepresent the facts in order to gain some advantage in the process---When a party had formally asserted a certain version of the facts in litigation, he or she could not later change those facts because the initial version no longer suits him or her---For application of the principle of judicial estoppel, the Court must ascertain that a party had asserted a contradictory position before another Court which position was accepted by that Court---Party's later position must be clearly inconsistent with its earlier position, and the courts should inquire whether the party had succeeded in persuading a court to accept its earlier position and it had to be determined whether the party seeking to assert the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped---Party's change in its factual or legal position threatened to produce inconsistent decisions by the courts and therefore, the doctrine of judicial estoppel was necessary to protect the integrity of the court from the harm caused when a litigant engaged in cynical gamesmanship, achieving success on one position yet arguing a different position in another case to satisfy an exigency of the moment---Allowing a litigant to adopt contradictory positions in different courts would mean that one court was misled or perhaps defrauded.

Arkison v. Ethan Allen 160 Wn.2d 535 (Wash.2007); New Hampshire v. Maine 532 U.S.742 (2001); Habiba Kassam and others v. Habib Bank Ltd. 1989 CLC 1433; Sheikh Gulzar Ali & Co. Ltd. and others v. Special Judge, Special Court of Banking and another 1991 SCMR 590; Noor Muhammad, Lambardar v. Member (Revenue), Board of Revenue, Punjab, Lahore and others 2003 SCMR 708; Overseas Pakistanis Foundation and others v. Sqn. Ldr. (Retd.) Syed Mukhtar Ali Shah and another 2007 SCMR 569; Amrital N. Shah v. Alla Annapurnamma (Andhra Pradesh) 1959 AIR (A.P) 9:1958(2) An.WR 447:1958 ALT 584:1958 ILR (Andhra Pradesh) 509; Cornell Law Review, Volume 89 Issue 1 November, 2003, Article 3, titled Judicial Estoppel and Inconsistent Positions of Law Applied to Fact and Pure law by Kira A. Davis rel.

(e) Public functionary---

----Functions of---Public officials to act as trustees of public funds and public property---Decisions/actions of public functionaries to be transparent, reasonable and free from abuse of public office and from personal advantage---Conflict of interest arising from private interests of public officials---Fairness in the decision-making process of public functionaries---Scope---Public officers were trustees of public funds and public property and were expected to take decisions based on public interest---Transparent and reasonable decision must be free from abuse of public office and from personal advantage---Where there existed a conflict of interest between private interest and public duty; the same must be clearly identified, appropriately managed and effectively resolved in order to ensure public confidence in public institutions---Conflict of interest would arise where an official decision will impact a personal interest, financially or otherwise such that a public official was seen to have gained from that decision or was perceived to have gained from such a decision---Where there existed a conflict between a public official's interest as a private citizen and his duty as a public official, there was potential for a conflict of interest to arise---Jurisprudence on conflict of interest aimed to ensure that private interest would not prosper from decisions taken in public office, while carrying out official duties and responsibilities---Mandate of any elected government was based on trust and public confidence and both such elements found its tools in transparency, good governance and fairness in the decision making process---Any conflict of interest, in fact or perceived, would destroy public trust and malign the decisions making process.

Pir Imran Sajid and others v. Managing Director/General Manager (Manager Finance) Telephone Industries of Pakistan and others 2015 SCMR 1257 rel.

Aitzaz Ahsan and Shahid Saeed for Petitioners (in W.P. No.37.2016).

Shehzad A. Elahi for Petitioner (in W.P.No.35 of 2016).

Syed Ali Zafar for Petitioner (in W.P. No.61 of 2016).

Jawad Hassan, Taimur Akhtar, Umair Saleem, Haider Zaman Qureshi, Rana Muhammad Asif and Ali Usman for Petitioner (in W.P. No.78 of 2016).

Imtiaz Rashid Siddiqui, Barrister Shehryar Kasuri and Muhammad Hamza for Petitioners (in W.P. No.76 of 2016).

Syed Ali Zafar, Shehzad A. Elahi and Mubashar Aslam Zar for Petitioners (in W.P. No.23145 of 2016).
Muhammad Akhtar Shabbir, DAG along with Muqtedir Akhtar Shabbir and Mian Umar Hayat for Respondent.
Ch. Sultan Mahmood, A.A.G. along with Asif Mushtaq Ahmad, Senior Law Officer, Industries Department, Muhammad Bakhsh SO, Food Department; Javed Iqbal, Law Officer; Agriculture Department, Nawaz Malik, Director Law on behalf of Secretary Environment Protection Department and Waqas Alam, Cane Commissioner, Punjab for Respondents.

Salman Akram Raja, Tariq Bashir, Malik Ahsan Mehmood and Usman Ali Bhoon, for Respondent No.9 (in W.Ps. Nos.35 of 2016, 37/2016, 76/2016) and for Respondent No.17 (in W.P. No.78/2016).
Ali Sibtain Fazli, Hasham Ahmad Khan and Abad-ur-Rehman, for Respondents Nos.10, 11 and 12 (in W.Ps. Nos. 35/2016, 37/2016, 76/2016 and for Respondents Nos. 18, 19, 20 (in W.P. No.78/2016) and for Respondents Nos. 9, 10, 11 (in W.P. No.61/2016 and for Respondent No.14 (in W.P. No.23145/2016).
Dates of hearing: 20th June and 28th July, 2016.

JUDGMENT

AYESHA A. MALIK, J.---This common judgment decides upon the issues raised in Writ Petitions Nos.37/2016, 35/2016, 61/2016, 76/2016, 78/2016 and 23145/2016, as all Petitions raise common questions of law and facts. Writ Petitions Nos.37/2016, 35/2016, 61/2016, 76/2016 and 78/2016 were argued on 20.6.2016 and WP No.23145/2016 being similar to the said Petitions was argued on 28.7.2016.

2. The Petitioners have challenged Notification No.AEA-III-3-5/ 2011(Vol-III) dated 4.12.2015 ("Impugned Notification") issued by the Government of Punjab, Industries, Commerce and Investment Department, to the extent of Clauses 6, 7, 8 and 11 which allows existing sugar mills to relocate within the Province. They are also aggrieved by Notification No.AEA-III-3-5/2011 (Vol-III) dated 4.12.2015 issued by the Government of Punjab, Industries, Commerce and Investment Department, to the extent of clause 2(b) ("Second Impugned Notification") which forms a committee to assess the impact of the transportation of sugarcane from the bordering districts of the Punjab to other provinces to determine loss of sugar cess.

3. The Petitioners are public companies, operating sugar mills in the south of Punjab. Writ Petitions Nos.37/2016 and 23145/2016 have been filed by JDW Sugar Mills Limited which is operating a sugar mill in Tehsil Sadiq Abad, District Rahim Yar Khan. Writ Petition No.35/2016 has been filed by RYK Mills Limited which is operating a sugar mill in Rukanabad (Janpur), Tehsil Liaqatabad, Rahim Yar Khan. Writ Petition No.61/2016 has been filed by Indus Sugar Mills Limited which is operating a sugar mill in District Rajanpur. Writ Petition No.76/2016 has been filed by Ashraf Sugar Mills Limited which is operating a sugar mill in Ashrafabad,

District Bahawalpur. Writ Petition No.78/2016 has also been filed by Mian Mahmood Ahmad who is in the cotton ginning business in District Rahim Yar Khan and is aggrieved by the Impugned Notification as the relocation policy has failed to take into consideration the national interest and in particular the plight of the cotton industry.

4. The main contesting Respondent in these Petitions is the Government of Punjab, the Agriculture Department, the Industries, Commerce and Investment Department, the Food Department, the Environment Protection Department as well as the Law and Parliamentary Affairs Department have been impleaded through their competent authorities. The District Coordination Officers of Muzaffargarh, Rahim Yar Khan, Bahawalpur, Rajanpur have also been impleaded. The Federal Government through the Ministry of Textile Industry and the Ministry of National Food Security and Research, Islamabad have also been impleaded to explain the Federal Government's policy and the national interest. Report and parawise comments have been filed by all the stated Respondents. The Learned Law Officer on behalf of the Provincial Government stated that the report and parawise comments of the Government of Punjab can be read in all the petitions as the position of the Government is the same in all petitions including W.P. No.23145/2016. Same is the position of the learned DAG appearing for the Federal Government.

5. The contesting Respondents also include sugar mills and their owners who are in the process of shifting their mills to a new location. The specific allegation against Respondent Ittefaq Sugar Mills Limited is that it is establishing a new sugar mill in Channi Got, District Bahawalpur. Respondent Haseeb Waqas Sugar Mills Limited is establishing a new sugar mill in Mauza Jagmal, Tehsil Jatoi, District Muzaffargarh. Respondent Abdullah (Yousaf) Sugar Mills Limited is establishing a new sugar mill in Tehsil Jampur, District Rajanpur. Respondent Abdullah Sugar Mills Limited is establishing a new sugar mill in District Rahim Yar Khan and the Respondent Chaudhry Sugar Mills Limited is establishing a new sugar mill in District Rahim Yar Khan. Report and parawise comments have been filed by the stated Respondents.

6. The basic grievance of the Petitioners is that the Respondents under the garb of shifting/relocation of a functional sugar mill are in fact establishing a new sugar mill despite the ban imposed under the Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963 ("Ordinance") read with Notification No.AEA-III-3-3/03 (VOL-III) dated 6.12.2006. One of the main arguments raised by the Petitioners is that Respondent sugar mills are owned by the Chief Minister, Punjab and the Prime Minister of Pakistan along with close family relatives. Hence the Impugned Notification has been issued to benefit their business interest. Further that the Impugned Notification has been issued simply to facilitate and legalize the establishment of new sugar mills owned by the families of the Chief Minister, Punjab as well as the Prime Minister given the ban on establishing sugar mills in the Province. In this regard, it is specifically alleged that Ittefaq Sugar Mills Limited

and Chaudhary Sugar Mills Limited are owned by Mian Muhammad Nawaz Sharif, Hassan Nawaz Sharif, Hussain Nawaz Sharif, Mrs. Marriyam Nawaz, Mrs. Kalsoom Nawaz and Hamza Shahbaz along with other family members. Haseeb Waqas Sugar Mills Limited is owned by Haseeb Ilyas, Zakia Ilyas, Mrs. Shahzadi Ilyas and other family members. Abdullah Sugar Mills Limited is owned by Mian Mohammad Ejaz Miraj, Yasmin Riaz and other family members. It is noted that the ownership alleged by the Petitioners and the documents relied upon have not been denied by the Respondent sugar mills.

7. Mr. Aitzaz Ahsan, Syed Ali Zafar, Mr. Shehzad A. Elahi, Mr. Jawad Hassan and Mr. Imtiaz Rashid Siddiqui, Advocates on behalf of the Petitioners argued that Section 3 of the Ordinance prohibits the establishment or the enlargement of any industrial undertaking unless specifically permitted in writing by the Provincial Government. It is their case that the Ordinance provides for the organized and planned growth of industry in the Punjab thereby regulating the establishment of an industry as well as its location. In terms of the proviso to Section 3 of the Ordinance, a person may establish an industrial undertaking with the prior permission, in writing, by the Government of Punjab who has to satisfy itself that the establishment of the industrial undertaking will not prejudice the national interest. Section 11 of the Ordinance allows the Government to exempt any industry from the provisions of Section 3 of the Ordinance. It is their case that pursuant to Section 11, Notification dated 6.12.2006 imposed a ban on the establishment or enlargement of sugar mills throughout the Province and that the Impugned Notification violates the mandate of Section 3 of the Ordinance as well as the ban imposed on 6.12.2006 as it was issued to benefit the Respondent sugar mills.

8. Counsel for the Petitioners further argued that the Respondent sugar mills are in the process of establishing new sugar mills and in some cases have already established their sugar mills under the garb of shifting/relocation. They argued that none of the Respondent sugar mills have been given permission to establish or even relocate their sugar mill and Respondents Nos.1 to 6 have acted partially, in collusion with the Respondent sugar mills to give legal cover to their illegal acts. During the course of arguments it was admitted by the counsel for Ittefaq Sugar Mills Limited, Haseeb Waqas Sugar Mills Limited and Abdullah Sugar Mills Limited that the said mills have relocated and are functional at the new locations. So far as Respondent Chaudhary Mills Limited is concerned, they are still in the process of constructing the mill at the new location. All the Respondent sugar mills accept that they do not have permission for relocating under the Impugned Notification or under the Ordinance.

9. The case of the Petitioner in W.P. No.78/2016 is that the districts of Rahim Yar Khan, Muzaffargarh, Bahawalpur and Rajanpur are primarily cotton producing areas of Punjab. Cotton products are the main exports of Pakistan, contributing over 60% of the export value of the country. Therefore, cotton and the textile industry is a major contributor to the national economy, hence this industry is of national interest. The Petitioner's grievance is that without considering the national interest

and in particular the plight of the cotton industry, the Government of Punjab has introduced the relocation policy which is not permitted under the law. Mr. Jawad Hassan, Advocate for the Petitioner argued that additional sugarcane cultivation in these areas will reduce cotton production in the area and will have an adverse effect on the soil and environment thereby causing heavy loss to cotton growers. Consequently national interest will suffer because the growth of cotton will be reduced. It is also his case that the Respondent sugar mills have violated the mandatory provisions of the Punjab Environmental Protection Act, 1997 ("Act") as the Respondent sugar mills have established themselves without fulfilling the requirements under the Act. Learned counsel further argued that relocation of sugar mills is nothing more than relaxation or exemption from the complete ban on establishing sugar mills within the Province. Submitted that the consistent stance of the Government of Punjab and the Federal Government over the years remained to prohibit establishment of new sugar mills especially in the areas of Bahawalpur, Muzaffargrh, Rajanpur and Rahim Yar Khan so as to protect the cotton crop. Therefore the Impugned Notification was issued simply to facilitate the business interest of the Respondent sugar mills owned by the family members of the Chief Minister of the Punjab and the Prime Minister of the country. Further submitted that the Government of Punjab issued the Impugned Notification to validate the concept of relocation and to validate the illegal act of establishing new sugar mills in the Province.

10. In terms of the order of this Court dated 07.03.2016 reports have been submitted by the local commission comprising of the Cane Commissioner, District Coordination Officers and Syed Waqar Hussain Naqvi, Advocate. The reports testify to the fact that Ittefaq Sugar Mills Limited, Haseeb Waqas Sugar Mills Limited and Abdullah Sugar Mills Limited have shifted and were functional in the crushing season from December 2015 to March 2016. During the course of arguments, counsel for the said sugar mills also admitted to the fact that the mills had shifted and were functional during the crushing season from December 2015 to March 2016. So far as Chaudhary Sugar Mills is concerned, construction work started in January 2016 and is still under way.

11. The basic case of the Respondent sugar mills is that they are not establishing new sugar mills nor are they enlarging the sugar production capacity of their existing sugar mills. They are simply relocating their sugar mills from one area to another which is not prohibited under the Ordinance or Notification dated 6.12.2006. It is their case that they have not violated the ban imposed under the Notification of 6.12.2006. It is also their case that since there is no prohibition on relocation, hence they have not committed any illegality and there was no obligation to obtain permission for relocation. Learned counsel for Chaudhry Sugar Mills argued that since the Impugned Notification came in December, 2015 and was suspended by this Court on 4.1.2016, hence the question of taking any permission under the Impugned Notification did not arise.

12. The case of the Government of Punjab set out by the learned Law Officer is that a policy for relocation of existing sugar mills was introduced through the Impugned Notification in order to regulate and facilitate the process of relocating a functional sugar mill. He argued that since relocation does not increase the production capacity of sugar mills hence it does not fall within the domain of Section 3 of the Ordinance read with Notification dated 6.12.2006. He further argued that the relocation policy was introduced after a full deliberative process in which it was concluded that relocation should be permitted in order to save the sugar industry. In this regard, Government of Punjab has relied upon minutes of meeting as well as the reports considered during the deliberation process.

13. A report has been filed on behalf of Respondent No.8, Ministry of Textile Industry, Government of Pakistan, Islamabad. Learned DAG stated that as per report of the stated Respondent the matter falls within the domain of the Government of Punjab. It has been further stated in the report that Pakistan Central Cotton Committee, Multan is working under the administrative control of the Ministry. The said Ministry is responsible to protect the growth and production of cotton in the country. It is further stated that with the installation of new sugar mills in cotton growing areas of Punjab the cultivation of cotton will be adversely affected and curtailed which will cause a decline in cotton production, causing loss to the economy of Pakistan. It is also argued that the stated Ministry is against the installation of sugar mills in the cotton growing areas being against the national interest.

Preliminary Objections

14. Preliminary Objections were raised on the maintainability of the Writ Petitions on the ground that alternate remedy is available to the Petitioners in the form of appeal and revision under Section 7 of the Ordinance. The Petitioners have challenged the government policy on relocation of functional sugar mills and have also challenged the intent behind the issuance of the policy on the ground that it is mala fide and intended to benefit the Respondent sugar mills. Under the circumstances, any remedy before a government functionary in the form of an appeal or revision would not be proper and efficacious as a government functionary cannot deliberate on the vires of the policy nor is it likely that he will comment on the allegations of collusion and mala fide intent given that the Respondent sugar mills are owned by the families of the Chief Minister, Punjab and the Prime Minister. This issue was also considered by the august Supreme Court in Civil Appeals Nos.1242 to 1245 of 2013 vide judgment dated 25.7.2016 where Notification dated 6.12.2006 was challenged. The august Supreme Court held that availing the alternate remedy under the Ordinance would be an exercise in futility since a government functionary is not likely to take a decision contrary to government policy. Hence there is no merit in this objection.

15. Preliminary objections were also raised on the locus standi of the Petitioners that they are not aggrieved parties and that they could not challenge a government policy. The basic contention is that the Petitioners are competitors of the

Respondent sugar mills and are operating their own mills in the Southern Region of Punjab where the Respondent sugar mills have relocated. The argument is that these Petitions have been filed simply to oust the competitors and maintain a monopoly in the region. It has been argued that no fundamental or legal right of the Petitioners have been violated, hence they are not aggrieved and cannot invoke the constitutional jurisdiction of this Court.

16. The Petitioners have challenged the Impugned Notification on the ground that the Impugned Notification is arbitrary, discriminatory, tainted with partiality and mala fide. The main grounds are that it has been issued without consideration of national interest and violates the ban of 6.12.2006, that it is a personal relaxation or exemption granted to the Respondent sugar mills who are close relatives of the Chief Executive of the Province and the country. The record shows that the Government has defended the ban on establishment of sugar mills and has consistently maintained the position that the relocation of a functional sugar mill from one district to another tantamounts to establishing a new sugar mill. On this understanding, the Government has time and again rejected applications for relocation by sugar mills. However it changed its long standing position in December 2015 by introducing the relocation policy notwithstanding the ban on the establishment of sugar mills. Furthermore the Respondent sugar mills admittedly did not apply for permission to relocate yet they have relocated their sugar mills despite the ban imposed through Notification dated 6.12.2006. Since the Respondent sugar mills have relocated to the south of Punjab, where the Petitioners have functional sugar mills, the relocation policy and the acts of the Respondent sugar mills give cause to the Petitioners to file the instant Petitions. Furthermore since the policy is stated to be against public interest and national interest, this Court can look into the reasonableness of the policy and review the manner in which the executive exercised its powers to ensure that the rights of the citizens are protected. Reliance is placed on the case titled Engineer Iqbal Zafar Jhagra and others v. Federation of Pakistan and others (PLD 2013 SC 224). The Court can also exercise its power of judicial review to ensure that the decision making process was reasonable and not arbitrary or tainted with mala fide. Reliance is placed on the case titled Dr. Akhtar Hassan Khan and others v. Federation of Pakistan and others (2012 SCMR 455). Therefore as such there is no merit in the preliminary objections.

Law and Policy governing the establishment of sugar mills

17. The basic law governing the establishment or enlargement of sugar mills is the Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963. Section 3 of the Ordinance provides as under:-

No person shall establish or cause to be established any industrial undertaking or enlarge or cause to be enlarged any existing industrial undertaking except with the previous permission in writing of Government.

Provided that the application of any person for the grant of such permission shall not be rejected

(a) Without giving such person an opportunity of showing cause against it; or

(b) Unless the Government is satisfied, on the basis of information available to it and after making such inquiry as it may deem fit, that the grant of permission to such person will be prejudicial to the national interest, or injurious to the health of or a source of nuisance for, the residents of the local area in which the industrial undertaking is proposed to be set up or, as the case may be, the industrial undertaking which is proposed to be enlarged is situated.

In terms of this Section, an industrial undertaking can only be established with the specific permission of the Government and permission can be refused if national interest is prejudiced or if it adversely affects public health or is source of nuisance for the locality. Section 11 of the Ordinance empowers the Government to grant exemption from the requirements of the Ordinance, in specific from the requirements of Section 3 in the following terms:-

Government may, by notification in the official Gazette, exempt any industrial undertaking or class of industrial undertakings from all or any of the provisions of this Ordinance or the rules.

18. The Government of Punjab has from time to time issued several notifications under Section 11 of the Ordinance regulating the establishment of sugar mills. The first Notification was issued on 2.10.1986 in which all industries and areas in the Province of Punjab were exempted from the application of Section 3 of the Ordinance except those specified in the Notification. As a consequence border areas, areas prone to flooding, urban areas and other specified locations mentioned in the Notification were not exempted from the provisions of Section 3 of the Ordinance. The area-wise restriction in the Notification of 2.10.1986 was referred to as the location policy for the purposes of organizing and planning the growth of sugar mills in the Punjab. In terms of this Notification a sugar mill was not exempted from Section 3 of the Ordinance, hence for the establishment of sugar mills permission was required from the Government.

19. On 3.11.1988 a new Notification was issued which amended the earlier notification of 2.10.1986. In terms of this Notification, no sugar mill was allowed to be set up in the area of Multan, Bahawalpur, DG Khan and Okara. On 17.9.2002 the location policy continued such that no new sugar mill could be set up or enlarged in the districts of Multan, Sahiwal, Vehari, Khanewal, Pakpattan, Lodhran, Bahawalpur, Rahim Yar Khan, Bahawanagar, DG Khan, Rajanpur, Layyah, Muzaffargarh and Okara. On 4.9.2003 the location policy was again amended such that no new sugar mill could be set up and no existing sugar mill could be enlarged anywhere in the Province. Therefore by way of the 2003 Notification, an absolute ban was imposed prohibiting the establishment or enlargement of sugar mills throughout the Province. On 1.4.2004 yet another Notification was issued which changed the absolute ban to an area-wise ban. The districts of Multan, Sahiwal, Vehari, Khanewal, Pakpattan, Lodhran, Bahawalpur, Rahim Yar Khan, Bahawalnagar, DG Khan, Rajanpur, Layyah, Muzaffargarh, Okara and Toba Tek Singh were areas within which no new sugar mill could be established or enlarged without the permission of the Government.

20. On 2.10.2004 by way of another amendment in the location policy it was stated that no new sugar mill could be set up in the Province and existing sugar mills could not be enlarged in the Districts of Sahiwal, Pakpattan and Toba Tek Singh. By way of Notification dated 15.7.2005, the ban was lifted but soon thereafter through letter dated 23.11.2005 the ban was again imposed on the establishment and enlargement of sugar mill throughout the province of Punjab. Thereafter Notification No.AEA-III-3-5/2003(Vol-III) dated 6.12.2006 was issued whereby a complete ban was once again imposed such that no new sugar mill could be set up and no existing sugar mill could be enlarged within the province of Punjab. This Notification continues even today and states the location policy of the Government of Punjab with respect to sugar mills.

21. On 8.4.2011 the ban imposed vide Notification dated 6.12.2006 was reconsidered by a committee constituted by the Chief Minister. The committee deliberated on the issues and decided that the ban should continue because the establishment of sugar mills in the cotton growing belt of Punjab was not in the national interest in view of the risk of increased production in sugarcane which would harm the cultivation of cotton as sugarcane is a water intensive crop which would have an adverse effect on the water resources necessary for cotton production.

Case Law

22. The various notifications issued by the Government of Punjab under Section 11 of the Ordinance have been challenged before this Court several times. In the judgment cited as Muhammad Aslam v. Government of the Punjab through Secretary Industries Department and another (PLD 2013 Lahore 528) and Madina Sugar Mills v. Secretary, Ministry of Industries and others (PLD 2001 Lahore 506) the location policy of the Government was upheld. The judgment in Muhammad Aslam and others was challenged before the august Supreme Court of Pakistan which ultimately resulted in judgment dated 25.7.2016 passed in Civil Appeals Nos.1242 to 1245 of 2013. Leave was granted to consider the scope of the provisions of Sections 3 and 11 of the Ordinance, that is whether the Government has the power to impose a ban upon the establishment/enlargement of the sugar industry specifically under Notification dated 6.12.2006 and whether the Government had valid reasons for issuing the Notification of 6.12.2006. The august Supreme Court of Pakistan in the above judgment held that:--

The decision to impose the ban was not to benefit or punish anyone but to ensure the organized and planned growth of the industry, which may include the factors noted in paragraph 16 above, even though by imposing a ban, the existing sugar mills may have obtained an advantage of reduced competition. The decision to impose the ban was taken after long deliberations and on the advice of experts and we have not been shown any mala fide or ulterior motive of the Government in taking this decision.

The august Supreme Court of Pakistan further held that:

The Act starts with the position of not permitting the setting up of any industry except by the prior written permission of the Government and then proceeds to state

that the applications seeking such permission shall not be rejected except for the reasons mentioned in the proviso to Section 3. Regretfully the rules which were envisaged in the Act and were to be made by the Government have not materialized despite the Act being in the field for over 53 years. Consequently, anyone can submit an application wanting to set up any industry and each such application is to be dealt with on a case to case basis. This, to say the least, is a most unsatisfactory state of affairs. In this terrain unregulated by rules the Government may reject the applications received by it either under clause (a) or clause (b) of the Act. Under clause (a) the Government has to provide an opportunity to show cause against it. However, under clause (b) the Government may reject an application if it is satisfied, on the basis of information available to it and after making such inquiry as it may deem fit. As noted above the Government had inquired into the matter and there was considerable information available with for it to conclude that permitting the establishment of new sugar mills or permitting the expansion of existing ones was prejudicial to the national interest. The Government therefore took the decision to prohibit both new sugar mills and the expansion of existing ones and issued the impugned notification. The decision of the Government was/is in the public and national interest. Such decision was also not motivated by malice, mala fide nor taken for any ulterior reason. Therefore, it is unexceptionable. In respect of such a decision a writ under Article 199 of the Constitution does not lie.

In this way, the august Supreme Court of Pakistan held that the notification of 6.12.2006 was a valid and justified notification which falls within the ambit of the executive authority of the Government. Furthermore the ban of 6.12.2006 was declared legal and in the national interest.

Shifting/Relocation

23. In this way, the case of the Petitioners is that since a ban has been imposed by the Government on the establishment and enlargement of sugar mills vide Notification dated 6.12.2006, there is no legal justification for issuing a policy for relocating existing sugar mills. It is their case that the relocation policy violates the ban imposed on establishment of new sugar mills, which ban has been upheld by the august Supreme Court of Pakistan for being in the national interest. The Respondents have argued that the relocation policy does not violate the ban on the establishment of new sugar mills as relocation of a functional sugar mill is different from the establishment of a new sugar mill. It is their case that notwithstanding the ban relocation is permissible. On the basis of what was argued the first question before this court is whether relocation of sugar mills falls within the ambit of establishment of new sugar mills as provided under the Ordinance and regulated under the Notification of 6.12.2006 or whether relocation is separate and distinct from establishment of a sugar mill such that it is not governed by the Ordinance or the ban. For the sake of convenience the relevant portion of the Impugned Notification reads as follows:

No.AEA-III 3-5/2011 (Vol-VIII).- In exercise of powers conferred under Section 11 of the Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963 (IV of 1963) and subject to the following exceptions and conditions, Governor

of the Punjab is pleased to exempt all industries throughout Province of the Punjab from the provisions of Section 3 of the Ordinance.

5. No new sugar mill shall be set up in the Province, and the capacity of an existing sugar mill shall not be enlarged.

6. Subject to clause 5 and the conditions, criteria and guidelines mentioned in clause 8, the Government, on the recommendations of the appropriate Committee mentioned in clause 10, may, in public interest, allow the relocation of a functional sugar mill.

7. A sugar mill, which fulfills the requisite criteria and conditions, may submit an application, along with the requisite documents and the proof of deposit of the processing fee, for the relocation of the sugar mill or merger of the sugar mills to the Government in the Industries, Commerce and Investment Department.

8. The appropriate Committee may recommend the relocation of a functional sugar mill, if the following conditions and criteria are fulfilled by the applicant-mill:

(a) The applicant-mill has cleared all the outstanding amount due to the Government and the farmers; and, for the purpose, a certificate to this effect issued by the Cane Commissioner, Punjab shall be annexed with the application.

(b) The applicant-mill has continuously been in operation for the last five years immediately before the submission of application.

(c) The application for the purpose of relocation shall:

(i) Contain complete details and justification for the proposed relocation; and

(ii) be accompanied by the requisite documents, including environmental, ecological and spatial planning feasibility and NOCs from Government department or the agencies concerned, and the original receipt of the deposit of non-refundable process fee of rupees five hundred thousand.

(d) The applicant-mill, on relocation, shall not in any manner whatsoever, enlarge the crushing capacity of the sugar mill.

(e) The ownership of a relocated mill shall not be changed or altered for at least three years from the date the mill starts functioning at relocated site.

9. The Government, on the recommendations of the appropriate committee, may allow the merger of two or more mills which will be subject to surrendering of idle capacity of the sugar mills applying for merger.

10. The following Committees shall be the appropriate committees for purposes of this Notification:-

(a) Intra-district Committee:

(i) Divisional Commissioner Convener

(ii) Administrator/DCO Member

(iii) District Officer Agriculture Member

(iv) District Officer IPW&M Member

(v) Executive Engineer Irrigation Member

(vi) District Officer Environment Member

(b) Inter-district Committee:

(i) Secretary to Government IC&I Department Convener

(ii) Secretary to Government Agriculture Department (Member)

(iii) Secretary to Government Law & PA Department (Member)

(iv) Secretary to Government Food Department (Member)

(v) Secretary to Government Environment Protection Department (Member)
(vi) Member, Board of Revenue, Punjab (Member)
(vii) Member, Planning and Development Board (Member)
(viii) Administrators or DCOs of the districts (Member)
(ix) Any co-opted member (Member)
11. The Government may, after recording reasons, refuse the establishment or enlargement of an industrial unit if it is in derogation of public interest, ecology or environment or contravenes any law or rules for the time being in force.

24. Clause 5 of the Impugned Notification reiterates the ban imposed vide Notification dated 6.12.2006 meaning that by virtue of the Impugned Notification the ban on the establishment or enlargement of new sugar mills continues by way of policy of the Government. Clause 6 allows the Government to recommend relocation of a functional sugar mill subject to the ban imposed in Clause 5 and subject to the conditions provided in Clause 8, if it is in public interest. A bare reading of Clauses 5 and 6 shows that relocation must be considered in the context of the ban on establishment of new sugar mills and in the context of public interest. In this way the Impugned Notification creates a direct nexus between relocation of a sugar mill and establishment of a new sugar mill. When seen in its historical perspective, the Government has pursuant to Section 11 of the Ordinance issued various notifications from time to time, regulating the location of sugar mills such that there were restrictions on the establishment of new sugar mills in certain areas. The area-wise restriction remains the location policy of the Government which regulates the establishment and growth of new sugar mills within the Province. This is evident from the fact that various notifications issued up to 2006 restricted the establishment of sugar mills in particular areas such as Multan, Bahawalpur, DG Khan, Rahim Yar Khan and Muzaffargarh amongst others. Ultimately the Notification of 6.12.2006 set out a complete ban on the establishment of new sugar mills and on the enlargement of the capacity of an existing sugar mill throughout the Province. The long standing rationale given for the location policy and for the ban is to protect the national interest that is the cotton crop, cotton growing areas and the textile industry. In essence the location policy of the Government has continuously protected cotton growing areas by restricting the establishment of new sugar mills in those areas.

25. The Notification dated 6.12.2006 was challenged before this Court and the matter regarding the legality of the ban has been put to rest by the judgment of the august Supreme Court of Pakistan dated 25.7.2016 in Civil Appeals Nos.1242 to 1245 of 2013 which upheld the ban on the ground that that the Government can impose such a ban if it has duly considered the national interest as well as other relevant factors. The august Supreme Court considered the national interest as well as the factors on the basis of which the ban was imposed and upheld the decision of the Government on the ground that considerable deliberations were made, advice of experts and relevant departments were considered before issuance of Notification dated 6.12.2006. The august Supreme Court considered the Pakistan Economic Survey 2015-16, heard the stance of the Province as well as the Federation and held

that not only is the ban justified but its continuance is imperative to protect the national interest. In this way the policy of the Government to protect the cotton crop and cotton growing areas has been upheld by the august Supreme Court of Pakistan which recognizes that the location of a sugar mill is relevant in order to protect national interest.

26. Relocation of a functional sugar mill means that the mill will close its operations in one area and relocate to another area. In the instant cases, the relocation is without increasing the production capacity of sugar mills, so essentially relocating the sugar mill means moving from one location to another, based on the licensed production capacity of the sugar mill. The key element for the purposes of relocation is the location to which the functional sugar mill will shift. For the purposes of the new location the sugar mill will establish itself in that area and it is a new sugar mill in the local area which does not increase the overall production capacity of sugar. In the way establishment and relocation of sugar mills are correlated when seen in the context of the ban and public interest as the key element for both is the location of the sugar mill. Hence relocation of a sugar mill is the establishment of a new sugar mill in the local area to which the provisions of Sections 3 to 12 of the Ordinance are applicable and for the purposes of the Ordinance relocation falls within the ambit of establishment of a new sugar mill and will have to be planned and organized as per the requirements of Section 3 of the Ordinance.

27. The Ordinance aims to organize and plan the growth of industry within the Province placing special emphasis on the local area within which the industrial undertaking carries out its business. Organizing and planning the growth of industry itself suggests that the location and factors related to the local area are relevant when considering an application under Section 3 of the Ordinance for grant of permission to set up an industrial undertaking. In terms of Section 3 of the Ordinance read with the Notifications issued under Section 11 of the Ordinance, when determining whether a new sugar mill can be established, the Government of Punjab has emphasized on the location of the sugar mill which means that the local environment, its geographical features and its non-geographical conditions are relevant. The Ordinance also mandates that location be considered in the context of national interest, public health and public nuisance such that it does not cause prejudice to the national interest or the public at large. To argue that relocation is different from establishment of a sugar mill is without merit as the factors considered at the time of grant of permission for establishment or relocation of a sugar mill will be identical since both are location specific and because the objective of the Ordinance and notifications issued under Section 11 is to control the location where the sugar mill is to carry out its business and to protect the national interest.

28. The august Supreme Court in its judgment dated 25.7.2016 listed the factors on the basis of which the ban of 6.12.2006 was imposed and the factors which support

the continuance of the ban today. In terms of the judgment of the august Supreme Court, the relevant factors are as follows:
a) Punjab has an arid climate whereas sugarcane is best grown in tropical zones:
b) Sugarcane consumes far more water than other crops;
c) The water required for growing sugarcane in non-perennial irrigation canal areas is made up by tapping into groundwater/aquifers inducing water scarcity by depleting aquifers;
d) Sugarcane stubble remains rooted in the soil after it has been cut therefore the second (wheat) crop cannot be grown on such land whereas it can be grown on the land from which cotton is harvested;
e) Sugarcane adversely affects food security;
f) Sugarcane substitutes cotton and wheat;
g) Existing sugar mills have underutilized capacity;
h) Textile industry is being starved of locally available cotton;
i) Cotton bales are imported by using scarce foreign exchange;
j) Textiles are a major foreign exchange earner; and
k) International price of sugar is cheaper than the local price therefore sugar does not have export potential.
The aforementioned factors confirm that the establishment of a new sugar mill is not justified simply on the basis of production capacity, but is also seen in the context of its location and the factors relevant to the local area. The same would be applicable to the relocation of a functional sugar mill because the location policy protects the national interest and there can be no relocation of a functional sugar mill without due consideration of the location it is desirous of shifting to. This understanding is in consonance with the planned policy of the Government to control the location of sugar mills. The judgment cited at PLD 2001 Lahore 506 (supra) considered the establishment of sugar mills and location policy as issued under Section 11 of the Ordinance from time to time and held that the location policy was made with the object of ensuring that additional sugar manufacturing capacity could be set up in the Punjab without displacement of the cotton crop as the same was considered to be of special significance having special interest. It further held that the location policy set out and represented a legitimate exercise of the executive authority of the Government and was consistent with its objectives to ensure organized and planned growth of industries in the Province. The Court further held that the location policy was well considered even though occasionally it was tampered with for extraneous reasons and not for national interest. The establishment of sugar mills and the location policy including the ban of 6.12.2006 when considered by the august Supreme Court of Pakistan in Civil Appeals Nos.1242 to 1245 of 2013 was upheld given that the factors regulating the location policy justified the ban on establishing sugar mills in order to protect cotton growing areas. The factors considered by the august Supreme Court and relied upon by the Government will also be relevant while considering an application seeking permission to relocate.

29. While the Impugned Notification requires relocation to be considered in the context of the ban imposed on establishing sugar mills as well as in the context of

public interest it fails to set out the guidelines on the basis of which an application for relocation should be considered. It does not provide for any of the conditions or factors on the basis of which a recommendation can be made. The conditions and criteria given in Clause 8 of the Impugned Notification leave the decision of relocation totally to the discretion of the Committee considering the matter. Clause 8(a) requires all outstanding dues to be paid and 8(b) requires continuous operation for five years. Both conditions are procedural in nature and do not control the substantive decision regarding the relocation. Clause 8 (c)(i) calls for details and justifications from the applicant, for the purposes of relocation. Since no guideline has been provided for this fundamental clause in the policy, the entire decision making process is left open ended with no specific guideline on the basis of which a decision can be made. Hence the basic objective of the policy that is to make relocation subject to the ban on establishment and in public interest is not achieved and cannot be given effect to. In its defense the learned Law Officer explained that there is a dire need to allow sugar mills to relocate on account of the change in cropping patterns and improved environmental conditions and since relocation does not enhance the overall sugar production capacity there is no violation of the ban or national interest. He argued that the policy aims to allow relocation to protect the sugar industry. The stated intent of the Government is a cause of serious concern because the Government has consistently maintained its policy to protect the cotton growing areas of Punjab yet on the basis of the Impugned Notification a sugar mill can move into a cotton growing area under the garb of relocation, which will not only violates the ban but also prejudices the stated national interest. The Government is well versed with all the factors relevant to the location of a sugar mill because it has historically and even before the august Supreme Court of Pakistan while defending the ban on the establishment of sugar mills, emphasized on the fact that the location of a sugar mill is important and must be controlled in order to ensure that the national interest in the cotton crop is protected. The purpose of the various notifications issued under Section 11 of the Ordinance from time to time evidence the need to protect the national interest that is cotton growing areas. All the notifications have been location specific intended to control the location of the sugar mill, hence to urge production capacity as the key factor controlling relocation is against the record and public interest. In fact the record shows that the Government held the view that relocation and establishment are synonymous and since relocation effectively means to establish at a new location, it was not permissible. This is evident from letter dated 29.1.2015 issued by the Deputy Director (Opinion), Government of Punjab, Law and Parliamentary Affairs Department addressed to the Secretary, Government of Punjab, Industries, Commerce and Investment Department, wherein the Government of Punjab was of the opinion that relocation of a sugar mill from Sargodha to Muzaffargarh means the establishment of a new sugar mill in Muzaffargarh and relocation would have to be considered against the touchstone of national interest, public health and in the context of public nuisance. To now minimize the emphasis on location and focus on the production capacity in order to justify the Impugned Notification compels the Court to take a harder look at the relocation policy to ascertain whether it was

issued for the benefit of the public and whether there is a rational justification for the policy.

30. It is settled law that the Government is entitled to make policies for good governance and the courts in general do not interfere in policy matters. However, there are exceptions to this rule giving this Court the power to review a policy decision to ensure that it is not arbitrary or capricious, and that it does not violate any fundamental right or provision of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution"). Reliance is placed on the case titled Messrs Al-Raham Travels and Tours (Pvt.) Ltd. and others v. Ministry of Religious Affairs, Hajj, Zakat and Ushr through Secretary and others (2011 SCMR 1621). The august Supreme Court of Pakistan has held that as regards the contention of the learned counsel that the High Court cannot interfere with the policy matters in its jurisdiction, we have some reservations, as if the policy is in conflict with any provision of law or is violative of the fundamental rights of a citizen, the same can be called in question before the High Court in its writ jurisdiction. Furthermore there are three grounds on which a policy can be reviewed by this Court under Article 199 of the Constitution. First if the policy is illegal and contrary to the law; secondly if the policy is irrational and unreasonable and thirdly if there has been procedural impropriety. The judicial review of a policy is intended to prevent arbitrariness or favourtism and is exercised in the larger public interest. Reliance is placed on the case titled Asaf Fasihuddin Khan Vardag v. Government of Pakistan and others (2014 SCMR 676). The august Supreme Court of Pakistan has also held that Article 199 of the Constitution can be invoked if the policy is a product of mala fide as held in the case titled Dossani Travels Pvt. Ltd. and 4 others v. Messrs Travels Shop (Pvt.) Ltd. and others (2013 SCMR 1749).

31. The question that arises is whether the Impugned Notification could introduce the concept of relocation when it has continued with the ban imposed on the establishment of sugar mills through Notification dated 6.12.2006. The rationale for the Impugned Notification is evidenced through the Summaries prepared for the Chief Minister by the Secretary Industries as well as Secretary (I&C), dated 8.6.2015 and 2.12.2015 (the Summaries) which discusses the factors relevant to relocation and considers the need for allowing relocation. In this regard, great reliance has been placed on both the Summaries which have been filed with the reply of the Government of Punjab. A Cabinet Committee was formed by the Chief Minister on 22.6.2015 to deliberate and formulate a policy on relocation given that the earlier location policies did not cover the aspect of relocation. The Committee comprised of:--

(i) Minister Industries
(ii) Minister for Law
(iii) Minister for Agriculture
(iv) Minister for Food
(v) Secretary Industries
(vi) Secretary Law
(vii) Secretary Agriculture

(viii) Secretary Food
(ix) Any other member to be co-opted by the committee.
The Cabinet Committee concluded that a relocation policy should be introduced since relocation does not increase the crushing capacity of the overall sugar industry. It opined that notwithstanding the existing ban on the installation of new sugar mills, relocation was inevitable as per market dynamics. It observed that Districts like Rahim Yar Khan, Muzaffargarh, Rajanpur have improved environmental factors which can sustain a change in cropping patterns. The Cabinet Committee considered the cultivation of sugarcane in Rahim Yar Khan, Muzaffargarh, Rajanpur, Bhakkar and concluded that changes in the water table, better crop variety and other environmental factors justified a relocation policy. It also observed that it would be in the public interest to allow relocation. Hence the Cabinet Committee concluded that relocation of sugar mills was necessary and a policy in support thereof was recommended. Consequently, the Impugned Notification set out the relocation policy while continuing the ban that no new sugar mill can be set up in the Province.

32. The significance of the ban is that no new sugar mill can be established nor can the licensed capacity of a sugar mill be enlarged. Consequently if a sugar mill wants to relocate to a new location that is if a sugar mill wants to establish itself at a new location, it would fall under the ban. The Government has argued that relocation does not fall under the ban because the ban is for the establishment of new sugar mills only and not for functional mills since relocation does not change the overall production capacity of sugar mills the ban will not affect functional mills. This argument is flawed as the relocation of a sugar mill means the establishment of a new sugar mill in the local area which is regulated by the Ordinance. Furthermore since the ban is on the establishment of a new sugar mills and on increasing or enlarging the capacity of sugar mills, to argue that relocation is permissible since it does not change the production capacity of sugar, fails to address the matter in its totality as it does not address the establishment or location aspect of the matter. The Government has stressed on the fact that the relocation policy is necessary to protect the capital investment of the owners of sugar mills and to respond to change in market conditions. This is evident from the Summaries relied upon. However, these reasons do not justify making relocation a way to shift into cotton growing areas because the policy of imposing the ban means that national interest overrides the capital investment requirements of any sugar mill and the need to respond to market conditions. Section 3 of the Ordinance mandates that individual requirements have to be weighed against national interest, general health of the people and causes of nuisance in the local area. The Notifications issued under Section 11 especially Notification dated 6.12.2006 means that a sugar mill cannot establish in a cotton growing area. So while the long standing policy of the ban prevents setting up mills in cotton growing areas, the relocation policy creates a way to defy the ban. In this way, the Impugned Notification does not benefit the public interest nor does it protect the national interest but to the contrary facilitates sugar mills to bypass the requirements of Section 3 of the Ordinance and totally ignore national interest. Further there appears to be no rational connection between the ban on establishing

sugar mills and the relocation policy. Looking at in another way Section 3 of the Ordinance requires a sugar mill to seek permission for establishing itself and the permission must be considered against the touchstone of national interest, public health and public nuisance for the local area. The law itself emphasizes on the local area meaning the location of the sugar mill. The objective of the Ordinance read with the Notifications under Section 11 has been to protect the cotton growing areas. The relocation policy steers away from the objective of the Ordinance and the ban and allows sugar mills to relocate within the Province with no control over the location. This means that the Respondent sugar mills can set up in cotton growing areas even though the stated national interest is to the contrary. Under the circumstances the only plausible explanation for introducing the relocation policy is to purportedly relax the effect of the 2006 ban so as to facilitate the relocation of the Respondent sugar mills.

33. Interestingly the Government of Punjab defended the ban on the establishment of sugar mills before the august Supreme Court in Civil Appeals Nos.1242 to 1245 of 2013 on the ground that new sugar mills should not be set up in cotton growing areas as it would encourage farmers to grow sugarcane in areas which would adversely affect the growth of cotton crop in those areas. Para 4 of the judgment of the august Supreme Court sets out the arguments of the Government of Punjab as follows:--

He referred to a number of documents to show that sugarcane crop consumed considerably more water than cotton or wheat and that the installed capacity of the existing sugar mills was under utilized, therefore, if additional sugar mills were set up or the existing ones expanded it would encourage farmers to grow sugarcane in their vicinity which would be bought by the sugar mills and the growing of cotton or other crops would be discouraged. By referring to the documents on record, he stated that the cotton industry adds considerable value to the harvested cotton and a sizeable portion of the textiles manufactured from it are exported, earning considerable foreign exchange for the country, but the same benefits do not accrue by growing sugarcane and manufacturing sugar. Documents were also referred to show that there was, and is, a considerable shortage of cotton in the country which is adversely impacting the textile industry which has on the one hand reduced foreign exchange earnings and on the other resulted in valuable foreign exchange being spent on the import of raw cotton for consumption by the textile industry. Reference was also made to reports to show that sugarcane as compared to other crops attracts more bacteria and insects which have an adverse impact on other crops. Under such circumstances, the Government had decided to stop the erection of new sugar mills as well as the expansion of existing ones and this decision of the Government, incorporated in the impugned Notification, was in the national interest which was also one of the stated factors to be taken into account when considering an application under Section 3 of the Act. Therefore, since every application for the setting up of a new sugar mill or the expansion of an existing one, would be contrary to the national interest, good governance and transparency mandated the issuance of the impugned Notification which had removed all discretion and prevented either favouritism or victimization.

He further defended the ban on the ground that there was no mala fide or ulterior motive while imposing the ban and that the same was done in the national interest since sugarcane is a water intensive crop yet ground water sources have depleted and sugarcane areas will only worsen the situation. Further that sugarcane crop nourishes pests and bacteria which is detrimental to cotton crop. The august Supreme Court also heard the Cane Commissioner, Punjab who also opposed the lifting of the ban and the establishment of new sugar mills for the same reasons as given by the AAG. The Secretary of Agriculture also endorsed the views of the Government on the ground that lifting the ban would adversely affect the production of cotton. Hence the august Supreme Court concluded that not only the ban was justified but also its continuance was necessary. The learned AAG also referred to the comments filed in the writ petition in which Civil Appeals Nos.1242 to 1245 of 2013 arose. The following reasons have been recorded in the judgment of the august Supreme Court of Pakistan:--

(a) At present, 46 sugar mills exist in the province and there is a deficit of about 35% between requirement and production of sugarcane crop. All the existing sugar mills are working below the installed capacity. The Punjab Province is already over crowded with regard to sugar mills, therefore, sanction for establishment of new sugar mills would not be feasible and lead to over investment.

b) Cotton is the backbone of our economy. It ensures economic security as its value added products contribute 60% to foreign exchange earnings.

c) Sugarcane crop poses threat to cotton growing areas as it has very strong substitution effect for cotton. Proliferation of Sugar Mills in the Province would adversely affect production of cotton. Government of the Punjab constituted and notified a Location Policy committee headed by the Chief Secretary, Punjab to deliberate upon the policy of Government regarding establishment of new sugar mills to maintain a balance between production of sugar and protection of cotton growing areas of the Province in the public interest. On recommendation of committee, ban was imposed on establishment of new sugar mills and enhancement of capacity of existing sugar mills throughout the province vide Industries Department's Notification dated 6.12.2006.

34. Clearly the Government of Punjab has taken an inconsistent and contradictory position before both the Courts. In the august Supreme Court while defending the ban on the establishment of sugar mills the Government of Punjab took the position that setting up new sugar mills in areas such as Rahim Yar Khan Multan, Rajanpur, Bhakkar is detrimental to the cotton crop and that cultivation of sugarcane crop poses a threat to cotton growing areas. It was also stated before the august Supreme Court that sugarcane is a water intensive crop and since ground water sources have depleted, increase in the sugarcane crop will worsen the situation. The position of the Government before the august Supreme Court of Pakistan was that the establishment of new sugar mills was not in the national interest. However, before this Court, the Government of Punjab, while relying on the recommendations of the Cabinet Committee has argued that while historically the growth of sugarcane in some areas posed a threat to cotton and wheat, today the climate and the environment conditions have changed and as such the cultivation of sugarcane in

areas like Rahim Yar Khan Multan, Rajanpur, Bhakkar would not be detrimental to cotton crop. They have also stated that the establishment of sugar mills in the aforementioned areas would not compromise or prejudice national interest. In fact they have urged that the cropping pattern should change as per market dynamics. When confronted with the contradictory position of the Government, the learned AAG appearing before this Court defended the position by relying on the fictional notion that relocation does not amount to establishment of a new sugar mill because it does not increase the total production capacity of sugar mill. In this regard, it is noted that the overall production capacity of sugar is not the driving force behind relocation or the location policy. The Respondent sugar mills have relocated to promote their commercial interest and business prospects. The new location is considered more suitable to business due to its environmental and geographical factors. The Respondent sugar mills want to relocate for better business prospects. Hence the relocation is motivated by personal interest and ignores the national interest in totality.

35. It is the fundamental duty of a Court to protect the integrity of the judicial process. A party cannot approbate and reprobate at the same time. When a party takes an inconsistent position in the same case or in a prior case, the principle of judicial estoppel should be applied. Judicial estoppel is an equitable doctrine which precludes a party from taking inconsistent positions before the Court. It protects the integrity of the judicial system and not of the litigant. It seeks to ensure respect for judicial proceedings and avoid inconsistency and abuse of process. Under the doctrine of judicial estoppal a court can stop a party from taking up contradictory stances because it is clearly inconsistent with the previous position taken by that party before another Court. The application of judicial estoppel depends upon the facts and circumstances of each case. When a party puts forth a position, as a matter of fact in one case and is successful in that assertion, that party is estopped from asserting a different position on the same facts in the second case. Obviously the party who is to be estopped in the second case is the same party in the earlier case meaning that the party is the same in both cases. Furthermore the issue for which the party is estopped from asserting its facts must have some nexus in both proceedings. It is imperative that this equitable principle be applied so that a judicial process functions properly and effectively. Litigants must approach the Court in a truthful manner especially if the litigant party is the Government. A party can always vigorously assert its position, but cannot misrepresent the facts in order to gain some advantage in the process. When a party has formally asserted a certain version of the facts in litigation, he or she cannot later change those facts because the initial version no longer suits him or her. Reliance is placed on the case titled Arkison v. Ethan Allen (160 Wn.2d 535 (Wash. 2007). The doctrine of judicial estoppel, in its most generic form, prevents a party from asserting a position in one legal proceeding, that directly contradicts a position taken by that same party in an earlier proceeding. To apply the principle of judicial estoppel, the Court must ascertain that a party has asserted a contradictory position before another Court which position was accepted by that Court. The case titled New Hampshire v. Maine (532 U.S. 742 (2001) held that there are three conditions necessary to apply

the principle of judicial estoppel. First, a party's later position must be clearly inconsistent with its earlier position. Second, courts should inquire whether the party has succeeded in persuading a court to accept its earlier position. And the third consideration is whether the party seeking to assert the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. Furthermore the literature on judicial estoppel clarifies that a party's change in its factual or legal position threatens to produce inconsistent decisions by the Courts. It reasons that judicial estoppel is necessary to protect the integrity of the court from the harm caused when a litigant engages in cynical gamesmanship, achieving success on one position yet arguing a different position in another case to satisfy an exigency of the moment. If a litigant is allowed to adopt contradictory positions in different courts it means that one court was misled or perhaps defrauded.1

36. This principle is recognized in our jurisdiction in cases where the court finds that inconsistent legal pleas in juxtaposition to each other, in two proceedings, pertaining to same subject matter taken by the same counsel is not desirable. Reliance is on the case titled Habiba Kassam and others v. Habib Bank Ltd. (1989 CLC 1433). A litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate, to the detriment of his opponent; and this doctrine applies not only to the successive stages of the same suit, but also in different suits. Reliance is placed on the cases titled Sheikh Gulzar Ali & Co. Ltd. and others v. Special Judge, Special Court of Banking and another (1991 SCMR 590), Noor Muhammad, Lambardar v. Member (Revenue), Board of Revenue, Punjab, Lahore and others (2003 SCMR 708), Overseas Pakistanis Foundation and others v. Sqn. Ldr. (Retd.) Syed Mukhtar Ali Shah and another (2007 SCMR 569) and on the case titled Amrital N. Shah v. Alla Annapurnamma (Andhra Pradesh) (1959 AIR (A.P) 9:1958(2) An.WR 447:1958 ALT 584:1958 ILR (Andhra Pradesh) 509).

37. In the instant case, the position of the Government of Punjab is clearly inconsistent with its earlier position before the august Supreme Court where the ban of 6.12.2006 was challenged. The Government defended the imposition of the ban on the ground that if new mills are established in cotton growing areas, it will have a negative impact on the cotton crop and the water tables. It defended the continuance of the ban even today on the ground that cotton is the backbone of the economy and that the sugarcane crop poses a threat to the cotton crop in Multan, Bahawalpur, DG Khan, Rahim Yar Khan and Muzaffargarh. Yet before this Court they have stated that the environment has changed since 2006 and now the cotton crop and water tables are not threatened if sugar mills are established in Multan, Bahawalpur, DG Khan, Rahim Yar Khan and Muzaffargarh. They have also stated that relocation will not harm the cotton crop yet have argued before the august Supreme Court of Pakistan that the establishment of a sugar mill will harm the cotton crop, cotton cultivation and the textile industry. The plea of the Government of Punjab was relied upon and accepted by the august Supreme Court in its judgment dated 25.7.2016. Therefore it cannot now adopt a contradictory position

before this Court. The matter in issue is related as it deals with the establishment of sugar mills and the location policy that was argued by the Government. Therefore there is a strong nexus in both the cases. The august Supreme Court of Pakistan considered the location policy wherein a ban was imposed and upheld the ban to protect national interest. In this case, the Government has justified the relocation policy even though there is a complete ban on the establishment of sugar mills. Hence, the Government of Punjab is barred from asserting that relocation of a sugar mill will not prejudice the national interest or that a policy facilitating relocation is necessary to promote the sugar industry since it has asserted its long standing policy of banning the establishment of sugar mills in the Province. The position taken before the august Supreme Court will be deemed as the correct factual and legal position of the Government of Punjab and will also be relied upon by this Court.

38. In view of the aforesaid, no sugar mill can establish in cotton growing areas as not only does it defy the ban but it also prejudices the national interest. The Impugned Notification creates a mechanism to avoid the ban by allowing sugar mills to relocate within the Province and in this case to relocate in cotton growing areas. The relocation policy undermines the basic intent for imposing a restriction on the establishment and enlargement of sugar mills in the Province. If new sugar mills cannot be established within the Province pursuant to the ban of 2006, a functional sugar mill cannot establish itself in a new area on the pretext of relocation on the justification that it is permissible since the overall sugar production is not enhanced. The cotton growing areas are protected for the collective benefit of nation. The august Supreme Court of Pakistan had declared the ban to be legal and in national interest. This being the current position, the relocation policy fails to consider all important aspects of the problem and leaves the national interest hostage to the discretion of the relevant committee. A sugar mill is given a licensed capacity to operate and the need to relocate is not based on the need to enhance its licensed capacity. The Respondent sugar mills as well as the Government of Punjab have justified the need to relocate on geographical conditions, climate conditions and on the basis of the overall environment in the areas of Rahim Yar Khan, Muzaffargarh, Bahawalpur and Rajanpur. Therefore clearly its intended to allow sugar mills to function in cotton growing areas. In this case, it has validated the Respondent sugar mills establishment in cotton growing areas.

39. This brings us to another important aspect of the case. Public officers are trustees of public funds and public property and are expected to take decisions based on public interest. Reliance is placed on the case titled Pir Imran Sajid and others v. Managing Director/General Manager (Manager Finance) Telephone Industries of Pakistan and others (2015 SCMR 1257). A Government notification or policy is not immune from challenge if it is demonstrated that the notification was issued for reasons against public or national interest. While exercising constitutional jurisdiction, this Court can look into the reasons for issuance of a policy where there are serious allegations of flouting transparency and good governance. There is no cavil to the fact that the Government can exercise its executive authority and

formulate policies necessary for governance and that Courts generally do not interfere in policy matters. However, where there are elements of abuse of power, arbitrariness and violation of the process, this Court can look into the legality of the policy. The issue before this Court is whether the relocation policy was issued for national interest or for personal interest. The main allegation against the Impugned Notification is that it was introduced to benefit the business interest of the families of the Chief Minister of Punjab and the Prime Minister of the country. A transparent and reasonable decision must be free from abuse of public office and from personal advantage. Where there is conflict of interest between private interest and public duty it must be clearly identified, appropriately managed and effectively resolved. This ensures public confidence in public institutions. A conflict of interest will arise where an official decision will impact a personal interest, financially or otherwise such that a public official is seen to have gained from that decision or is perceived to have gained from that decision. Where there is a conflict between a public official's interest as a private citizen and his duty as a public official, there is potential for a conflict of interest to arise. The jurisprudence on conflict of interest aims to ensure that private interest will not prosper from decisions taken in public office, while carrying out official duties and responsibilities. The mandate of any elected government is based on trust and public confidence. Both elements find its tools in transparency, good governance and fairness in the decision making process. Any conflict of interest, in fact or perceived will destroy public trust and malign the decisions making process.

40. In this case, the relocation policy has not benefitted or protected the national interest but is aimed to facilitate certain sugar mills, which happen to be owned by the families of the Chief Minister, Punjab and the Prime Minister of Pakistan. The deliberations on the relocation policy began in June, 2015 when a Cabinet Committee was formed to consider a policy on relocation of sugar mills in the Punjab. However prior to this, the process of relocation was under way by Ittefaq Sugar Mills Limited, Haseeb Waqs Sugar Mills Limited and Abdullah Sugar Mills Limited. Prior to June, 2015 the consistent position of the Government was that relocation and establishment of a mill are synonymous. The record shows that they considered it one and the same and rejected relocation to protect national interest. While maintaining the ban the Government carved out a relocation policy enabling the Respondent sugar mills to relocate on the pretext that relocation will not enhance the production capacity of sugar mills, hence it does not violate the ban. The timing of the policy conveniently matches the timing of the relocation of the Respondent sugar mills. Furthermore admittedly none of the sugar mills have permission to relocate or establish themselves at another location yet no action has been taken against any Respondent sugar mills. In its defense the Government claims that show cause notices were issued to the Respondent sugar mills on account of establishing a new sugar mill without the prior permission of the competent authority. However, the said notices do not establish the vigilance of the Government but instead highlights the contradictory stance as they question the relocation on the ground that there is a ban on establishing new sugar mills. The

Government took a contradictory stand before this Court to protect and rationalize its policy, however, there has been no rational justification for the relocation policy.

41. The decision making process in this case was not initiated in national interest or public interest. The process was initiated to protect certain business interests at the expense of national interest and public interest. The fact that the Government of Punjab supports the ban imposed on establishing new sugar mills means that it has deliberated on the factors relevant to the establishment of new sugar mills within the Province and has accepted that cotton growing areas are to be protected and no sugar mill can be set up in those areas. It is important to note that the ban exists within the Province since 2006 to date and the Government has reiterated the necessity of ban before the august Supreme Court. The relocation of any sugar mill from one area to another is the establishment of the sugar mill in a new location which cannot be rationalized if there is a ban on the establishment of sugar mills. The districts of Rahim Yar Khan, Muzaffargarh, Bahawalpur and Rajanpur are cotton producing areas which have been protected for a considerable period of time through the location policy under the Ordinance. The Government in order to protect the interests of cotton growers as well as cotton crop has from time to time issued notifications to control the growth of sugar mills in cotton growing areas. With the ban in place, the decision of the Government is clearly to protect the cotton industry and cotton growers and all factors, environment, geographical and non-geographical relevant to the cotton industry and cotton crop become relevant when allowing the establishment of an industry in those areas. The shifting of the Respondent sugar mills specifically into cotton growing areas evidences their intent to defy the ban and the efforts of the Government to justify their relocation.

42. The matter does not end here. The Government not only designed a policy to cater to a few sugar mills but it also failed to take action against the Respondent sugar mills for establishing new sugar mills without any permission whatsoever required under the law. The Respondent sugar mills have failed to comply with the requirements of the environmental laws of the Province and have admittedly not taken the required permissions. In terms of Section 12 of the Act, no proponent of a project shall commence construction or operation unless he has filed with the Government Agency designed by Federal Environmental Protection Agency or Provincial Government Protection Agencies, as the case may be, or, where the project is likely to cause an adverse environmental effects an environmental impact assessment, and has obtained from the Government Agency approval in respect thereof. Admittedly the requirements of Section 3 of the Ordinance with respect to health and nuisance have not been looked into and the requirements of Section 12 of the Act have not been fulfilled. Yet three of the Respondent sugar mills are functional at the new location and one is in the construction phase without fulfilling the requirements of the Act or the Ordinance. The very commencement of the construction of the mills without filing an Initial Environmental Examination with the competent department and without approval on the Environmental Impact Assessment is illegal and in absolute contravention of the Act. This fortifies the view that the policy was issued for the benefit of the Respondent sugar mills and not

for the public or national interest. Reliance is placed on the case titled Sheri-CBE and others v. Lahore Development Authority and others (2006 SCMR 1202). The Respondent sugar mills are therefore establishing sugar mills under the garb of shifting/relocation in clear violation of the Ordinance as well as the Act.

43. The facilitation of the Government has given the Respondent sugar mills the ability to circumvent the ban and establish sugar mills in areas where sugar mills prejudice and adversely affect the cotton crop. The relocation policy is therefore a tool established to grant personalized exemptions to the Respondent sugar mills to establish their sugar mills despite the ban. If at all any permission was to be granted, it had to be done prior to the construction of the sugar mills in the new location and any effort now to grant NOCs under the said policy for relocating would be a mockery of public trust, transparency and good governance. Therefore, the Respondent sugar mills are restrained from carrying out the business of sugar mills in their relocated premises.

44. The Petitioners have also challenged Notification No.AEA-III-3-5/2011 (Vol-III) dated 4.12.2015 issued by the Government of Punjab, Industries, Commerce and Investment Department to the extent of clause 2(b) of the Second Impugned Notification. However the stated clause merely forms a committee to assess the impact of the transportation of sugarcane from the bordering districts of the Punjab to other provinces to determine loss of sugar cess. Hence at this stage there is no action of the Government which infringes upon any rights of the Petitioners. Therefore, the objection of the counsels for the Petitioners against the establishment of the committee is premature and not sustainable at this stage.

45. In view of the aforesaid, all these writ petitions are allowed to the extent of the relocation policy issued by the Government of Punjab which is not permitted under the law and is therefore struck down. However these petitions are dismissed to the extent of clause 2(b) of the Second Impugned Notification which merely forms a committee to assess the impact of the transportation of sugarcane from the bordering districts of the Punjab to other provinces to determine loss of sugar cess being premature and not sustainable at this stage. The Government should take necessary legal action against the Respondent sugar mills pursuant to the show cause notices issued to the Respondent sugar mills on account of their establishing new sugar mills without seeking the prior permission from the competent authority required under the law.

KMZ/J-8/L Petition allowed.

2017 P L C 31
[Lahore High Court]
Before Ayesha A. Malik, J
NASEER MUHAMMAD
Versus
WORKMEN'S COMPENSATION COMMISSIONER FOR MINES, SARGODA REGION and another
W.P.No.20554 of 2009, decided on 23rd June, 2016.

Workmen's Compensation Act (VIII of 1923)---

----S. 19---Mines Act (IV of 1923), S.3(f)---Reference to Workmen's Compensation Commissioner---"Mine"---Definition---Employee filed disability claim before Workmen's Compensation Commissioner for Mines on having fallen from 20 feet height and hurt---Commissioner awarded compensation to workman---Validity---Employer alleged that Commissioner had no jurisdiction to adjudicate upon matter as employer ran a gypsum quarry which was not a "mine" and employee did not fall under the definition of 'workman' as defined in Workmen's Compensation Act, 1923---Held, that quarry was an "open pit mine" which fell under definition of "mine" under the Mines Act, 1923---Employee was a "workman" under the Workmen's Compensation Act, 1923 and Workmen's Compensation Commissioner for Mines had jurisdiction in the matter---Constitutional petition of employer was dismissed accordingly.
Ras Tariq Chaudhary for Petitioner.
Ch. Sultan Mehmood, AAG.
Zafar Abbas Khan, Advocate for Respondent No.2.

ORDER

AYESHA A. MALIK, J.--- Through this petition, the Petitioner has impugned order dated 16.7.2009 issued by Respondent No.1.

2. The facts of the case are that Respondent No.2 filed a disability claim before Respondent No.1 on account of an injury sustained on 14.11.2007 after falling from twenty feet. Respondent No.1 awarded Respondent No.2 compensation vide order 16.7.2009 which is impugned before the Court.
3. The grievance of the Petitioner is that Respondent No.2 was working at a gypsum quarry when he got hurt and since the quarry does not fall under the definition of "mine" as defined in Section 19 of the Workmen's Compensation Act, 1923 ("Act"), he is not entitled to any compensation. It was argued that the Act only applies to persons specified in paras (i) to (xxviii) of the Second Schedule of the Act and since persons who work in a gypsum quarry are excluded, hence the Act will not apply. Learned counsel further argued that Respondent No.2 is not a workman within the meaning of Section 2(1)(n) of the Act as there is a difference between working in a mine and working in a gypsum quarry. Hence he argued that the Respondent No.1

had no jurisdiction to entertain the application of Respondent No.2 and to adjudicate upon it.

4. Learned counsel for Respondent No.2 submitted that the arguments urged before this Court today were never urged before Respondent No.1, no objection of his kind was raised, the Petitioner cannot set out a new case at this stage. Learned counsel further argued that remedy of appeal was available to the Petitioner under Section 30 of the Act which remedy was never availed by the Petitioner. Given that adequate and efficacious remedy was available, the instant Petition is not maintainable. Learned counsel further argued that Respondent No.2 was injured badly during work and has been awarded compensation, therefore, there is no grievance to be made out at this late stage when more than seven years have been gone by. He has placed reliance on the case titled Anwar Munir v. Mohd. Iqbal and others (PLD 1975 Lahore 367).

5. In response, learned counsel for the Petitioner submitted that to hold that remedy of appeal was available to the Petitioner at this stage would create a great injustice to the Petitioner as his case has been pending before this Court since 2009 and the matter should be decided on its merits. Therefore, after considering the matter, in order to ensure that injustice is not caused to the Petitioner, at this stage, the remedy of appeal which was available to the Petitioner is no longer efficacious. Hence the petition will be decided on its merits.

6. The objection of the Petitioner is that Respondent No.1 did not have jurisdiction in the matter as the Petitioner runs a gypsum quarry which is not a mine, hence Respondent No.2 is not a workman under the Act. Workman as defined under Section 2(1)(n) of the Act means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purpose of the employer's trade or business. Schedule II of the Act provides for the list of persons who are included in the definition of workman. In terms of Schedule II (v) of the Act any person employed, in any mine as defined in clause (f) of section 3 of the Mines Act, 1923 (IV of 1923) in any mining operation, or in any kind of work, incidental to or connected with any mining operation or with the mineral obtained, or in any kind of work whatsoever below ground. The Mines Act, 1923 defines 'mine' as any excavation where any operation for the purpose of searching for or obtaining minerals has been or is being carried on, and includes all works, machinery, tramways and sidings, whether above or below ground, in or adjacent to or belonging to a mine. As per the arguments of the Petitioner, he was excavating gypsum from quarry No.ML.KHB-Gypsum(29) at Golewali, District Khushab. The learned counsel was not able to explain how excavation in a gypsum quarry did not fall under the definition, of a mine. A quarry is an open pit mine which falls under the definition of a mine under the Mines Act, 1923. Therefore, there is no merit in this argument. Hence Respondent No.2 is a workman under the Act and Respondent No.1 had jurisdiction in the matter of the Petitioner. No illegality has been made out in the impugned order dated 16.7.2009 issued by Respondent No.1.

7. Under the circumstances, no case for interference is made out. Petition is dismissed.WA/N-35/L Petition dismissed.

P L D 2017 Lahore 111
Before Ayesha A. Malik, J
TEZ GAS (PRIVATE) LIMITED and others---Petitioners
Versus
OIL AND GAS REGULATORY AUTHORITY and others---Respondents
Writ Petitions Nos. 33661/2015, 31817/2013, 6569/2014, 1461 of 2016 9214/2011, 9693 of 2011 and 262 of 2016, decided on 23rd November, 2016.

(a) Liquefied Petroleum Gas (Production and Distribution) Rules, 2001 ---

----R. 18---Liquefied Petroleum Gas (Production and Distribution) Policy, 2013, Cl. 3.4---Tender notices for upliftment/sale of Liquefied Petroleum Gas ("LPG")---"Signature Bonus" charged by Oil and Gas Development Company Limited ("OGDCL") for awarding contract for lifting LPG from different gas fields---Nature and legality of 'Signature Bonus'---Whether Oil and Gas Regulatory Authority ("OGRA") could intervene to ensure that Signature Bonus was not charged---Whether Saudi Aramco Contract Price ("Aramco Price") was relevant for the purposes of fixing base stock price of LPG---The price of LPG was deregulated and determined by market forces in terms of Liquefied Petroleum Gas (Production and Distribution) Policy, 2013---Neither the Government nor OGRA was required to fix the price of LPG---'Aramco Price' was no longer relevant for the purposes of fixing base stock price of LPG---'Signature Bonus' was not pegged or related to the price of LPG; it was a term and condition of the tender and did not increase the price of LPG---Licensees'/petitioners' participation in the tender process was based on their own free will, thus, payment of 'Signature Bonus' was neither compulsory nor mandatory for the licensees/petitioners---Object of calling for bids on 'Signature Bonus' was to provide equal opportunity to all prospective bidders and to receive the highest bid---Charging of 'Signature Bonus' by OGDCL did not tantamount to unjust enrichment or abuse of dominant position in the market---Charging of 'Signature Bonus' was neither illegal nor did it infringe any fundamental right of the licensees/petitioners---Constitutional petition was dismissed accordingly.

Petitioners were in the business of marketing Liquefied Petroleum Gas ("LPG") pursuant to licenses issued by the Oil and Gas Regulatory Authority ("OGRA"). Petitioners purchased LPG from LPG Producers, and sold it to consumers. Petitioners impugned Tender Notices for upliftment/sale of LPG from different gas fields on the basis that Oil and Gas Development Company Limited ("OGDCL") was charging a "Signature Bonus" payable by the successful company prior to signing of the sale/purchase agreement. Petitioners contended that Signature Bonus raised the price of LPG such that it exceeded the Saudi Aramco Contract Price ("Aramco Price") which was not permissible as per the Liquefied Petroleum Gas (Production and Distribution) Policy, 2013, and that OGRA was not intervening for regulating the LPG price and ensuring that a premium over and above the price was not charged.

In terms of the clause 3.4 of the Liquefied Petroleum Gas (Production and Distribution) Policy, 2013, the price of LPG was determined by market forces. Said

policy clarified that LPG price was deregulated and that neither the Government nor OGRA was required to fix the price of LPG.
'Aramco' Price was not relevant for the purposes of fixing base stock price of LPG because the price was fixed by market forces.
'Signature Bonus' was clearly a term of the tender. It was the price that the LPG licensees were required to pay for award of the contract and essentially qualified as a commercial deal between the parties. In order to participate in the bidding process for the uplifting of gas, the licensees had to tender their bid on the basis of 'Signature Bonus' and the highest bidder was to be awarded the contract accordingly. 'Signature Bonus' was a part of the terms and conditions of the tender process and the licensees' participation was based on their own free will, thus, it was neither compulsory nor mandatory for the licensees to pay the same. 'Signature Bonus', therefore, was not a component of the price but was the methodology adopted by OGDCL for the purposes of selection of the highest bidder and it was a one-time amount that had to be paid.
Tata Cellular v. Union of India 1994 (6) SCC 651 ref.
Prime object of calling for bids on 'Signature Bonus' was to provide equal opportunity to all prospective bidders and to receive the highest bid. The settlement of the terms and conditions was the discretion of the LPG producers in awarding the contract for uplifting of gas from different gas fields. The fact that OGDCL charged 'Signature Bonus' did not tantamount to unjust enrichment or abuse of its dominant position in the market. It is a commercial deal between the parties and there was no restriction on OGDCL in putting forward terms and conditions that in its opinion represented the best commercial deal.
Licensees did not have any fundamental right or vested right to insist that the Government must offer a particular tender on more favourable terms and conditions or that it should adopt a particular method for selection and not follow the given method. Licensees must either accept or reject the terms offered but could not require it to be changed through the present constitutional petitions. Charging of Signature Bonus was therefore neither illegal nor did it infringe any fundamental right of the licensees. Constitutional petition was dismissed accordingly.

(b) Tender ---

----Acceptance of tender and award of contract---Scope---Terms and conditions of tender set by the Government---Judicial scrutiny---Scope---High Court did not sit as a court of appeal in relation to the terms and conditions of tender but merely reviewed the manner in which the decision was made---Terms of the invitation to tender could not be open to judicial scrutiny because the invitation to tender was in the realm of a contract---Normally, decision to accept the tender or award the contract was reached through a process of negotiation and deliberations through several tiers---More often than not, such decisions were made qualitatively by experts and the government was free to settle the terms of the contract with the parties---In such cases, if the terms and conditions of the contract were not suited to a party, they need not participate in the tender process or accept the contract---State could fix its own terms of invitation to tender and those terms were generally not

open to judicial scrutiny---Court could examine the decision making process and interfere if it was found tainted with mala fides or was arbitrary.
Tata Cellular v. Union of India 1994 (6) SCC 651 ref.

(c) Tender---

----Preconditions or qualifications---Permissibility---For tenders certain preconditions or qualifications could be laid down to ensure that the contractor had the capacity and the resources to successfully execute the works---Fair and transparent process was necessary to ensure that the contract was awarded to a credible party.

Association of Registration Plates v. Union of India and others 2005 (1) SCC 679 ref.
Kh. A. Tariq Rahim and Muhammad Azhar Siddique for Petitioners.
Feisal Hussain Naqvi for Petitioners (in W.P.No.31817 of 2013).
Muhammad Ahmad Pansota for Petitioner (in W.P. 6569 of 2014).
M.N. Beg and Tariq Farooqi for Petitioner (in W.P.No.1461 of 2016).
Dr. A. Basit for Petitioner (in W.P.No.262 of 2016).
Salman Akram Raja for Petitioners (in W.Ps.Nos.9214/2011 and 9693/2011).
Mirza Nasar Ahmad, Muzammil Akhtar Shabbir and Muhammad Zikria Sheikh, DAGs.
Mustafa Ramday and Jehanzaib Inam for Respondent PPL (in W.P. No.33661/2015).
Ali Sibtain Fazli for Respondent PARCO (in W.P.No.33661/2015).
Tahir Ali Zahi and Asad Javed for Respondent PARCO (in W.P.No.33661/2015).
Haroon Dugal for Respondent OGRA.
Mehmood Azam Awan, Sardar Qasim Farooq and Muhammad Umar Qureshi for Respondent OGDCL along with Sajid Mehmood, Corporate Law Officer, OGDCL.
Asim Iqbal for Respondent SSGCL.
Kh. Saeed uz Zafar for Respondent Ministry of Petroleum, Islamabad.
Khaliq uz Zaman for Respondents Nos. 1-3 (in W.P.No.6569/2014).
Date of hearing: 21st October, 2016.

JUDGMENT

AYESHA A. MALIK J.---This judgment decides upon the common issues raised in the instant Petition as well as Writ Petitions Nos.31817/2013, 6569/2014, 1461/2016, 9214/2011, 9693/2011 and 262/2016.

2. The Petitioners are all in the business of marketing Liquefied Petroleum Gas ("LPG") pursuant to licenses issued by Respondent Oil and Gas Regulatory Authority ("OGRA"). The Petitioners purchase LPG from LPG Producers, such as Respondent No.5, Oil and Gas Development Company Limited ("OGDCL") and sell it to consumers. The Respondent No.5 is a public listed company whose majority shares are owned and controlled by the Government of Pakistan and is one

of the largest producers of LPG in Pakistan. A dispute has arisen between the parties on account of the charging of Signature Bonus by the Respondents for the purposes of allocating contracts for lifting LPG from different gas fields. They are aggrieved by the role of OGRA and the charging of the Signature Bonus by OGDCL which has increased the price of LPG for the Petitioners.

3. The Petitioners in the instant Petition and W.P. No.1461/2016 have sought a declaration that the LPG price cannot go over and above the Saudi Aramco Contract Price ("Aramco Price"). The five Petitioners in W.P. No.31817/2013 have impugned Tender Notices for upliftment/sale of LPG from Makori Field, Tehsil Wanda Daud Shah, District Karak, KPK (OGDCL Share) and from Sinjhoro field, District Sanghar (Sindh) as the Tender is based on Signature Bonus. All the five Petitioners have their registered offices in Punjab and seek relief against OGDCL and OGRA. In the same way, the Petitioner in W.P. No.6569/2014, has impugned Tender Notice dated 21.2.2014 for upliftment/sale of LPG from TAL Block, District Karak as it is based on Signature Bonus. It also has its registered office in Punjab and has sought relief against OGDCL and OGRA. In W.P. No.262/2016, the Petitioner has impugned decision dated 6.12.2006 passed by the Economic Coordination Committee ("ECC") of the Cabinet of Federal Government. The said Petitioner is a private company limited by shares which holds a LPG marketing license from OGRA to sell/ uplift extracted gas from different locations where gas fields exist. It is also noted that Petitioners No.4 and 5, Pioneer Gas (Private) Limited and Tez Gas (Private) Limited in W.P. No.31817/ 2013 are also Petitioners Nos.1 and 2 in the instant Petition. The Petitioner, Sehwan Gas (Private) Limited in W.P. No.6569/2014 is also Petitioner No.3 in W.P. No.33661/2015. Essentially the named Petitioners seek the same relief through different Petitions.

4. The basic issue between the parties is the demand for Signature Bonus made by Respondent No.3 for the purposes of award of contract for lifting LPG from different gas fields. In terms of the impugned tender notices, OGDCL will allocate LPG lifting contracts on the basis of non-refundable Signature Bonus payable by the successful company prior to signing of the Sale/Purchase Agreement. The contract offered is for a period of five years and the marketing company offering the highest Signature Bonus will be declared the successful bidder. The remaining bidders in descending order of the offer made for Signature Bonus will be given the option to match the price of the highest bidder so that quantity of LPG produced by OGDCL is lifted by the buyer. In this regard, the Petitioners are aggrieved by the act of OGRA for not regulating the LPG price and ensuring that a premium over and above the price is not charged.

5. The counsel for the Petitioners argued that the payment of Signature Bonus is against the regulatory framework provided under Sections 7 and 21 of the Oil and Gas Regulatory Authority Ordinance, 2002 ("OGRA Ordinance"), LPG (Production and Distribution) Rules, 2001 ("2001 Rules") and the various policies introduced from time to time being LPG (Production and Distribution) Policy, 2006 ("2006 Policy"), LPG (Production and Distribution) Policy, 2011 ("2011 Policy") and the

LPG (Production and Distribution) Policy, 2013 ("2013 Policy"). It is further argued that the demand for Signature Bonus raises the price of LPG base stock which is controlled by the Aramco Price in terms of the letter issued by the ECC dated 6.12.2006. This means that the base stock price cannot exceed the Aramco Price. However, Signature Bonus raises the price such that it exceeds the Aramco Price which is not permissible as per the policies. They further argued that the ECC decision of 2006 holds the field and in terms thereof, LPG producers are free to fix the price of LPG base stock provided it does not exceed the Aramco Price. It is their case that LPG producers cannot charge a premium over and above the Aramco Price. The counsels for the Petitioners further argued that by charging Signature Bonus, the Respondent OGDCL is exploiting its position as a dominant state entity and is unjustly enriching itself at the expense of the Petitioners and the common consumers of LPG. It is their case that OGRA has distanced itself from this dispute and instead of regulating the issue and ensuring that the price of LPG does not exceed Aramco Price, they have abdicated their function in favour of the Federal Government.

6. The Petitioner, WAK Limited in W.P. No.9214/2011 seeks a declaration that it may be allowed to lift LPG from Adhi Gas Field. Learned counsel for the Petitioner argued that the Petitioner has a vested right to lift gas from the Adhi Gas Field since it has a contractual arrangement with the Respondent OGDCL from 1990. Stated there appears to be no reason to now tender the same contractual rights on the basis of Signature Bonus. Learned counsel submitted that Signature Bonus is like a 'Pagri' payment which essentially favours companies with deep pockets and therefore is tainted with mala fide.

7. Report and parawise comments have been filed on behalf of the Federal Government, Ministry of Petroleum and Natural Resources, Islamabad. It is their case that the LPG price mechanism was deregulated since September 2010 and the Government exercises no control in the fixation of LPG price. It is their case that price is fixed by market forces and thereafter OGRA regulates and monitors the reasonableness of the price. It is also their case that the Aramco Price is no longer relevant as LPG price has been deregulated. They clarified that the ECC decision of 6.12.2006 no longer holds the field and was superseded by the subsequent decision of 1.1.2013.

8. Report and parawise comments have also been filed on behalf of Respondent OGRA. Learned counsel for OGRA argued that the 2013 Policy is the prevailing policy which superseded all previous instructions, orders and policies issued by the Government from time to time. He stated that as per the 2013 Policy, LPG pricing and allocation is de-regulated and OGRA monitors the reasonableness of the price with the objective that the price remains within a reasonable margin after accounting for primary transportation, all operating and administrative costs and taxes incurred by the LPG marketing companies and distributors. It is their case that OGRA does not have any mechanism for determining the LPG price as market

forces control the price. It is further contended that the issue of Signature Bonus does not fall within their domain as it has nothing to do with the price of LPG.

9. Respondent SSGC has filed parawise comments as well. Counsel for the stated Respondent agreed that the price of LPG was deregulated and that the ECC letter of 6.12.2006 is no longer relevant. He further argued that the Petitioners have no legal or vested right which can be enforced by this Court in writ jurisdiction. He argued that the Petitioners have challenged the tender process in which no right has been created in their favour. Learned counsel submitted that the 2013 Policy was issued pursuant to the ECC's decision dated 1.1.2013. Therefore the decision of the ECC 6.12.2006 and earlier policies are no longer relevant. Learned counsel further submitted that LPG prices are no longer linked to Aramco Price and that this fact is known to all parties. Learned counsel argued that Signature Bonus is a mechanism used for selection during the tendering process and most of the Petitioners before the Court, have entered into an agreement with the stated Respondent whereby they have already paid Signature Bonus. In this regard, he has specifically referred to the Petitioners Nos.1 to 5 in W.P. No.31817/2013 and Petitioner Wak Limited in W.P. No.9214/2011 who participated in the bidding process in Sindh and offered to pay Signature Bonus and in some cases have paid the Signature Bonus. Learned counsel further argued that the Petitioners are not obligated to participate in the tender process if the terms of the tender or contract are not acceptable to them. Hence the Petitions are not maintainable.

10. By filing of parawise comments learned counsel for Respondent PARCO also supports the 2013 Policy. Learned counsel stated that the matter relates to the 2013 Policy and the ECC decision dated 1.1.2013. Learned counsel further submitted that Signature Bonus has been paid in previous tenders and as such the Petitioners have no vested or fundamental right on the basis of which they can challenge the methodology adopted by the Respondents to award contracts. Learned counsel further argued that Respondents Nos.2 to 5 in the instant Petition have adopted selection through the Signature Bonus as there are more than 100 OGRA Licensed GMCs participating in the tendering process and in this way the most credible and reliable GMCs come forward. Learned counsel further submitted that an alternate to the Signature Bonus method, a profit sharing arrangement, however, that is up to the agency seeking to tender out the contract and as such the Petitioners have no right in the matter.

11. Learned counsel for the Respondent OGDCL in support of report and parawise comments argued that the case of the OGDCL is that Federal Government does not determine, fix or notify the price of LPG. Furthermore Aramco Price is no longer relevant. The prevailing policy is the 2013 Policy based on the ECC letter of 1.1.2013. Learned counsel further argued that Signature Bonus is a way of selecting successful bidders and is a transparent and competitive process. Learned counsel further submitted that this selection mechanism is not new to the system and has been followed since 2013 in which some of the Petitioners have participated. Learned counsel clarified that Signature Bonus is not a component of the LPG

price, hence the entire case of the Petitioners is built upon the misconception that Signature Bonus increases the LPG price. He explained that Signature Bonus ensures that capable and interested parties come forward and selection is not based on favouritism nor it discriminatory. The highest bidder gets the contract and there is no unjust enrichment in this process as Signature Bonus represents the commercial deal between the parties. Since there is no price on the basis of which tender process can take place, auction is based on Signature Bonus. Learned counsel further argued that the Petitioners have no legal or vested right to question the legality of Signature Bonus as no fundamental or vested right of the Petitioners has been infringed and most of the Petitioners have paid Signature Bonus in other tenders. It is their case that Signature Bonus is a one time payment made for securing the license and the Petitioners are not obligated to enter into the tendering process if they do not wish to pay the Signature Bonus. It is also pointed that for the sale of LPG from Makori Field in the tendering process, the bids were opened on 11.12.2013 and for sale of LPG from Sinjhori Field, the bid was opened on 12.12.2013. The Petitioners before this Court namely Tez Gas (Private) Limited, WAK Limited, Petroleum Gas Company (Private) Limited, Noor LPG Company (Private) Limited and Pioneer Gas (Private) Limited have all participated in the tendering process which was based on Signature Bonus. This fact has not been denied by the stated Respondents.

12. Learned counsel for the Respondent OGDCL in relation to W.P. No.9214/2011 argued that the Petitioner is seeking performance of a contractual obligation after the expiry of the contract which stance is not maintainable in the instant writ petition. Learned counsel argued that the Petitioner has not disclosed that the Petitioner is a defaulter who did not pay the relevant dues at the time and therefore its contract was terminated on 31.7.2004. Learned counsel further submitted that the Petitioner has no vested right to seek allotment of LPG from Adhi Gas Field or from any specific field.

13. I have the learned counsel for the parties on many dates and gone through the available record and the documents relied upon by the parties.

14. The core issue before the Court is the charging of Signature Bonus and whether the Respondents can require the upfront payment of Signature Bonus to award the contract for lifting of gas. The role of OGRA with respect to price fixation and Signature Bonus is also in issue in these Petitions.

15. The relevant law with respect to pricing of LPG is contained in Rule 18 of the 2001 Rules and clause 3.4 of the 2013 Policy. The 2001 Rules and the 2013 Policy set out the manner in which the LPG price has to be fixed. Rule 18 of the 2001 Rules reads as follows:-

Price of LPG base-stock and LPG:- (1) A licensee shall charge from another licensee or a consumer a reasonable price of LPG base-stock and LPG, during a specified period, which in no case shall be less than one month, and the licensee

shall inform about such prices to the Authority. The licensee shall also publicise such prices in the media for information of the public.
(2) In case the prices of LPG base-stock or LPG so fixed by a licensee under sub-rule (1) are not considered to be reasonable or in the event of any cartel formation, the Authority may, in the public interest, determine a reasonable price of LPG base-stock or LPG, in accordance with the prevailing policy of the Federal Government which a licensee shall charge from another licensee or a consumer.
Clause 3.4 of the 2013 Policy reads as under:-
3.4.1 The Government will continue to follow its deregulation policy and the Price of LPG supply chain will not be determined or notified by the Government. The Government will charge a Petroleum Levy from local LPG producers as provided in the Petroleum Products (Petroleum Levy) Ordinance, 1961 as specified from time to time by MP&NR and levy of this levy be so fixed to protect investment in local LPG production as well as to encourage imports.
3.4.2 To ensure that cartels are not formed and high consumer price of LPG is not charged, MPNR and OGRA will determine the quantity of LPG to be imported to meet the gap between demand and supply. This quantity will be imported by public sector Sui companies. Besides, the private sector companies can also import LPG to meet the demand.
3.4.3 The LPG consumer price/retail prices will be determined by Market forces in accordance with Government's de-regulation policy. However, OGRA will oversee/monitor that LPG Prices remain within a reasonable margin after accounting for primary transportation, all operating and administrative costs and taxes for LPG marketing companies and distributors.
3.4.4 OGRA will intervene in case of deviation from the above basis and would also involve the local administration to ensure punitive action against the defaulting companies and distributors.
In terms thereof, the price of LPG is determined by market forces. The Government has no role to play in LPG price fixation. Furthermore OGRA as the front line regulator determines the reasonableness of the price so as to ensure that cartels are not formed or that high price of LPG is not charged from the consumer. They also do not fix or control the price of LPG. The counsel for the Petitioners argued their case essentially on the ground that Signature Bonus is a component of the LPG price and therefore has to be regulated by OGRA and cannot exceed the Aramco Price. A bare review of the 2013 Policy clarifies that LPG price is deregulated and that neither the Government nor OGRA is required to fix the price of LPG. In fact clause 3.4.1 of the 2013 Policy reveals that the 2013 Policy Guidelines on LPG Pricing is in continuation of the Government's deregulation policy which has been in force since 2011. It also clarifies the role of OGRA such that OGRA will only intervene if the LPG price becomes unreasonable. In such cases OGRA can look into the reasonableness of the price after accounting for certain given factors. The record also shows that the Aramco Price is not relevant for the purposes of fixing base stock price because price is fixed by market forces. Pursuant to the ECC decision dated 1.1.2013, the 2013 Policy was issued which requires price to be fixed by market forces and not the Aramco Price. Furthermore Clause 4(iii) of the 2013 Policy clearly provides that the 2013 Policy supersedes all previous instructions,

orders and policies issued by the Government from time to time. Since this Policy was approved by the ECC on 1.1.2013, the letter of 6.12.2006 by the ECC is no longer relevant on this issue.

16. The dispute of the Petitioner is on the charging of Signature Bonus. They claim that it is a component of the LPG price, hence it cannot exceed the Aramco Price. As already stated, the Aramco Price is not relevant for the fixation of LPG price. Hence the only question which arises is whether Signature Bonus is a component of the price of LPG. The counsel for Respondent OGDCL argued that Signature Bonus is a lumpsum amount which has to be paid in order to secure a contract for the uplifting of gas. The impugned tender notices testify to this fact as Signature Bonus is clearly a term of the tender. It is the price that the Petitioners are required to pay for award of the contract and essentially qualifies as a commercial deal between the parties. In order to participate in the bidding process for the uplifting of gas produced by the Respondent OGDCL, the Petitioners had to tender their bid on the basis of Signature Bonus and the highest bidder is to be awarded the contract accordingly. Therefore Signature Bonus is not a component of the price but is the methodology adopted by the Respondent OGDCL for the purposes of selection of the highest bidder and it is a one time amount that has to be paid. As such it does not a feature of the price of LPG. Furthermore Signature Bonus admittedly has been paid by some of the Petitioners namely Tez Gas (Private) Limited in the instant Petition, WAK Limited, Petroleum Gas Company (Private) Limited, Noor LPG Co. (Private) Limited and Pioneer Gas (Private) Limited in tendering process which has yet not been challenged before this Court. The stated Respondents do not deny the payment of Signature Bonus for the contracts awarded to them.

17. Under the circumstances, not only are the Petitioners Tez Gas (Private) Limited and Pioneer Gas (Private) Limited in the instant Petition estopped from challenging the charging of Signature Bonus but the entire premise of the arguments raised by the counsel for all the Petitioners that Signature Bonus is a premium on the price and that the price cannot exceed the Aramco Price, is misconceived. Signature Bonus is not a component of the price. It is the basis for bidding of a contract for uplift of gas. Signature Bonus is the mechanism used for selecting the successful bidder in the tendering process and it is neither compulsory nor mandatory for the Petitioners to pay it. It is a part of the terms and conditions of the tender process and the Petitioners participation is based on their own free will. In the case titled Tata Cellular v. Union of India (1994 (6) SCC 651) it was held that the court does not sit as a court of appeal in relation to the terms and conditions of tender but merely reviews the manner in which the decision was made. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of a contract. Normally speaking, the decision to accept the tender or award the contract is reached through a process of negotiation and deliberations through several tiers. More often than not, such decisions are made qualitatively by experts and the government is free to settle the terms of the contract with the parties. In such cases, if the terms and conditions of the contract are not suited to a party, they need not participate in the tender process or accept the contract. However, if they

choose to participate, they are bound by the terms offered to them as the terms represent the commercial deal offered by OGDCL and other Respondents. Furthermore the terms and conditions of tender are not open to judicial scrutiny simply because some participants are aggrieved by a particular condition. OGDCL being a state instrumentality has the mandate to tender out contracts of LPG based on a methodology and rationale which encourages transparency, fairness and does not lead to discrimination or exploitation. Reliance is placed on the case titled Association of Registration Plates v. Union of India and others (2005 (1) SCC 679) wherein it has been held that certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the works. Therefore a fair and transparent process is necessary to ensure that the contract is awarded to a credible party. It has been held in the case titled Messrs Airport Support Services v. The Airport Manager, Quaid-e-Azam International Airport, Karachi and others (1998 SCMR 2268) that contractual disputes between private parties and public functionaries are not open to scrutiny under the Constitutional jurisdiction. Breaches of such contracts, which do not entail inquiry into or examination of minute or controversial questions of fact, if committed by Government, semi-Government or Local Authorities or like controversies if involving dereliction of obligations, flowing from a statue, rules or instructions can adequately be addressed for relief under that jurisdiction. It has also been held in the case titled Habibullah Energy Limited and another v. WAPDA through Chairman and others (PLD 2014 SC 47) that a contract, carrying elements of public interest, concluded by functionaries of the State has to be just, fair transparent and reasonable. It must be free of any taint of mala fides and all these elements being part of the process are open to judicial review. In this case, the Petitioners do not have any fundamental right or vested right to insist that the Government must offer a particular tender on more favourable terms and conditions or that it should adopt a particular method for selection and not follow the given method. The Petitioners must either accept or reject the terms offered but cannot require it to be changed through the instant Petitions. Therefore, the charging of Signature Bonus is neither illegal nor does it infringe any fundamental right of the Petitioners.

18. This Court is of the view that the prime object of calling for bids on Signature Bonus is to provide equal opportunity to all prospective bidders and to receive the highest bid. The settlement of the terms and conditions is the discretion of the Respondents in awarding the contract for uplifting of gas from different gas fields. The fact that OGDCL charges Signature Bonus does not tantamount to unjust enrichment or abuse of its dominant position in the market. It is a commercial deal between the parties and there is no restriction on OGDCL in putting forward terms and conditions that in its opinion represents the best commercial deal. In this regard, no arbitrariness or mala fide has been proven against the Respondents. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation

to tender and those terms are generally not open to judicial scrutiny. The court can examine the decision making process and interfere if it is found tainted with mala fides or is arbitrary. In the instant case Federal Government has directed that Aramco Price and the ECC decision of 2006 are no longer relevant for the fixation of LPG price, hence the entire argument that Signature Bonus raises the base stock price is misconceived. Signature Bonus is not pegged or related to the price of LPG. It is a term and condition of the tender and does not increase the price of LPG.

19. So far as the prayer in W.P. No.262/2016 that decision dated 6.12.2006 of the ECC has no legal force is concerned, the said decision admittedly is no longer relevant as the ECC passed a fresh decision on 1.1.2013 which supersedes its earlier decision. Therefore as such W.P. No.262/2016 has become infructuous. So far as the prayer of the Petitioner, WAK Limited in W.P. No.9214/2011 is concerned, the stated Petitioner is not entitled to seek such a declaration that it may be allowed to lift LPG from Adhi Gas Field or any other field. The Respondents are free to tender out the contract on the basis of Signature Bonus. The stated Petitioner has no vested right on the basis of which it can claim such a declaration and demand extension in the license or the right to uplift gas from any particular gas field. This is the sole discretion of the Respondents.

20. In view of the aforesaid, no case for interference is made out. All the Petitions are dismissed. MWA/T-20/L Petitions dismissed.

2017 M L D 173
[Lahore]
Before Ayesha A. Malik, J
ABDUL ALEEM KHAN---Petitioner
Versus
ELECTION COMMISSION OF PAKISTAN through Secretary and others---Respondents
W.P. No.13510 of 2016, heard on 17th June, 2016.

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

----Ss. 103A, 103AA & 56---Contempt of Court Ordinance (V of 2003), S.3---Constitution of Pakistan, Art.225---Election dispute---Power of Election Commission of Pakistan to punish for contempt---Scope---Petitioner made an application under S. 103AA of the Representation of the People Act, 1976 to declare results of a bye-election as void and in support of the same, submitted a number of affidavits from voters of the constituency alleging fraud---Said application was rejected by the Election Commission on the ground that the remedy to be availed by the petitioner was to approach the Election Tribunal as mandated by Art. 225 of the Constitution with the observation that some of the affidavits submitted by the petitioner were false and fabricated---Subsequently, on basis of said observation, and upon the application of the respondent, the Election Commission proceeded to initiate proceedings for contempt against the petitioner under S. 103A of Representation of the People Act, 1976---Validity---Admittedly there was no order which had been disobeyed or disregarded by the petitioner and no proceedings were interfered with or obstructed by the petitioner---Contempt was said to have been committed by filing false affidavits in support of the petitioner's application under S. 103AA of the Representation of the People Act, 1976---Election Commission did not adjudicate on the merits of the complaint under S. 103AA of the Representation of the People Act, 1976, therefore it could not have concluded that some affidavits were false and fabricated as the said observation was presumptive without following any process of the law---Election Commission, therefore, essentially left an option open to itself to proceed against the petitioner once the Election Tribunal decided the fate of his election petition---Election Commission's observation regarding the allegedly false and fabricated affidavits prejudiced the case of the petitioner before the Election Tribunal wherein he had challenged the results of the bye-elections, and which had not been decided so far---Since the Election Commission did not adjudicate upon the merits of the petitioner's complaint under S. 103AA of the Representation of the People Act, 1976; there was no legal justification for it to observe that some of the affidavits filed by the petitioner were false , especially after the Commission itself had held that the matter was to be decided by the Election Tribunal, meaning thereby that Commission had accepted that jurisdiction in the matter lay with the Election Tribunal, hence the veracity of the affidavits was to be determined by the Election Tribunal and not the Commission---Proceedings for contempt of court against the petitioner under S.

103A of the Representation of the People Act, 1976 were declared to be illegal---Constitutional petition was allowed, in circumstances.
Syed Mehmood Akhtar Naqvi v. Federation of Pakistan through Secretary Law and others PLD 2012 SC 1089 ref.

(b) Contempt of Court Ordinance (V of 2003)---

----Ss. 3, 4 & 6----Power to hold a person in contempt of court---Object and nature of such power---Distinction between contempt of court and criminal contempt of court---Contempt of court is when a person willfully interfered with process of the court in order to disrupt or challenge authority or dignity of the court---Criminal contempt was made out when a person willfully interrupted or interfered in the administration of justice such that it obstructed or hampered the course of justice---While simple contempt of court was the disobedience of the order or direction of the court, criminal contempt was the obstruction of administration of justice in a court of law---In both cases, objective of the law of contempt was that law and order must be maintained by the court and the course of justice was not hampered---Power of contempt was a necessary sanction to protect administration of justice, however, it was a power which must be exercised with great care and caution and only when it was absolutely necessary for the proper administration of justice.

Anis Ali Hashmi for Petitioner.
Muzammil Akhtar Shabbir, D.A.G.
Hafiz Muhammad Saleem for Respondent No.1.
Ayesha Hamid for Respondent No.2.
Date of hearing: 17th June, 2016.

JUDGMENT

AYESHA A. MALIK, J.---Through this Petition, the Petitioner has challenged the proceedings undertaken by the Election Commission of Pakistan ("ECP") under Section 103A of the Representation of the People Act, 1970 ("Act").

2. The basic facts of the case are that the Petitioner moved a petition under Section 103AA of the Act calling into question the result of the bye-election held in NA 122 on 11.10.2015, on the ground that gross illegalities were uncovered in the bye-elections. In this regard, the basic grievance of the Petitioner was that a large number of people, listed as voters in NA 122 for the general elections of May 2013, were excluded from the list of voters for the bye-elections of 11.10.2015. Also that some voters were included in the electoral roll for the bye-elections whereas they did not reside within NA 122. In support of these allegations, the Petitioner supplied more than 2000 affidavits from different voters, which affidavits were relied upon for the purposes of the petition. The Petitioner also prayed for providing information pertaining to the electoral rolls and the record related thereto. The said petition was heard over four dates and eventually the ECP issued its order on 1.2.2016. In terms of the order, the petition filed under Section 103AA of the Act

was rejected and it was held that remedy under Section 56 of the Act was the proper and efficacious remedy available to the Petitioner. As to the request for information, a direction was issued making available the requisite information to the Petitioner. The ECP also made an observation in the said order which essentially gives rise to the instant Petition. For ease of reference, the order of 1.2.2016 is reproduced hereunder:--

The petition under Section 103AA is rejected. The proper and efficacious remedy is already provided under Article 225 of the Constitution, for which, the Election petition of the petitioner stands already referred to the Tribunal under Section 56 of the Representation of the People Act, 1976. It was not pressed as well, having become otherwise infructuous.

2. So far as the application under Section 19A of the Constitution is concerned, the Commission declines to adhere to unlawful assertions whereby the petitioner aimed at converting a simple application under Article 19A into a matter of investigative nature and indirectly holding a trial which is the job of the Election Tribunal.

3. All the petitioners and respondent No.1 under Article 19A of the Constitution are allowed to inspect before and obtain from District Registration Officer:

a) Documents/record under Section 45 of the Representation of the People Act, 1976.

b) They are entitled to have copies of record whereby the voters were freshly included in the Electoral Roll of 2015.

c) They may obtain the copies of record from District Registration Officer of numerous persons registered on a specific address after specifying the Census Blocks and the specific persons so registered.

d) They may obtain the copies of record of inclusion, exclusion and deletions of voters in the electoral rolls of 2015 compared with electoral roll of 2013 after specifying such persons as well as incidents.

e) They may obtain the copies of supplementary list published in July, 2015 which includes the record justifying the addition/deletion/inclusion of alleged 4542 votes.

f) They are entitled to obtain the copies of record of additions, if any, made in the electoral roll after the announcement of schedule for bye-elections in NA-122.

4. The inspection and copies of the above documents/record would be available on payment of such fee as prescribed by Rules.

5. It has been observed by the Commission with serious concern that some Affidavits filed by the petitioner were absolutely false and hence the Commission reserves its authority/right to proceed against them in accordance with law after final decision by the Tribunal concerned.

3. On the basis of this observation in paragraph 5, Respondent No.2 moved a contempt petition under Section 103A of the Act seeking action against the Petitioner for committing contempt of court. The basic grievance of Respondent No.2 in his petition was that false and fabricated affidavits were filed by the Petitioner, thereby giving false evidence to the ECP with the intent to obstruct and divert the course of justice. The Respondent No.2 detailed his objections against

180 affidavits and prayed that action be taken against the Petitioner and that he be punished for submitting false and fabricated affidavits before the ECP.

4. As per the record, the contempt petition was filed on 10.3.2016. Notices were issued and the first date of hearing was 30.3.2016. On 30.3.2016, counsel for the respondent in the petition, the Petitioner in this case, raised certain preliminary issues before the ECP. The case was adjourned for 7.4.2016. On 7.4.2016 the case was not heard and it was adjourned to 8.4.2016. On 8.4.2016, it was again adjourned giving the Petitioner one last opportunity to argue his case. The case was fixed for 25.4.2016. On 25.4.2016, counsel for the Petitioner appeared before the ECP and argued his entire case. The case was then adjourned to 2.5.2016 for orders. On 2.5.2016 it was adjourned for 9.5.2016 again for orders. On 9.5.2016, the ECP was informed of the orders of this Court dated 3.5.2016 wherein the proceedings were stayed by this Court. Hence the matter was not taken up.

5. Learned counsel for the Petitioner argued that the ECP rejected the petition under Section 103AA of the Act on the ground that jurisdiction lies with the Election Tribunal, being the proper forum. Notwithstanding the same, the ECP observed in paragraph 5 of its order that certain affidavits filed by the Petitioner were false and that the ECP would take action against the Petitioner once a final decision was taken by the Tribunal. Learned counsel submitted that once the Respondent ECP decided, it did not have jurisdiction in the matter. It could not have made the said observations. However, even though such observation was made, it could proceed under Section 103 of the Act against the Petitioner on account of the fact that there is no order of the ECP which has been violated in terms of Section 3 of the Contempt of Court Ordinance, 2003 ("Ordinance"). Since the ECP did not adjudicate upon the merits of the case, its observation regarding the falsity of some affidavits was presumptive and after the filing of the application under Section 103A of the Act by Respondent No.2, the Respondent No.1 hastily proceeded against the Petitioner and concluded the matter on 2.5.2016, reserving the case for orders. Learned counsel further argued that Respondent No.1 has no jurisdiction in the matter and cannot proceed under Section 103A of the Act since there was no adjudication on the merits of the affidavits, hence the question of their falsity could not be presumed.

6. Reply has been filed by Respondent No.1. Learned counsel for Respondent No.1 submitted that the Respondent ECP has acted in accordance with law. In terms of the proceedings under Section 103AA of the Act on cursory examination of the record and on the basis of the information provided by NADRA, the ECP was of the opinion that some of the affidavits filed by the Petitioner contained false declarations. Hence the ECP opined in its order dated 1.2.2016 in paragraph 5 that it may look into the matter after a decision by the Election Tribunal. In the meantime, the Respondent No. 2 filed the contempt petition, hence the ECP heard the matter and reserved the case for orders. He argued that the instant writ petition is premature as no order has been passed by the ECP and it has not decided whether it will proceed under Section 103A of the Act or not. Learned counsel further

submitted that where false information is given to the ECP, it can proceed under Sections 78 and 94 of the Act read with Ordinance in terms of its constitutional mandate under Article 218(3) of the Constitution of Islamic Republic of Pakistan, 1973. Learned counsel argued that at this stage any interference from the Court is premature as no order has been passed by the ECP and the Petitioner has misrepresented the facts before the Court.

7. Reply has also been filed by Respondent No.2. Learned counsel for Respondent No.2 submitted that Respondent No.2 filed petition under Section 103A of the Act read with Sections 191, 192, 193, 196, 199 and 200. Also Sections 468 and 471 of the Pakistan Penal Code, 1860 and Sections 2(B), 3 and 5 of the Ordinance. The basic grievance of Respondent No.2 is that the Petitioner brought 180 false affidavits before the ECP to obstruct the process of justice and to give a bad name to the Respondent No.2. Learned counsel further argued that the matter was heard at length by the ECP and an undertaking was given by the counsel for the Petitioner before the ECP that he would withdraw the instant writ petition as he was of the opinion that it was a misconceived petition. Learned counsel submitted that the Petitioner is bound by the undertaking given by the Petitioner and as such cannot proceed in the instant petition. She further argued that the ECP is acting in accordance with law as false and fabricated affidavits were relied upon before it and the factum of their falsity was brought to the notice of the ECP by NADRA, hence it made its observation in paragraph 5 of its order dated 1.2.2016. Learned counsel argued that since the allegations relate to Respondent No.2, hence he was well within his rights to move an application seeking necessary action against the Petitioner. She has placed reliance on the case titled Syed Mehmood Akhtar Naqvi v. Federation of Pakistan through Secretary Law and others (PLD 2012 SC 1089).

8. Arguments of the learned counsel for the parties have been heard and record perused.

9. The basic issue before the Court is whether the ECP can proceed under Section 103A of the Act against the Petitioner. Section 103A of the Act authorizes the power of the ECP to punish any person for committing contempt of court. The Section reads as follows:--

The Commission shall have the same power as the High Court has to punish any person for contempt of court and the Contempt of Court Act, 1976 (XLIV of 1976), shall have effect accordingly as if reference therein to a "court" and to a "judge" were a reference, respectively, to the "Commission" [and the Commissioner or, as the case may be, a] member of the Commission].

Sections 3, 4 and 6 of the Ordinance reads as follows:

3. Contempt of Court.---Whoever disobeys or disregards any order, direction or process of a Court, which he is legally bound to obey, or commits a willful breach of a valid undertaking given to a Court; or does anything which is intended to or tends to bring the authority of a Court or the administration of law into disrespect of disrepute, or to interfere with or obstruct of interrupt or prejudice the process of law

or the due course of any judicial proceedings, or to lower the authority of a Court or scandalize a Judge in relation to his office, or to disturb the order of decorum of a Court, is said to commit "contempt of Court". The contempt is of three types, namely, the "civil contempt", "criminal contempt" and "judicial contempt".

4. Jurisdiction.---(1) Every superior Court shall have the power to punish a contempt committed in relation to it.
(2) Subject to subsection (3), every High Court shall have the power to punish a contempt committed in relation to any Court subordinate to it.
(3) No High Court shall proceed in cases in which an alleged contempt is punishable by a subordinate Court under the Pakistan Penal Code (Act No. XLV of 1860).
Since the Respondent No.2 has alleged committing criminal contempt against the Petitioner of the Ordinance, Section 6 becomes relevant which is reproduced hereunder:--
Criminal contempt when committed.---(1) A criminal contempt shall be deemed to have been committed if a person:--
(a) Attempts to influence a witness, or proposed witness, either by intimidation or improper inducement, not go give evidence, or not to tell the truth in any legal proceedings;
(b) Offers an improper inducement or attempts to intimidate a Judge, in order to secure a favourable verdict in any legal proceedings;
(c) Commits any other act with intent to divert the course of justice.
(2) Nothing contained in subsection (1) shall prejudice any other criminal proceedings which may be initiated against any such person as it mentioned therein.

10. Contempt of Court as per Section 103A of the Act read with Section 3 of the Ordinance is the deliberate disobedience or disregard of an order or direction of the Court. Contempt of court is when a person willfully interferes with the process of the Court in order to disrupt or challenge the authority or the dignity of the Court. Criminal contempt is made out when a person willfully interrupts or interferes in the administration of justice such that it obstructs or hampers the course of justice. The difference between the two kinds is that where contempt of Court is the disobedience of the order or direction of the Court, criminal contempt is the obstruction of the administration of justice in a Court of law. In both cases the objective is that law and order must be maintained in the Court and the course of justice should not be hampered or deviated. Hence the power of contempt is a necessary sanction to protect the administration of justice, however it is a power which must be exercised with great care and caution and only when it is absolutely necessary for the proper administration of justice.

11. In this case, there is admittedly no order which has been disobeyed or disregarded by the Petitioner. There was no proceeding which was interfered with or obstructed by the Petitioner. Contempt is said to have been committed by filing 180 false affidavits in support of the petition under Section 103AA of the Act. The basic allegation is that these 180 affidavits are false and fabricated, hence they

divert the course of justice. In order to determine whether the ECP could have proceeded under Section 103A of the Act, the first question that needs to be determined is the effect of the observation it made in paragraph 5 of the order dated 1.2.2016. Given that the ECP did not adjudicate on the merits of the complaint, the ECP could not have concluded that some affidavits were false and fabricated. The said observation is presumptive, without following any process of law, supported by no reasoning. The ECP essentially left an option open to itself to proceed against the Petitioner, once the Election Tribunal decides the fate of the election petition filed by the Petitioner. Interestingly, more than 2000 affidavits were filed by the Petitioner yet the ECP observed that some of the affidavits were false and fabricated, without explaining how it has quantified or qualified that 180 affidavits are false out of the 2000 or more filed. The ECP's observations in fact prejudices the case of the Petitioner as it is still pursuing its remedy to challenge the bye-election results of NA 122 and the fate of that challenge is yet to be finally decided. Furthermore the affidavits were filed in support of the petition under Section 103AA of the Act meaning thereby that the affidavits are evidence in support of the petition and have to be seen in the context of the petition under Section 103AA of the Act. Since the ECP did not adjudicate upon the merits of the petition under Section 103AA, there was no legal justification to observe that some affidavits are false. It is important to note that the ECP passed this observation after holding that the matter will be heard, by the Tribunal, meaning that the ECP itself accepted that jurisdiction has with the Election Tribunal, hence it accepted the fact that the veracity of the affidavits would be determined by the Tribunal and not by the ECP.

12. The next question that needs to be determined is whether the ECP could proceed under Section 103A of the Act on the basis of the petition filed by Respondent No.2. The answer to this question is quite simply that it could not have proceeded in the matter. Admittedly, there is no order of the Court which has been disobeyed, no process of law which has been interfered with or disrupted by the Petitioner. The Respondent No.2 as the winning candidate has been notified and has assumed public office. Therefore, the argument that the Petitioner has committed contempt of Court for which he is liable to be punished is totally misconceived. When the learned counsel for Respondent No.2 was confronted with this reasoning, she relied upon Section 6 of the Ordinance to urge the point that criminal contempt has been committed by the Petitioner. Even this argument is misconceived as there was no case, no proceeding, no order before the ECP in which the Petitioner could have committed contempt, to divert or hamper the course of justice. The ECP declined to adjudicate upon the petition under Section 103AA of the Act on the ground that the Election Tribunal has jurisdiction. Having held that the petition and all affidavits in support thereof would not be considered by the ECP, the matter ended and there was no proceeding pending before the ECP. There was no case pending before the ECP, no proceedings held by the ECP in which the Petitioner could have committed criminal contempt. Even otherwise in criminal contempt there must be some act which has obstructed the course of justice. In this case, the Petitioner has challenged the bye-election result and has given affidavits in support of his case. The filing of the affidavits cannot be considered obstruction of justice. They have been filed by

the Petitioner in his effort to claim justice in a case that he has filed. Hence the question of contempt or criminal contempt does not arise by the filing of the affidavits. The Respondent No.2 filed the petition under Section 103A of the Act on the basis of the observation in para 5 of the ECP's order of 1.2.2016 which observation does not give rise to any reason or cause of action to allege contempt against the Petitioner. In fact, the ECP itself observed that it will consider whether it wants to proceed against the Petitioner, after a final decision by the Tribunal. Hence by way of its observation the ECP would have to first ascertain whether the affidavits were false or not before it could proceed against the Petitioner for relying on false affidavits. Admittedly, there have been no such proceedings or determination by the ECP. Under the circumstances, the ECP could not have proceeded on the petition under Section 103A of the Act.

13. Learned counsel for the Respondent ECP has also argued that the instant petition is premature as the ECP has not decided upon the matter and there is no order of the ECP. However, I am of the opinion that not only was the ECP unlawful in proceeding with the contempt petition but it also acted in haste. The contempt petition was filed on 10.3.2016, the case was heard at length and reserved for order on 2.5.2016 and again on 9.5.2016. Learned counsel for the Respondent ECP has not been able to explain why the case was heard at length and thereafter reserved for orders. In terms of the reply filed by Respondent No.2, the contempt petition was argued at length and information given by NADRA was relied upon for the purposes of establishing the falsity of 180 affidavits that were filed. Therefore, it appears that the ECP was determined to proceed in the matter and it hastily reserved the case for orders even though there is no order, direction or proceedings pending before it in which any contempt could have been made out. The ECP could not have commenced proceedings on the application filed by Respondent No.2 as there is no order of the ECP that has been violated and no act of the Petitioner that has hampered the process of justice. At this stage when the fate of the Petitioner's allegations regarding wrongful exclusion and inclusion of voters in NA 122 has not been decided, the ECP cannot presume that the affidavits were false and based on that presumption proceeded in contempt proceedings against the Petitioner.

14. Under the circumstances, the instant writ petition is allowed. The act of the ECP to proceed on the petition under Section 103A the Act filed by Respondent No.2 is illegal and against the mandate the law.

KMZ/A-96/L Petition allowed.

P L D 2017 Lahore 271
Before Ayesha A. Malik, J
ASIF NAZ---Petitioner
Versus
GOVERNMENT OF PUNJAB and others---Respondents
Writ Petition No.39823 of 2016, decided on 22nd December, 2016.

Constitution of Pakistan---
----Art. 199---Constitutional jurisdiction of High Court---Petitioner impugned decision of the Administrative Committee of the High Court whereby he was debarred from sitting in a judicial examination---Validity---Propriety demanded that a decision of the Chief Justice of High Court or the Administrative Committee of judges, be challenged at a higher forum, which was the Supreme Court since invoking the constitutional jurisdiction of the High Court would affect the comity and concordance amongst Judges and upset their administrative working---All actions and orders taken by the High Court or order of any High Court Judge in exercise of functions and powers of his/her office, shall not be amendable to the constitutional jurisdiction under Art.199 of the Constitution---Constitutional petition was dismissed, in circumstances.

Ch. Muhammad Akram v. Registrar Islamabad High Court PLD 2016 SC 961 distinguished.
Muhammad Ahmad Qayum for Petitioner along with Petitioner.

ORDER

AYESHA A. MALIK, J.---Through this Petition, the Petitioner challenges order dated 6.5.2016 passed on behalf of the Registrar, Lahore High Court, Lahore and Notification dated 19.8.2015 containing the names of the Civil Judges-cum-Magistrates appointed at the Lahore High Court, Lahore.

2. The case of the Petitioner is that he applied for the post of Civil Judge-cum-Magistrate. He passed the test and was called for interview on 14.7.2015. The Petitioner was not interviewed as he was informed that he had concealed registration of FIR No.78/2012, Police Station, Qaboola and his previous service record in the application form for judicial service. Thereafter he was informed through Notification dated 19.8.2015 that he along with six others have been permanently debarred from appearing in any examination for judicial service due to their involvement in criminal cases and suppression of some basic facts. The grievance of the Petitioner is that he cannot be penalized for life as there is no provision in the Punjab Judicial Service Rules, 1994 ("Rules") to debar an advocate from appearing in any examination of judicial service for the rest of his life. It is also his case that the concept of permanent disqualification was never mentioned in the advertisement issued in the month of January, 2015, hence it could not be levied on the Petitioner.

3. At the very outset, learned counsel for the Petitioner was questioned on the maintainability of the instant Petition. The basic challenge in this Petition is an order issued by the Administrative Committee headed by the Hon'ble Chief Justice of the Lahore High Court in its meeting held on 19.8.2015. In the said meeting, seven Judges of the Lahore High Court including the Hon'ble Chief Justice decided that persons who had concealed registration of cases against them or material facts in their application forms would be permanently debarred from participating in any examination for judicial service. Learned counsel for the Petitioner relied upon the case cited at Ch. Muhammad Akram v. Registrar, Islamabad High Court (PLD 2016 SC 961) to urge the point the Petition is maintainable on the basis of the latest view of the august Supreme Court of Pakistan.

4. The judgment cited at PLD 2016 SC 961 (supra) relied upon by the counsel for the Petitioner essentially looks at the process for appointments, absorptions and transfers made in the Islamabad High Court which were stated to be in violation of the Islamabad High Court Establishment (Appointment and Conditions of Service) Rules, 2011 ("2011 Rules") and in violation of Rule 26 of the Lahore High Court Rules 1981 ("1981 Rules"). In this case, the august Supreme Court of Pakistan examined the discretionary power exercised by the Chief Justice of the Islamabad High Court under Rule 16 of the 2011 Rules and Rule 26 of the 1981 Rules and held that the discretionary powers were not in accordance with the rules of the court. The import of the judgment, with respect, is not to interfere in all administrative affairs of the High Court which have duly been passed under the Rules of the court or where the Court has taken a policy decision. The emphasis of the court was on the exercise of powers under Rule 26 of the 1981 Rules and the violation thereunder. The said judgment is not applicable to the case of the Petitioner and the arguments that the constitutional petition lies against all administrative orders issued by the Lahore High Court is misconceived. Learned counsel for the Petitioner has not referred to the violation of any fundamental right or any rules. He is aggrieved by a policy decision of the Administrative Committee of this Court, hence reliance placed on PLD 2016 SC 961 (supra) is totally misconceived. It is also added that propriety demands that a decision of the Hon'ble Chief Justice or the Administrative Committee be challenged in a higher forum that is before the august Supreme Court of Pakistan because invoking Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 against Senior Coordinate Judges of this Court will affect the comity and concordance amongst the Judges and upset their administrative working. Hence the august Supreme Court of Pakistan in the case cited at Abrar Hassan v. Government of Pakistan and another (PLD 1976 SC 315) has held that all actions and orders taken by the High Court or has been that order by any Judge thereof in exercise of functions and powers of his office are not amenable to writ jurisdiction.

5. Therefore for the above reasons, the instant petition is not maintainable and dismissed in limine.

KMZ/A-4/L Petition dismissed.

P L D 2017 Lahore 289

Before Ayesha A. Malik, Abid Aziz Sheikh and Shahid Karim, JJ

INDEPENDENT NEWSPAPERS CORPORATION (PVT) LTD and others---Petitioners

Versus

FEDERATION OF PAKISTAN and others---Respondents

Writ Petition No.25317 of 2016, decided on 28th December, 2016.

Per Ayesha A. Malik, J; Shahid Karim, J, agreeing.

(a) Pakistan Electronic Media Regulatory Authority Ordinance (XIII of 2002)---

----Ss. 23, 39 & Preamble---Constitution of Pakistan, Art.19---Regulatory objective of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 in the context of the Fundamental Right to "freedom of speech" under Art. 19 of the Constitution---Enlargement of choice and optimization of free flow of information in the electronic media---Open and healthy competition in the electronic media---Rationale for prevention of undue concentration of ownership---Determination of circumstances in which concentration of ownership undue---Exercise of power under S.39 Pakistan Electronic Media Regulatory Authority Ordinance, 2002 to make rules in order to achieve regulatory objectives, and limitations thereto---Nature of the regulatory landscape, contours of the regulation, and limitations to authority to frame rules, extensively explained.

Pakistan Broadcasters Association and others v. Pakistan Electronic Media Regulatory Authority and others PLD 2016 SC 692; In the Book titled the Judge in Democracy by Professor Aharon Barak; Dr. Raja Aamer Zaman v. Omar Ayub Khan and others 2015 SCMR 1303; Muhammad Nawaz Chandio v. Muhammad Ismail Rahu and others 2016 SCMR 875 and Khawaja Ahmad Hassaan v. Government of Punjab and others 2005 SCMR 186 rel.

(b) Pakistan Electronic Media Regulatory Authority Ordinance (XIII of 2002)-

----S. 23(2) & Preamble---Exclusion of monopolies---Media ownership concentration and exclusion of monopolies---Vertical and horizontal integration of media ownership---Nature of such vertical and horizontal integration---Rationale for regulation of "vertical integration" of media---Any enterprise or owner who operated publication, distribution or broadcast was a media enterprise---Media enterprise could own more than one company engaged in the media business which would include a group of companies which were engaged in different areas of the media sector---Within electronic media, a media enterprise engaged in broadcast, distribution or publication and could operate another media enterprise engaged in the same line of work being broadcast, distribution or publication which was horizontal integration---Horizontal integration could give rise to oligopoly and in extreme cases monopoly, hence such integration was regulated by capping the number of licences a media enterprise could own in the same medium being broadcast, distribution or publication---Vertical integration, on the other hand, was

caused when one media enterprise integrated within the electronic media to operate some other media enterprise, so a broadcaster would integrate to operate distribution services or publication or publication would integrate to operate broadcast media---Vertical integration included cross-ownership, that was, when a common entity would operate broadcast media as well as distribution service---Vertical integration was of concern for Pakistan Electronic Media Regulatory Authority (PEMRA) because if a smaller group of owners controlled a large share of the market through broadcast and distribution it would cause concentration of ownership, which in turn meant reduction in diversity and plurality of content and the free flow of information.

(c) Interpretation of statutes---

----Purposive tool of interpretation---Subjective and objective purpose of a statute---While construing law, purposive interpretation was necessary to give the fullest possible meaning to the law which included the subjective and objective purpose of the law---Legislative intent must be seen in the context of the legal system in which the statute operated and must be sensitive to changing environment---Objective purpose of the statute would involve interests, values, objectives and functions which the law sought to protect and its interpretation must reflect the fundamental values and principles which the law-maker wished to preserve---Subjective purpose would be seen in the context of the statute and its purpose and therefore a dynamic purposive interpretation bridged the gap between law and society and could not be insensitive to the technological advancements and changing needs of the public because if the courts were to focus on subjective purpose only it would not manifest the objective of the law and would create stagnation and would be a time-centric interpretation possibly freezing the meaning of the law in one historical moment.
In the Book titled the Judge in Democracy by Professor Aharon Barak; Dr. Raja Aamer Zaman v. Omar Ayub Khan and others 2015 SCMR 1303 and Muhammad Nawaz Chandio v. Muhammad Ismail Rahu and others 2016 SCMR 875 rel.

(d) Pakistan Electronic Media Regulatory Authority Ordinance (XIII of 2002)-

----Ss. 23, 39 & 2(1)---Pakistan Electronic Media Regulatory Authority Rules, 2009, Rr. 13(3) & 13(4)---Pakistan Electronic Media Regulatory Authority (Eligibility Criteria and Bidding Procedure for Direct to Home (DTH) Distribution Service Licensing) Regulations, 2016, Reglns. 2.11 & 3.23---Constitution of Pakistan, Art. 199---Vires of Rr.13(3) & 13(4), Pakistan Electronic Media Regulatory Authority Rules, 2009 and Reglns. 2.11 & 2.23 of Pakistan Electronic Media Regulatory Authority (Eligibility, Criteria and Bidding Procedure for Direct to Home (DTH) Distribution Service Licensing) Regulations, 2016---Media ownership concentration and exclusion of monopolies---Legislative intent, nature and scope of S. 23 of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002---Rules/delegated legislation cannot go beyond the statute---Role of PEMRA as a frontline regulator---Scope---Petitioner challenged the legality of Rr.13(3) & 13(4) of the Pakistan Electronic Media Regulatory Authority Rules,

2009 and Reglns. 2.11 & 3.23 of the PEMRA (Eligibility Criteria and Bidding Procedure for Direct to Home (DTH) Distribution Service Licensing) Regulations, 2016; on the ground, inter alia, that the same went beyond the scope of S. 23 read with S. 39 of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002---Validity---Impugned Rules and Regulations ousted broadcast media licence owners from owning, controlling or operating distribution service licence and vice versa, meaning thereby that it totally prohibited "vertical integration"---Scope of S.23(2) of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 was to provide PEMRA with its regulatory objectives so that it could regulate the electronic media and achieve its stated purpose which was diversity and plurality in content---To accomplish said stated purpose, maximum participation of stakeholders was required for grant of a licence---Section 23 of Pakistan Electronic Media Regulatory Authority Ordinance, 2002, did not envision any prohibition on broadcast media operating distribution services or vice versa but to the contrary it required all media enterprises to compete in the media market with each other and with new media entities---Intent of S.23(2) of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 was for PEMRA to ensure that ownership conglomerates were not formed given that the regulatory objective was to prevent undue concentration of media ownership in a given market---Use of the word "and" in S.23(2) of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 separated two distinct regulatory objectives being "fair competition and prevention of undue concentration"; and whether the said word "and" was read disjunctively or conjunctively, it would not change the intent of the law--- Pakistan Electronic Media Regulatory Authority (PEMRA) was required to regulate vertical integration of all media enterprises so that they did not form concentrated ownership and under S.23(2) of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002; Legislature delegated the authority to PEMRA to define the circumstances, which could cause such undue concentration in any market and PEMRA could set out a regulatory environment within which the Legislature's intent was effectuated---Pakistan Electronic Media Regulatory Authority, in the present case, defined such circumstances to mean a total restriction on vertical integration between broadcast media and distribution services which restriction was based on the presumption that any vertical integration between broadcast media and distribution services would result in undue concentration of ownership---Section 23(2) of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 did not mandate such an ouster or restriction and required ownership concentration to be regulated so that it did not become undue, meaning thereby that some element of concentration was permissible---Impugned Rules and Regulations were enacted by PEMRA without setting any standards or thresholds on the basis of which it could measure, monitor or control media ownership---Effect of the impugned Rules and Regulations was that by restricting two specific media enterprises from vertically integrating and allowing other media enterprises to vertically integrate, undue concentration of media ownership was left unregulated because it was seen only in the context of integration between broadcast media and distribution services and not in the context of the relevant market, which was illogical and is not in furtherance of the objectives or purpose of the law---High Court observed that S.23(2) of the Pakistan

Electronic Media Regulatory Authority Ordinance, 2002 did not leave it open to PEMRA to set out a new regulatory authority but instead required it to work within the confines of the prescribed objectives and in the present case, PEMRA abdicated from its functions as a regulator and instead transgressed into the domain of the Legislature, which is not permissible---High Court further observed that if the intent of the law was to prohibit vertical integration it would not have required PEMRA to define the circumstances, which created undue concentration of ownership and the Legislature would have prescribed the restriction in the stated section---High Court held that Rr.13(3) & 13(4) of the Pakistan Electronic Media Regulatory Authority Rules, 2009 and Reglns. 2.11 & 3.23 of the PEMRA (Eligibility Criteria and Bidding Procedure for Direct to Home (DTH) Distribution Service Licensing) Regulations, 2016 were enacted without lawful authority and were struck down---Constitutional petition was allowed, accordingly.

Pakistan Broadcasters Association and others v. Pakistan Electronic Media Regulatory Authority and others PLD 2016 SC 692; In the Book titled the Judge in Democracy by Professor Aharon Barak; Dr. Raja Aamer Zaman v. Omar Ayub Khan and others 2015 SCMR 1303; Muhammad Nawaz Chandio v. Muhammad Ismail Rahu and others 2016 SCMR 875; Khawaja Ahmad Hassaan v. Government of Punjab and others 2005 SCMR 186; Zarai Taraqiati Bank Limited and others v. Said Rehman and others 2013 SCMR 642; PLD 2014 SC 389 and Mian Zaiuddin v. Punjab Local Government and others 1985 SCMR 365 rel.

(e) Delegated legislation ---

----Framing of rules/regulations under a parent statute---Rules and regulations framed under a statute could not transgress the limits set by the statute---Rule-making body/authority could not frame rules which were in conflict with or in derogation of the substantive provisions of the statute under which said Rules were framed and in case of any inconsistency with the parent statute; the excessive rule would be considered illegal if it went beyond its delegated authority---When the Legislature conferred powers on a regulatory authority to frame rules, it was expected that such rules would advance the purpose of the Legislature and not run contrary to it.

(f) Delegation of powers ----

----Delegated authority was incidental to statutory function and could not run parallel to the statutory function---Regulators drew their authority from Legislation which created it, and limits placed on a regulator were prescribed by law.

(g) Regulatory authority--

----Exercise of powers by a regulatory authority/public regulator---Flexibility and independence of regulatory authorities---Subordinate legislation/rules enacted by a Regulator---Test to determine validity of such subordinate legislation/rules---

Whenever there was an element of flexibility, a regulator may run the risk of over stepping its boundary and going beyond the authority delegated to it and therefore it was important to examine the question as to whether the rules and regulations made under a statute were inconsistent with the statute itself and whether such rules and regulations achieved the purpose of the statute---Courts were to ensure that a regulator remained within its regulatory domain and did not attempt to step into the role of the Legislator.
Khawaja Ahmad Hassaan v. Government of Punjab and others 2005 SCMR 186 rel.

Per Shahid Karim, J; agreeing with Ayesha A. Malik, J

(h) Pakistan Electronic Media Regulatory Authority Ordinance (XIII of 2002)-

----Ss. 23 & 39---Pakistan Electronic Media Regulatory Authority Rules, 2009, Rr.13(3) & 13(4)---Media ownership concentration and exclusion of monopolies---Exercise of power of Pakistan Electronic Media Regulatory Authority ("PEMRA") for grant of licence---Concept of "undue concentration of media ownership" in the context of S.23 of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002---Limits on the power of PEMRA to shut the door on a whole category of media enterprise---Concept of "ex ante ownership" and "ex-post competition" regulation---Various ways in which Rr.13(3) & 13(4) of the Pakistan Electronic Media Regulatory Authority Rules, 2009 travel beyond the scope of the statutory domain of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002, discussed.
FCC v. National Citizens Comm, For Broadcasting 436 U.S. 775 (1978) distinguished.

(i) Interpretation of statutes ----

----Canons of statutory interpretation---"Omitted-Case Canon", explained.
Felix Ferankfuther, Some reflection on the Reading of Statutes, 47 Colum, L.Rev. 527, 533 (1947) and Interpretation of Legal Texts by Antonin Scalia and Bryan A. Garner rel.

(j) Rules---

----Framing of Rules---Rules are forged in the furnace of everyday experience---Rules cannot be framed to render a provision of the primary legislation as dormant and redundant.
"The Rule of Law" by Lord Bingham rel.

(k) Constitution of Pakistan--

----Art. 199---Judicial Review of administrative actions---Judicial review of delegated legislation/enactment of secondary legislation---Courts had the authority

to review subordinate legislation if it was satisfied that in making it, the delegatee acted outwith the legislative powers conferred upon it by Legislature.
F. Hohman La Roche and Co v. Secretary to State for Trade and Industry [1975] AC 295; RV Her Majesty's Treasury, Ex p Smedley [1985] 1 QB 651 (666-667); R (Asif Javed) v. Secretary of State for Home Department [2001] EWCA Civ 789 and Bank Mellat v. Her Majesty's Treasury [2013] UK SC 39 rel.

(l) Constitution of Pakistan--

----Art. 199---Constitutional jurisdiction of High Court---Judicial review of administrative actions---Principle of judicial restraint---Exercise of judicial restraint by High Court in its constitutional jurisdiction---Scope---If a case could be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court would decide only the latter---Where a statute was susceptible of two constructions, by one of which grave and doubtful constitutional questions arose and by the other of which such questions were avoided, the Court's duty was to adopt the latter.

Ashwander v. Tennessee Vally Auth. 297 US 288, 347 (1936) and Attorney Gen. v. Delaware and Hudson Co., 213 US 366 (1909) rel.
Ms. Asma Jahangir assisted by Ms. Noor Ejaz Chaudhary, Hamid Azam Leghari and Ms. Namra Gilani, for Petitioners.
Mirza Nasar Ahmad and Muzammil Akhtar Shabbir, DAGs for the Federation.
Salan Akram Raja assisted by Asad Ladha, Ms. Unsa Manzoor, Bilal Bashir, Nadeem Shehzad Hashmi, along with Wakeel Khan General Manager (Lecensing), PEMRA and Tahir Farooq Tarar, ACM(Legal) PEMRA for Respondents.
Date of hearing: 27th October, 2016.

JUDGMENT

AYESHA A. MALIK, J.---Through this Petition the Petitioner has challenged the vires of Rules 13(3) and (4) of the Pakistan Electronic Media Regulatory Authority Rules, 2009 ("Rules") and Regulations 2.5, 2.11 and 3.23 of the PEMRA (Eligibility Criteria and Bidding Procedure for Direct to Home (DTH) Distribution Service Licensing) Regulations, 2016 ("DTH Regulations") notified on 20.8.2016. The Petitioner has also challenged Regulation 12(3) of the PEMRA (Radio Broadcast Stations Operations) Regulations, 2012 ("2012 Regulations").

The Dispute

2. The Petitioner is in the electronic media business and holds a Broadcast Media License issued by PEMRA. The Petitioner wants to apply for a Direct To Home license ("DTH license"), which essentially is a distribution service within the electronic media. Through the impugned Rules and DTH Regulations PEMRA has prohibited broadcast media license holders from operating distribution service licenses which includes the DTH license. It is the Petitioner's case that the prohibition imposed under Rules 13(3) and (4) of the Rules and Regulations 2.11

and 3.23 of the DTH Regulations is unreasonable, discriminatory and beyond the scope of Section 23 of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 ("Ordinance"). It was explained that the challenge to Rule 12(3) of the 2012 Regulations is on the same grounds as the same restriction is placed on radio broadcasters, however the DTH license is only for the electronic media.

3. The dispute relates to the award of DTH licenses which is a license to operate a distribution service. PEMRA has offered three DTH licenses by way of which a DTH license holder will be able to deliver television transmission directly via satellite into the home of the viewer. The DTH technology enables a license holder to collect a bouquet of television channels in digital and encrypted form and uplink the entire bouquet through a DTH satellite. The bouquet is received by the subscriber directly from the satellite through a top box set which decodes and decrypts the DTH signal. In this way, the DTH license holder can transmit to remote areas which are not covered by terrestrial transmission or cable networks. Each licensee will be allowed, other than the live channels, five thematic channels on which the licensee can relay content of its own choosing as regulated by PEMRA. In this way the DTH license holder can beam any programme of its choice directly into the house of the viewer on the thematic channels. The DTH licensing initiative in Pakistan commenced in the year 2003 however, PEMRA was not able to successfully launch the DTH technology due to various reasons including litigation, which is stated to be still pending before the august Supreme Court of Pakistan. It was also stated that Pakistan is lagging behind other countries so far as DTH technology is concerned as DTH technology is used world over and once functional in Pakistan will provide connectivity in remote areas especially where there is no cable or internet transmission due to lack of infrastructure to support television viewage.

4. On 1st June 2016 PEMRA issued SRO No.551(1)/2016 which sets out the eligibility criteria and bidding procedure for the DTH license. Regulation 2.11 of the stated SRO provides that the maximum shareholding of broadcast media or landing rights permission in the applicant company shall not exceed a total of 20% and that broadcast media cannot have its management or control over the applicant company. On 12th August 2016 SRO No.774(1)/2016 was issued by PEMRA amending the earlier SRO No. 551(1)/2016. Consequently Regulations 2.11 and 3.23 was amended and now the stated regulation contains a total prohibition on broadcast media from applying for the DTH license. It was argued that this amendment was introduced to mirror the restriction contained in Rule 13(4) of the Rules which was earlier overlooked in SRO of 1.6.2016.

The Arguments

5. Counsel for the Petitioner Ms. Asma Jahangir, argued that the Rules and the DTH Regulations being subordinate legislation have traveled beyond the mandate granted to PEMRA under the Ordinance. While relying on Section 23 of the Ordinance, she explained that the Ordinance does not impose any restriction whatsoever on vertical integration between media enterprises and that PEMRA has travelled beyond its

delegated realm by prohibiting vertical integration. Resultantly, the Petitioner is at a disadvantage as it cannot distribute its own content and is denied the ability to expand its business. She argued that the DTH Regulations impose an unreasonable restriction on the right of the Petitioner to enter into lawful business, to apply for the DTH license and to enter into fair competition as provided for under the Ordinance. She further argued that the Rules and the DTH Regulations prohibit broadcast media license holders from obtaining a DTH license for which there is no reasonable or rational explanation and it offends the fundamental rights of the Petitioner. It is also her case that the restriction violates Article 25 of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution") , as the Petitioner is being discriminated against. The restriction is only on broadcast media whilst all other media enterprises can apply for the DTH license. Furthermore foreign companies have been allowed to bid for the DTH license irrespective of whether they are in broadcast media or not. However local broadcast media is prohibited from operating a DTH license which is discriminatory. She stated that there was no legitimate or lawful reason to separate broadcast media from distribution services. It is her case that no objective criteria was defined by PEMRA on the basis of which it decided that the integration of broadcast media with distribution service tantamounts to undue concentration of media ownership. In support of her arguments, she submitted a plethora of judgments including judgments from foreign jurisdiction such as India, USA and Australia.

6. Report and parawise comments have been filed by all the Respondents. Learned DAG stated that the Federal Government relies upon the parawise comments and arguments made on behalf of Respondent No.2, PEMRA. He clarified that the Federal Government only approves the regulations or amendments proposed by PEMRA and that PEMRA being the regulator is authorized to regulate the distribution of foreign and local television channels.

7. The case of PEMRA, as argued by Mr. Salman Akram Raja is that PEMRA as the front line regulator has the power to restrict broadcast media license holders from operating distribution services which includes the DTH license in order to avoid undue concentration of media ownership. This restriction has been imposed keeping in view the mandate of the Ordinance which specifically requires PEMRA to prevent concentration of market power within the electronic media. Hence PEMRA deemed it necessary to restrict broadcast media license holders from obtaining distribution licenses as the integration of the two media enterprises would lead to undue concentration of media ownership which in turn adversely affects diversity and plurality of content in the electronic media. He further argued that the mandate of Section 23 of the Ordinance is to prevent concentration of media ownership at the time of grant of license and thereby encourage diversity and plurality of content. He further argued that in terms of the delegated authority under Section 39 of the Ordinance PEMRA is to define undue concentration of media ownership and regulate media ownership accordingly. It is his case that the legislature left it to PEMRA to decide how to regulate and control concentration in media ownership. Accordingly PEMRA made the Rules in the year, 2009 and

restricted broadcast media from the grant of a distribution license and vice versa because as per its understanding cross ownership in media enterprises leads to undue concentration of media ownership. He further argued that the restriction imposed in the Rules and 2012 Regulations does not violate any fundamental right of the Petitioner nor is it discriminatory in any manner whatsoever. He contended that it is common in licensing regimes to prohibit a person engaged in one activity from simultaneously engaging in another activity. It is also his case that Section 23(2) of the Ordinance necessitates both competition regulation and ownership regulation by PEMRA. He argued that the use of the word 'and' in Section 23(2) of the Ordinance wherein it is provided that the Authority shall ensure open and fair competition and that undue concentration is not created, is disjunctive creating two distinct regulatory objectives for PEMRA. As per his contentions the first objective is to ensure fair competition. Generally competition regulation is ex post as it seeks to prohibit anticompetitive behaviour after it has happened and thereby punish entities that have indulged in such behaviour after the fact. The second objective is to regulate media ownership which regulation requires control before the grant of license. Therefore ownership restrictions are ex ante and do not punish a particular action after the event. It is a restriction that is to be applied before the grant of the license, meaning that PEMRA is not to grant a license which would ultimately result in undue concentration of media ownership. As to the DTH Regulations they simply give effect to Rules 13(3) and 13(4) of the Rules which have separated ownership control between broadcast media and distribution service. He argued that this separation has been accepted by the electronic media sector since 2009 and as such does not call for interference on account of the alleged grievances of the Petitioner. So far as the 2012 Regulations are concerned, they relate to radio broadcasters and envision the same restriction as contained in the Rules impugned by the Petitioner. In support of his arguments, the learned counsel submitted a plethora of judgments including judgments from foreign jurisdiction such as India and the USA.

The Issue

8. The case before the Court questions the legality of Rules 13(3) and 13(4) of the Rules as well as Regulations 2.11 and 3.23 of the DTH Regulations which have ousted the Petitioner from operating in distribution services. Consequently the Petitioner cannot bid for or operate a DTH license, hence this Petition. The issue before us is whether PEMRA has acted within its statutory authority as mandated under Section 23 read with Section 39(2)(e) of the Ordinance while promulgating Rules 13(3) and 13(4) of the Rules or whether PEMRA has gone beyond the statutory mandate by promulgating the stated Rules which oust broadcast media from distribution services and vice versa. Since the case before us was argued with reference to the DTH license which is available for the electronic media therefore we will confine ourselves to the legality of Rules 13(3) and 13(4) of the Rules and the impugned clauses of the DTH Regulations. Since the challenge to the 2012 Regulations was not argued before us, we deem it appropriate to leave that issue for some other appropriate case where the challenge is specifically related to the radio market and radio broadcasters. After hearing both the counsels it transpires that the

first question before us is the intent of the Ordinance and specifically the intent of Section 23(2) read with Section 39(2)(e) of the Ordinance wherein the authority to define the circumstances which cause undue concentration of ownership has been delegated to PEMRA. Thereafter the next question we will address in our judgment is whether Rules 13(3) and (4) of the Rules are consistent with the mandate of Section 23(2) of the Ordinance or whether PEMRA has gone beyond the prescribed mandate and exceeded its delegated authority by promulgating Rules 13(4) and (5) of the Rules and Regulations 2.11 and 3.23 of the DTH Regulations.

The Regulatory Objective

9. Under the Ordinance PEMRA is the regulatory authority for the electronic media and its objectives are clearly elucidated in the Preamble to the Ordinance stating therein that the Authority, PEMRA is to ensure a free and diverse electronic media giving an accurate and fair representation of information to the public. The importance of diversity and plurality of content within the electronic media is contained in clause (ii) of the Preamble wherein it is stated that PEMRA must enlarge the choice available to the people of Pakistan in the media for news, current affairs, religious knowledge, art, culture, science, technology, economic development, social sector, music, sports, drama and all subjects of pubic and national interest. The Preamble also requires that PEMRA ensure accountability, transparency and good governance by optimizing the free flow of information. The emphasis on choice and free flow of information is to encourage divergent viewpoints in the content so that the electronic media is representative of all segments of society, be it demographic, ethnic, gender or otherwise. At the same time the electronic media is required to present a variety of viewpoints and ideas maintaining plurality in its content. Hence the purpose of the Ordinance is to ensure diversity and plurality in content and information which is an integral part of the right to freedom of speech and expression.

10. The fundamental right to freedom of speech and expression as enshrined in Article 19 of the Constitution means the right to express one's own convictions and opinions in any form or mode through all available mediums. This fundamental right is the catalyst of a democratic process where all citizens have the right to participate in the affairs of the country and is essential for guaranteeing the rule of law. Participation becomes meaningless where the citizen is not well informed on all sides of the issues, through a variety of opinions and outlooks. Therefore the widest possible dissemination of information from diverse and opposed sources is essential for the welfare of the public and the existence of a democratic society. This right has been explained in the case titled Pakistan Broadcasters Association and others v. Pakistan Electronic Media Regulatory Authority and others (PLD 2016 SC 692) wherein it was held that:-

11. No doubt freedom of speech goes to the very heart of a natural right of a civilized society to impart and acquire information about their common interests. It helps an individual in self accomplishment, and leads to discovery of truth, it strengthens and enlarges the capacity of an individual to participate in decision

making, and provides a mechanism to facilitate achieving a reasonable balance between stability and social change.

12. The concept of freedom of media is based on the premise that the widest possible dissemination of information from diverse and antagonistic sources is sine quo non to the welfare of the people. Such freedom is the foundation of a free government of a free people. Any attempt to impede, stifle or contravene such right would certainly fall foul of the freedom guaranteed under Article 19 of the Constitution of Islamic Republic of Pakistan.
Freedom of expression and speech requires a free media to disseminate ideas and information through diverse and antagonistic sources. Through a range of programmes involving diverse social actors the electronic media disseminates information and ideas offering a wide variety of content based on need and public interest. The information and content plays a significant role in shaping public opinion and expression, which is why the media is recognized as an essential constituent of the democratic process. The role of a free media is critical in the democratic process since it is the primary medium through which information, ideologies, ideas and related content is made available to the viewer, which content will ultimately influence public opinion and decision making. In any democratic system it is therefore imperative that the media provide the public with information and the platform through which the freedom of expression can be exercised.

11. The electronic media uses three mediums for dissemination of information being broadcast, distribution and publication. For each of the mediums to effectively provide information, education and entertainment to the public a legal framework conducive to freedom of expression, ensuring diversity and pluralism of information has been set out under the Ordinance. The purpose of the Ordinance is to create a legal framework which will guarantee diversity and plurality in content and information and ensure the free flow of information. This is the underlying objective which PEMRA must achieve while regulating the electronic media. The Ordinance requires healthy competition and open access for the grant of licenses to operate in any given medium. Resultantly the ownership of media entities which are to become licensed operators under the Ordinance becomes relevant. Ownership of entities which operate within the electronic media is a cause of concern for the regulator as ownership concentration is considered to be a threat to diversity and pluralism of information which in turn can influence public opinion. The advancement of technology within the electronic media means that the viewer is given access to information and content through various different mediums and services which may interplay and enable media entities to communicate with the viewer through multiple channels. Consequently the interplay of technology and public need gives rise to issues of convergence in ownership as media owners look to expanding their business interest horizontally in all segments of broadcast, distribution or publication and at the same time expand their business interests vertically, across different mediums so that broadcasters enter into publication and distribution and distributors into publication or broadcasting and so on. Not only is the vertical and horizontal integration economically efficient and desirable but it

also means reaching a larger number of viewers by improving the quality of services and use of technological advancements. Hence the regulatory landscape is complex and demanding, requiring regulatory intervention at multiple levels.

12. Media ownership and its concentration are perceived as a direct threat to the elements of diversity and plurality of information. Concentration reduces the number of participants and creates larger economic units within the media market. Concentration also has a political dimension as it can promote certain interest groups over others and prevent the entry of new competitors in the market. It suggests that fewer people will dominate the electronic media thereby reducing variety and choice in content for the viewers. If the media is controlled by fewer individuals it adversely affects plurality since it will reduce the variety in ideas, debate and discussion. When the source of the information is reduced it will weaken the democratic processes because the circulation of ideas and opinions will become concentrated. Hence regulating media ownership becomes vital and in the public interest because it guarantees freedom of expression and speech through the dissemination of information. Undue concentration is considered as the negation of diversity and plurality which is the hallmark of freedom of expression and speech. The existence of monopolies and oligopolies in media ownership will impede the communication and circulation of ideas and opinions. Therefore the regulator is required to harmoniously balance the open access safeguards with the concentration controls to achieve an efficient media market. Regulating media ownership and anticompetitive practices essentially mean to prevent a lesser number of independent owners of media enterprise from dominating and controlling the relevant media market. Therefore in the context of both ownership regulation and competition regulation the control factor and the relevant market are significant.

13. In the case before us the issue revolves around ownership regulation that is on cross ownership of media enterprises. PEMRA has restricted vertical integration by prohibiting cross ownership such that a broadcaster cannot operate distribution services and vice versa. PEMRA is of the opinion that a common entity having control in broadcast media and distribution services in the same market will destroy the element of plurality and diversity of information. It was argued by the counsel for PEMRA that the Rules and DTH Regulations ensure that there is no concentration of ownership in the media market. He further argued that broadcasters can distribute their own content, hence their business is not adversely affected nor are they denied the right to expand their business by separating them from distribution services. By excluding broadcasters from the grant of DTH licenses, PEMRA has ensured that the broadcasters will not control the media market because if broadcast media owns distribution services it will cause undue concentration in media ownership and a few hands will end up influencing public opinion and choice. The question therefore arises as to whether PEMRA could exclude broadcasters from distribution services or whether it has to regulate the sector and prevent undue concentration of media ownership within the relevant market.

The Legal Landscape

14. For ease of reference the legal framework on the subject is reproduced hereunder:-

Section 23 of the Ordinance provides as follows:-

Exclusion of monopolies (1) No person shall be entitled to the benefit of any monopoly or exclusivity in the matter of broadcasting or the establishment and operation of broadcast media or distribution service or in the supply to or purchase from, a national broadcaster of air time, programmes or advertising material and all existing agreements and contracts to the extent of conferring a monopoly or containing an exclusivity clause are, to the extent of exclusivity, hereby declared to be inoperative and of no legal effect.

(2) In granting a licence, the Authority shall ensure that open and fair competition is facilitated in the operation of more than one media enterprise in any given unit of area or subject and that undue concentration of media ownership is not created in any city, town or area and the country as a whole:

Provided that if a licensee owns, controls or operates more than one media enterprise, he shall not indulge in any practice which may impede fair competition and provision of level playing field.

Section 39 of the Ordinance reads as follows:-

Power to make rules (1) The Authority may, with the approval of the Government, by notification in the official Gazette, make rules to carry out the purposes of this Ordinance.

(2) In particular, and without prejudice to the generality of the fore going power, such rules may be provided for all or any of the following matters, namely:-

(a) to prescribe the forms for the licences for working, installing, operating, or dealing in transmission broadcast or distribution apparatus and the manner in which applications for the licences shall be granted;

(b) To prescribe the terms and conditions of the licence including fee to be charged in connection with the issuance of licences and related matters,

(c) to prescribe standards and measures for the establishment of broadcast media stations, installation of broadcasting, distribution service or teleporting equipment, transmitters, receivers, boosters, converters, distributors and common antennae;

(d) to prescribe terms and conditions for the broadcast media or distribution service operators who own, control or operate more than one media enterprise; and

(e) to define the circumstances constituting undue concentration of media ownership and abuse of powers and anti-competitive practices by media companies.

Rules 13(3) and (4) of the Rules provides that:

Media ownership concentration and exclusion of monopolies: (1) To ensure that fair competition is facilitated, media diversity and plurality are promoted in the society and undue concentration of media ownership is not created. Maximum number of licences that may be issued to a person or any of its directors or partners where such person is a company or firm, who is directly or indirectly, controlling, owning or operating more than one media enterprise, shall not exceed a total of four satellite TV, four FM Radio licences and two landing rights permissions.

(2) A licensee having direct or indirect interest in any other media enterprise shall ensure:
1. appointment of separate editorial boards and monitoring facilities for each medium under its control;
2. establishment of separate management structures for each medium under its control; and
3. maintenance of separate accounting record for each medium under its control.
(3) A licensee who owns, controls or operates directly or indirectly any other distribution service license shall not be granted a landing rights permission or broadcast media licence.
(4) A licensee who owns, controls or operates directly or indirectly broadcast media licence or landing rights permission shall not be granted a distribution service licence.
DTH Regulations 2.5, 2.11 and 3.23 state as follows:
2.5 Applicants shall have less than 50% of the shares owned or controlled by foreign nationals/companies, if any, with or without management or control vested in foreign nationals or companies. The Chief Executive Officer of the applicant company shall be resident Pakistani.
2.11 The applicants must not already be a licensee who owns, controls or operates directly or indirectly any broadcast media licence or landing rights permission, in compliance with Rule 13 of the PEMRA Rules 2009.
3.23 Affidavit of the applicant company that neither the applicant company nor any of its Directors or shareholders are directly or indirectly owning, controlling or operating broadcast media license or landing rights permission in compliance with Rule 13 of PEMRA Rules 2009.

15. The term media enterprise is defined in Section 2(1) of the Ordinance to mean an enterprise concerned with the publication of a printed newspaper or a broadcast media or distribution service. So a media enterprise is an entity concerned with broadcast or distribution or publication in the electronic media. Section 2(hc) of the Ordinance defines electronic media to include broadcast media and distribution services. Broadcast Media has been defined in Section 2(c) of the Ordinance to mean such media which originate and propagate broadcast and prerecorded signals by terrestrial means or through satellite for radio or television and includes teleporting, provision of access to broadcast signals by channel providers and such other forms of broadcast media as the Authority may, with the approval of the Federal Government, by notification in the official Gazette, specify. Distribution Service is defined in Section 2(ha) of the Ordinance which means a service which receives broadcast and prerecorded signals from different channels and distributes them to subscribers through cable, wireless or satellite options and includes Cable TV, LMDS, MMDS, DTH and such other similar technologies. Simply put broadcast media collects and transmits its own content while distribution service is a license to deliver the content of various broadcasters to the viewer. So while broadcast media can distribute its own content it cannot distribute other broadcasters content whereas distributors deliver content from a variety of broadcasters to the viewer.

16. The legal framework is such that Section 23 of the Ordinance prescribes for the control of factors which cause concentration in the media market by preventing anticompetitive practices from developing and by avoiding ownership concentration in the relevant media market. Section 23(1) of the Ordinance requires PEMRA to ensure that there is no monopolistic control or exclusivity in broadcast media or in distribution service. Section 23(2) of the Ordinance requires PEMRA to ensure open competition and to regulate ownership concentration at the time of grant of license. While the Section does not define undue concentration of ownership it requires PEMRA to ensure that undue concentration is not created within the relevant market. To achieve the objectives of Section 23 of the Ordinance, Section 39(2)(d) requires PEMRA to make rules setting out the terms and conditions where broadcast media license holders or distribution service license holders can own more than one media enterprise meaning that PEMRA is to define the terms and conditions on which media enterprises can integrate horizontally within the electronic media. In the same way Section 39(2)(e) of the Ordinance requires it to make rules to define the circumstances that constitute undue concentration of media ownership meaning that PEMRA can describe the conditions which cause undue concentration of ownership within media enterprises to control vertical integration and prevent concertation of ownership in the media market. Therefore the intent of the law is that by defining the circumstances and providing for the terms and conditions PEMRA can regulate media enterprises and prevent fewer media owners from owning a larger share of the relevant media market.

17. PEMRA issued the Rules in 2009 and provided for the procedure of grant and renewal of licenses. Rule 13, being the rule under challenge, defines fair competition to mean that maximum number of licenses should be issued after full participation of media enterprises in the procedure for grant of licenses. In order to avoid monopolistic control by media enterprises Rule 13(1) caps the number of licenses that can be granted to one media enterprise in broadcast or in distribution and Rule 13(2) provides for the terms and conditions for multiple grants to a media enterprise. Rules 13(3) and (4) define the circumstances for undue concentration in media ownership to mean the total exclusion of broadcast media from distribution services and of distribution service from broadcast media. As per this Rule a broadcast media license holder cannot operate a distribution service license and vice versa. The DTH Regulations were issued in August 2016 and prescribe the terms and conditions on which the DTH licenses will be offered for bidding. The Regulations 2.11 and 3.23 of the DTH Regulations essentially replicates the provisions of Rules 13(3) and (4) of the Rules. PEMRA defends Rules 13(3) and (4) and the DTH Regulations as being consistent with the mandate of Section 23(2) of the Ordinance.

18. In order to appreciate the true effect and meaning of Section 23(2) of the Ordinance, it is necessary to understand the relevance of media ownership and vertical integration. An enterprise or owner who operates publication, distribution or broadcast is a media enterprise. A media enterprise can own more than one company engaged in the media business and will include a group of companies

which are engaged in different areas of the media sector. Within the electronic media a media enterprise engaged in broadcast, distribution or publication can operate another media enterprise engaged in the same line of work being broadcast, distribution or publication. This is integrating horizontally and allows the media enterprise to increase its production and reach a larger audience. Horizontal integration can give rise to oligopoly and in extreme cases monopoly hence integration is regulated by capping the number of licenses a media enterprise can own in the same medium being broadcast, distribution or publication. On the other hand, vertical integration is caused when one media enterprise integrates within the electronic media to operate some other media enterprise. So a broadcaster will integrate to operate distribution services or publication or publication will integrated to operate broadcast media and so on in the same market. Vertical integration includes cross ownership that is when a common entity will operate broadcast media as well as distribution service. Accordingly, vertical integration is of concern for PEMRA because if a smaller group of owners control a large share of the market through broadcast and distribution it will cause concentration of ownership, which in turn means reduction in diversity and plurality of content and the free flow of information. In this case, vertical integration refers to the ownership concentration of two important media enterprises, broadcast media and distribution services. This ownership concentration has the potential to challenge the stated objectives of the regulator, hence it must be adequately regulated.

19. The counsel for PEMRA argued at great length on the regulatory powers of PEMRA which arise out of Section 23(2) of the Ordinance. He argued that the stated Section called for a disjunctive interpretation of the word "and" in Section 23(2) of the Ordinance which requires the Authority to ensure that open and fair competition is facilitated in the operation of more than one media enterprise in any given unit of area or subject and that undue concentration of media ownership is not created in any city, town or area and the country as a whole. When reading Section 23(2) of the Ordinance, it is apparent that the word "and" is used to separate two regulatory functions attributed to PEMRA. One function is to ensure that competition amongst media enterprises is open and fair with maximum participation in a transparent process. The intent of the law is such that it guarantees free access to the market and any anticompetitive practice would call for ex post regulations with remedial or corrective interventions. However since increase in competition alone does not necessarily prevent ownership concentration, therefore Section 23(2) of the Ordinance also requires that at the time of grant of license PEMRA ensure that no undue concentration of media ownership is caused within the relevant market. The intent of the law mandated ex ante regulations where PEMRA while anticipating the dangers of vertical integration would consider ownership issues at the time of grant of license. Consequently PEMRA has separated broadcast media from distribution service because it considers that the integration in itself will create undue concentration of media ownership. The counsel argued that regulating competition and ownership involved two different regulatory regimes with different regulatory objectives. It is his case that PEMRA was authorized to ensure that there is no undue concentration of ownership in the media market, hence PEMRA as the

gatekeeper of the electronic media is mandated to prohibit vertical integration which results in undue concentration of ownership.

Understanding the Legislative Intent

20. In order to determine the scope of the regulatory framework within which PEMRA is to operate we will first look at the Preamble of the statute which is the gateway to the statute and the bedrock to understanding the scope and purpose of any statute. The Preamble to the statute sets out the reasons and the objects for which the statute has been promulgated and in this case the Preamble to the Ordinance clearly defines the purpose for which PEMRA was established. The stated purpose as per the Preamble is as follows:-

WHEREAS it is expedient to provide for the development of electronic media in order to:

(i) improve the standards of information, education and entertainment;

(ii) enlarge the choice available to the people of Pakistan in the media for news, current affairs, religious knowledge, art, culture, science, technology, economic development, social sector concerns, music, sports, drama and other subjects of public and national interest;

(iii) facilitate the devolution of responsibility and power to the grass-roots by improving the access of the people to mass media at the local and community level; and

(iv) ensure accountability, transparency and good governance by optimizing the free flow of information.

Professor Aharon Barak in his book titled The Judge in a Democracy emphasized the importance of purposive interpretation to advance the object and intent of law. He said:

Subjective purpose is not the only purpose relevant to statutory interpretation, especially in situations where we lack information about that purpose. Even when we do have such information it does not always help us in the interpretive task. Moreover, even when we do find useful information about the subjective purpose, we must keep in mind that focusing on legislative intent alone fails to regard the statute as a living, organism in a changing environment. It is insensitive to the existence of the system in which the statute operates. It is not capable of integrating the individual statue into the framework of the whole legal system. It makes it difficult to bridge the gap between law and society. Thus, it does not allow the meaning of the statute to be developed as the legal system develops. Rather, it freezes the meaning of the statute at the historical movement of its legislation, which may no longer be relevant to the meaning of the statute in a modern democracy. If a judge relies too much on legislative intent, the statute ceases to fulfill its objective. As a result, the judge becomes merely a historian and an archaeologist and cannot fulfill his role as a judge. Instead of looking forward, the judge looks backward. The judge becomes sterile and frozen, creating stagnation instead of progress. Instead of acting in partnership with the legislative branch, the judge becomes subordinate to a historical legislature. This subservience does not accord with the role of the judge in a democracy. The objective purpose of the

statute means the interests, values, objectives, policy and functions that the law should realize in a democracy... just as the supremacy of fundamental values, principles, and human rights justifies judicial review of the constitutionality of statutes, so too must that supremacy assert itself in statutory interpretation. The judge must reflect these fundamental values in the interpretation of legislation. The judge should not narrow interpretation to the exclusive search for subjective legislative intent. He must also consider the "intention" of the legal system, for the statute is always wiser than the legislature. By doing so the judge gives the statute a dynamic meaning and thus bridges the gap between law and society.

Therefore while construing the law purposive interpretation is necessary to give the fullest possible meaning of the law. This view was delivered by the august Supreme Court of Pakistan in the case titled Dr. Raja Aamer Zaman v. Omar Ayub Khan and others (2015 SCMR 1303) wherein it was held that:

The Courts in Pakistan have always preferred a purposive rather than a literal interpretation of Statutory Instruments. Reliance in this behalf may be made to the judgments, reported as Hudabiya Engineering (Pvt) Limited v. Pakistan through Secretary, Ministry of Interior, Government of Pakistan and 6 others (PLD 1998 Lahore 90) and Federation of Pakistan through Ministry of Finance and others v. Messrs Noori Trading Corporation (Private) Limited and 14 others (1992 SCMR 710).

In the case titled Muhammad Nawaz Chandio v. Muhamamd Ismail Rahu and others (2016 SCMR 875) the august Supreme Court also relied upon purposive, realistic and beneficial interpretation of the law. This includes the subjective purpose and the objective purpose of the law. The legislative intent must be seen in the context of the legal system in which the statute operates and must be sensitive to the changing environment. The objective purpose of the statute will involve the interests, values, objectives and functions which the law seeks to protect and its interpretation must reflect the fundamental values and principles which the law maker wishes to preserve. The subjective purpose will be seen in the context of the statute and is purpose. Therefore a dynamic purposive interpretation bridges the gap between law and society. To interpret media laws in particular requires purposive interpretation where the legislative intent must be seen in the context of the changing environment. It cannot be insensitive to the technological advancements and changing needs of the public because if the courts were to focus on subjective purpose only it would not manifest the objective of the law and would create stagnation. It would be a time centric interpretation possibly freezing the meaning of the law in one historical moment.

21. Now looking at the Ordinance and its intent to encourage fair and open competition, Section 23(2) of the Ordinance requires PEMRA to devise an open and fair process for grant of license enabling more than one media entity to operate more than one media enterprise in the electronic media. Essentially the stated Section requires effective competition in the market through maximum participation

in the process for grant of license. The declared objective of the lawmaker is to create open access where healthy competition is promoted so that a smaller number of license holders do not dominate the relevant market. It also encourages new corners in the market as the object is to reduce barriers and encourage competition. Importantly fair competition must be seen in the context of the relevant media market which can be any city, town, area or the country as a whole. Hence anti-competitive practice will be seen in the context of the relevant media market. At the same time, the lawmaker in its wisdom also requires PEMRA to regulate ownership concentration in the relevant media market. The rationale for avoiding ownership concentration as well as anticompetitive practices is that the regulatory controls used to ensure open access in the media market and to promote efficient economic practices are usually based on economic considerations. While they may introduce a variety of persons into the media market they cannot guarantee diversity and plurality of content nor can they ensure the free flow of information. This is because there are other forces operating in the media market which influence ownership convergence. Technology advancement and public needs/interest are two strong factors with competing interests which play an imperative role in the media market other than the economic factors. A harmonious balance of all three factors being economics, technology and public interest becomes vital while shaping the regulatory environment. In this way, fair competition and efficient media ownership are the stated regulatory objectives for PEMRA under the Ordinance, who is to ensure that a common owner does not end up with control of a larger share of the market.

22. To facilitate the regulatory requirement the legislature delegated its authority to determine the circumstances which make concentration undue. Section 39 of the Ordinance requires PEMRA to make rules to further the purpose of the Ordinance, meaning thereby that it is to create a responsive and regulated environment for the electronic media which will respond to the prevailing circumstances, public need and ensure that the stated purpose of the Ordinance is achieved. By requiring PEMRA to define the circumstances which make concentration undue, PEMRA can adjust the regulatory controls so as to meet the needs of the people at any given time. The lawmaker in its wisdom did not define the circumstances which make concentration undue because the relevant market will keep changing as will the environment with the interplay of technology, economics and public demand. The rapid changes in technology will cause an overlap between the mediums of broadcast; publication and distribution. It will also affect the conditions of competition and ownership as it alters the range and quality of services. Consequently the established structures ensuring diversity and plurality of content will have to keep changing and adapt to the changing circumstances. Different media enterprises fulfill different functions in a democratic society creating structures that encourage diversity and pluralism of content in the media. When advancement in technology breaks the traditional divides between media enterprises, the regulatory landscape will have to adjust to the need of the time in order to guarantee a diverse media. The Ordinance through Section 39(2)(e) facilitates PEMRA to retain control on the prevailing circumstances by adjusting its

regulatory controls as necessitated by the need and demand of the time. The delegated function of rulemaking enables PEMRA to modify the regulatory controls in order to achieve the purpose and regulatory objectives prescribed under the Ordinance. It is important to note here that although the legislator has imposed upon PEMRA the duty of enlarging the choice to ensure diversity in information and plurality in content, it has identified the regulatory controls through which this can be achieved. Hence Section 23(2) of the Ordinance provides the regulatory objectives to be achieved by PEMRA and Section 39(2)(e) gives PEMRA the authority to make rules to achieve the intent of Section 23(2) of the Ordinance.

23. The Rules were framed and notified on 12.12.2009 and in terms of Section 39(2)(e) of the Ordinance, the circumstances constituting undue concentration defined by PEMRA are contained in Rules 13(3) and 13(4). The stated Rules oust broadcast media license holders from owning, controlling or operating directly or indirectly a distribution service license and vice versa meaning thereby that it totally prohibits vertical integration. The question is whether the ouster created by PEMRA under the Rules is mandated under Section 23(2) of the Ordinance or whether the ouster is in excess of the powers delegated to PEMRA. The counsel for PEMRA argued at length that Rules 13(3) and (4) of the Rules define the circumstance which is perceived by PEMRA to create undue concentration of media ownership. It is their case that there are legitimate and lawful reasons for keeping broadcasters and distributors separate which includes preventing a high degree of market power by a common entity and by conflict of interest. The counsel argued that a broadcaster is an entity that creates original content and includes TV channels and FM radio stations. A distribution service is a platform that carries content from broadcasters and distributes it through its network to the subscriber. By way of cross ownership a common entity can control a significant share of the market if it is allowed a broadcast license holder to obtain a distribution license. The learned counsel also agitated that it is common practice for regulators to separate media owners from vertically integrating by separating the mediums issued in the electronic media. It is his case that since PEMRA has to define the circumstance which amounts to undue concentration it has restricted cross ownership which results in undue concentration. Therefore it was argued that PEMRA has performed its regulatory duty as mandated under Section 23(2) of the Ordinance by restricting broadcasters from obtaining distribution licenses and vice versa.

Opinion of the Court

24. We have given great thought to the arguments made before us and have examined the Ordinance, Rules and DTH Regulations impugned before us. We are of the opinion that Section 23(2) of the Ordinance does not mandate any prohibition which would lead PEMRA to conclude that it is authorized under the stated Section to oust broadcast media from distribution services and vice versa. The scope of delegated authority has been explained by the august Supreme Court in the case titled Khawaja Ahamd Hassaan v. Government of Punjab and others (2005 SCMR 186), wherein the Court held that :

The subordinate power of framing rules granted by the statute cannot be exercised to override the expression provisions of the statute itself. It is well settled by now that a statutory rule cannot enlarge the scope of the section under which it is framed and if a rule goes beyond what the section contemplates, the rule must yield to the statute. The authority of executive to make rules and regulations in order to effectuate the intention and policy of the Legislature must be exercised within the limits of mandate given to the rule making authority and the rules framed under enactment must be consistent with the provision of the said enactment. The rules framed under a statute, if are inconsistent with the provisions of the statute and defeat the intention of Legislature expressed in the main statute, same shall be invalid.

The scope of Section 23(2) of the Ordinance is to provide PEMRA with its regulatory objectives so that it can regulate the electronic media and achieve the stated purpose of the Ordinance being diversity and plurality in content. To accomplish the stated purpose of the Ordinance maximum participation of stakeholders is required for the grant of a license. In this regard not only does Section 23(2) of the Ordinance require open access and fair competition but to ensure diversity and plurality in content it necessitates that PEMRA reach out to a maximum number of participants which will include the participation of existing media enterprises for the grant of media licenses. Therefore the stated Section does not envision any prohibition on broadcast media operating distribution services or vice versa but to the contrary it requires all media enterprises to compete in the media market with each other and with new media entities. This is in consonance with the spirit of healthy competition and efficient economy. Furthermore the intent of Section 23(2) of the Ordinance is that PEMRA ensure that ownership conglomerates are not formed given that the regulatory objective is to prevent undue concentration of media ownership in a given market. PEMRA is therefore mandated to consider the ownership configuration of a media entity at the time of grant of a license, with reference to a particular market in order to guarantee that the grant of the license will not result in undue concentration within that market. This means that PEMRA has to consider the ownership issue of a media enterprise before it grants a new license because it is by virtue of that particular grant that undue concentration may be caused in a market. Each case for grant of license has to be seen against a set of circumstances that should be defined pursuant to Section 39(2)(e) of the Ordinance, where after a determination can be made whether the grant of a license will result in undue concentration, in a particular market. Hence the emphasis of Section 23(2) of the Ordinance is on the role PEMRA should play at the time of granting a license, keeping in mind the area within which the license is to operate. Therefore we are of the opinion that the law envisioned an ongoing regulatory exercise whereby PEMRA defines the conditions which will enable it to monitor and control the circumstances which will make the formation of media consolidations impossible in any given area, city, town or the country as a whole.

25. In terms of the dicta laid down by the august Supreme Court of Pakistan in the case cited at 2005 SCMR 186 (supra) rules and regulations formed under a statute

cannot transgress the limits set by the statute. The superior courts have repeatedly held that the rule making body cannot frame rules which are in conflict with or in derogation of the substantive provisions of the statute under which the rules are framed and in case of any inconsistency with the parent statute the excessive rule will be considered illegal because it has gone beyond its delegated authority. It must be kept in mind that when the legislature confers powers on a regulatory authority to frame rules it is expected that the rules will advance the purpose of the legislature and not run contrary to it. In this case Section 23(2) of the Ordinance provides PEMRA with two regulatory objectives having separate regulatory tools yet at the same time aiming to achieve the same stated purpose of the Ordinance. The use of the word 'and' in Section 23(2) of the Ordinance separates the two distinct regulatory objectives, being fair competition and prevention of undue concentration. The regulatory objectives provide PEMRA with the scope of its regulatory duty which will enable it to achieve the stated purpose of the Ordinance at all times. A great deal of emphasis was placed by Mr. Salman Akram Raja, the counsel for PEMRA on reading the and in Section 23(2) disjunctively, which as per his understanding means that PEMRA is authorized to prohibit broadcast media from operating distribution services and vice versa as the vertical integration of these two media enterprises will result in undue concentration of media ownership. However, we find that the emphasis on a disjunctive reading is misplaced as we are of the opinion that whether the and is read conjunctively or disjunctively it will not change the intent of the law. The Ordinance requires the regulator to achieve diversity and plurality in content and the free flow of information by encouraging entities to operate media. enterprises. Under Section 23(2) of the Ordinance the regulatory objectives for PEMRA are prescribed and in doing so the legislature did not impose any prohibition with respect to vertical integration of specific media enterprises in the electronic media. PEMRA has misunderstood its regulatory functions and the objectives of the law. The function of PEMRA is to carry out the stated purpose of the Ordinance and to ensure that it implements and enforces the objectives of Section 23(2) of the Ordinance. Hence PEMRA is required to regulate vertical integration of all media enterprises so that they do not form concentrated ownership in a media market, which will give them a larger share of that market and enable them to prevent diversity and plurality in content in that market.

26. We are mindful of the fact that PEMRA is a front line regulator who has been given authority by the legislator to structure the sector such that it works in the public interest and promotes diversity and plurality of content. For this purpose some flexibility has been given to PEMRA to ensure that it can effectively regulate the sector. Whenever there is an element of flexibility, the regulator may run the risk of over stepping its boundary and going beyond the authority delegated to it. That is why the superior courts of the country need to examine the question as to whether the rules and regulations under a statute are inconsistent with the statute itself and whether the rules and regulations achieve the purpose of the statute. The courts are to ensure that the regulator remains within its regulatory domain and does not attempt to step into the role of the legislator. In 2005 SCMR 186 (supra) the august Supreme Court of Pakistan held that:

Where a Court is required to determine whether a piece of delegated legislation is bad on the ground of arbitrary and excessive delegation, the Court must bear in mind the following well-settled principles:
(1) The essential legislative function consists of the determination of the legislative policy and its formulation as a binding rule of conduct and this cannot be delegated by the Legislature.
(2) The legislature must retain in its own hands the essential legislative functions and what can be delegated is the task of subordinate legislation necessary for implementing the purposes and objects of the Act.
(3) Where the legislative policy is enunciated with sufficient clearness or a standard is laid down, the Courts should not interfere.
(4) What guidance should be given and to what extent and whether guidance has been given in a particular case at all depends on a consideration of the provisions of a particular Act with which the Court has to deal, including its Preamble.
(5) The nature of the body to which delegation is made is also a guidance in the matter of delegation.
(6) What form the guidance should take, will depend upon the circumstances of each statute under consideration, and cannot be stated in general terms. In some cases guidance in broad general terms may be enough, in other cases more detailed guidance may be necessary.
We have examined the legal framework and the regulatory objectives and find that the legal framework under the Ordinance requires PEMRA to prevent undue concentration of ownership in a market. This is the given regulatory objective under Section 23(2) of the Ordinance. In order to achieve this objective the legislature delegated the authority to define the circumstances which could cause undue concentration in any market so that it can regulate ownership issues. By defining the circumstances PEMRA can set out a regulatory environment within which the legislators intent is effectuated. By requiring PEMRA to define the circumstances, the lawmaker delegated the authority of defining thresholds and standards on the basis of which it can police the electronic media. This function was delegated so that PEMRA could identify the factors which cause undue concentration. The legislature in its wisdom accepted that the circumstances would keep changing hence PEMRA must have the flexibility to change its controls or redefine the thresholds so that at all times it ensures that undue concentration is not caused in the relevant market. PEMRA defined the circumstances to mean a total restriction on vertical integration between broadcast media and distribution services which restriction we find to be based on the presumption that any vertical integration between broadcast media and distribution services will result in undue concentration of ownership. The Respondent PEMRA urged this point on the strength of the argument that diversity and plurality of information comes from a diverse number of media owners. The counsel for PEMRA also argued that in the Pakistani market the larger channels are all competitors and if they are allowed to distribute each other's content conflict of interest between media enterprises will arise. Hence the DTH license can be abused and exploited by the broadcast media license holders. In support of this argument it was stated that around the world media ownership rules and restrictions are included in the regulatory framework to

restrict cross ownership and vertical integration. The thrust of the arguments made was that PEMRA as the regulator can impose a complete restriction not specifically prescribed in the law to achieve the purpose of the Ordinance. We are of the opinion that Section 23(2) of the Ordinance does not contemplate or mandate an ouster or restriction. The letter and spirit of the law is to increase the free flow of information by increasing participation of media enterprises. Section 23(2) of the Ordinance in furtherance of this purpose requires PEMRA to regulate ownership concentration. While creating a regulatory framework which is geared towards encouraging diversity and plurality the lawmaker did not oust any media enterprise from integrating with another media enterprise. It simply required ownership concentration to be regulated so that it does not become undue, meaning thereby that some element of concentration is permissible. In this regard we are also of the opinion that PEMRA has not carried out the legislative intent by defining or identifying the circumstances which push ownership concentration beyond a threshold to become unacceptable concentration of ownership. PEMRA has simply issued a blanket ouster in the Rules without setting any standards or thresholds on the basis of which it could measure, monitor or control concentration of media ownership. The Ordinance recognizes that a democratic electorate needs to be well informed in order to make rational and intelligent decisions. With the growth of the electronic media and the development of technology, media enterprises have mover towards cross ownership and vertical integration not only for better business prospects but also to reach a larger audience. Television stations are owned by newspapers owners because they have the expertise, the resources and the economic interest to enter in the realm of broadcast media. Even today there is no bar on newspaper owners having broadcast media licenses or distribution service licenses meaning that vertical integration between publication and broadcast or publication and distribution service is not considered to cause undue concentration of media ownership. However the restriction in Rules 13(3) and (4) of the Rules suggests that when broadcast media integrates with distribution services then any level of integration will result in undue ownership concentration. We are of the opinion this kind of justification does not reflect the legislative wisdom nor does it achieve the stated purpose of the Ordinance.

27. The delegated authority of PEMRA under Section 23(2) read with Section 39(2)(e) of the Ordinance was to strike a balance between appropriate levels of concentration by placing limits on ownership to preserve pluralism in information. A certain level of ownership concentration can be allowed if it enables media enterprises engaged in the electronic media to offer more and better services in the market. With the rapid developments in technology they are bound to be overlaps within the mediums and the services provided by media enterprises. Technology will cross over into all mediums and compel the electronic media to interact at different levels. By prohibiting vertical integration vide the impugned Rules PEMRA denies two specific media enterprises from becoming more efficient and effective in their job. It also means that both the prohibited media enterprises cannot vertically integrate to cut costs or improve efficiency, while other media enterprises can benefit from vertical integration. Consequently the effect of the impugned Rules

is that by restricting two specific media enterprises from vertically integrating and allowing other media enterprises to vertically integrate undue concentration of media ownership is left unregulated because it is seen only in the context of integration between broadcast media and distribution services and not in the context of the relevant market. This understanding of the requirements of Section 23(2) of the Ordinance is totally illogical and is not in furtherance of the objectives or purpose of the law because regulating ownership concentration means regulating ownership of all media entities operating within the electronic media so that a few media owners do not end up with a larger share of the market. In our opinion the mandate of the law was to cover all media enterprises especially since the objective is to create an efficient market which will offer a wide range of programmes, news, information and entertainment having plurality in content.

28. Delegated authority is incidental to the statutory function and cannot run parallel to the legislative function. Section 23(2) of the Ordinance requires PEMRA to regulate the electronic media while maintaining diversity in content and plurality in information. Regulating the electronic media means to define the tools through which the objective of the law can be achieved. Given the fast pace at which the electronic media will grow and develop, the statutory intent is to give PEMRA the ability to regulate the changing landscape. While the realm for regulating is prescribed, PEMRA is to ensure that within the given domain, the regulatory objectives are achieved. This means that PEMRA is the implementer and enforcer of the legal mandate set out in the Ordinance. Its primary function is of regulating and not of devising a new legal landscape. As a frontline regulator PEMRA has to regulate the media market by imposing competition controls and ownership controls in the relevant market. It had to create effective safeguards to prevent vertical integration from resulting in undue concentration of media ownership. The material from international markets relied upon by PEMRA have prescribed different restrictions in their jurisdiction depending upon the characteristics of the market and the social and cultural needs of the people. Restrictions on dominance by and within the media market, restrictions on mergers and acquisitions, restriction on ownership levels. The material relied upon by the Respondents shows that the international markets have gone to great lengths to balance competing elements through laws and regulatory frameworks. Without determining the balancing requirements of the local market PEMRA has sought to rely upon the debates emerging in international markets which are dealing with concentration issues within their own systems as per their peculiar circumstances. The international literature relied upon does not conclude that vertical integration between broadcast and distribution means undue concentration of ownership. The jurisprudence and experiences from around the world reveal that restrictions, controls and safeguards are necessary and must be reviewed periodically to deal with the changes in the economic aims, technological advancement and public need. Periodical reviews and introspection is based on empirical data and evidence which identifies the concentration in media markets, its causes and possible solutions. For a market which has yet to launch the DTH technology PEMRA has assumed concentration issues based on experiences from around the world without any real time reference to its own market. Nothing was

placed before us in support of its contention that if broadcasters are allowed to operate DTH license they will cause undue concentration of media ownership.

29. A vital aspect of the regulatory function was to apply the defined circumstances when granting a license for a particular market. Section 23(2) of the Ordinance specifically requires that undue concentration is not caused in any city, town, area or country, as a whole. This is because the control of media ownership is within a relevant media market which means that the relevant market, its trends and requirements have to be identified before the controls are put into place. Cross media interests have to be looked at on a case to case basis to ascertain whether ownership concentration is being caused in a relevant media market. Hence the nature of media services available in a given market and its ownership composition are necessary indicators for measuring undue concentration of media ownership. Without identifying the indicators and merely relying on the medium of business to conclude undue concentration within a relevant market in our opinion is totally flawed and against the mandate of Section 23(2) of the Ordinance. Plurality and diversity of content requires a free flow of information from as many divergent sources as possible. The diversity of owners would mean a diversity of viewpoints including integration of broadcast media license holders with distribution license holder which does not necessarily result in undue concentration of media ownership. PEMRA has repeatedly relied on the thought process developing in some parts of the world on the question of undue concentration of media ownership through cross ownership or vertical integration, however, they have not been able to show any example of any regulatory regime where broadcast media has been totally ousted from distribution services. Furthermore each media market will be controlled based on its own experiences and prevailing circumstances and the fact that there is a debate in some parts of the world does not legitimize the restriction placed by PEMRA.

30. Another important aspect of this case is the role of the regulator PEMRA. Regulators draw their authority from the legislation which creates them. The limits placed on the regulator are prescribed under the law. Section 23(2) of the Ordinance did not leave it open for PEMRA to set out a new regulatory policy but instead required PEMRA to work within the confines of the prescribed objectives. We have considered the lengthy arguments made before us by the counsel for PEMRA justifying the acts of PEMRA and the reasons for defining the circumstances to mean that broadcast media and distribution media cannot vertically integrate. We have already held that Section 23(2) of the Ordinance did not impose any prohibition or restriction upon the aggregation of interests that is on common ownership. It essentially promotes the participation of all media enterprises that is a necessary consequence of open access and fair competition. Preventing concentration from becoming undue does not suggest or mandate a restriction because it recognizes the fact that there will be some amount of concentration which if not crossed will not be considered as undue. The electronic media is a fast growing sector with regular technological advancements and a growing media market as its basic features. In these circumstances, PEMRA must have due regard

for commercial viability and public interest. It must also understand the role technology plays and the need to remain responsive to new technological initiatives. Due to the continuous advancement in technology the hard lines between media enterprises have softened the divide and in fact today there are overlaps between media enterprises. An absolute restriction on vertical integration between broadcast media and distribution services will hamper technological advancement in these mediums especially since DTH technology will be launched in Pakistan for the first time and at this stage there is at best an apprehension that broadcast media may end up with a larger share of the media market. Therefore we find that PEMRA's response to controlling undue concentration has no nexus with the intent of the Ordinance. It has imposed a restriction which will not achieve the regulatory objective and in fact infringes on the rights of broadcast media and distribution service to participate and progress through vertical integration. Interestingly PEMRA has defended its actions by projecting the revenue the three DTH licenses will generate especially with foreign participation, as well as the potential jobs and opportunities it will create for the Country. In this regard, great emphasis was placed on the fact that foreign investors have shown interest in the auction for DTH license and their presence is of great significance for the media sector as well as the image of the Country. We find that these arguments are totally unrelated to the regulatory objectives given in Section 23(2) of the Ordinance and have no nexus with the stated purpose of the Ordinance. The presence of foreign investors and the quantity of revenue generation is not the primary objective for PEMRA. It has to achieve diversity and plurality through open access and fair competition allowing all stakeholders to participate in the bid for DTH license so that the viewers get diversity and plurality in content. It has to protect the public interest and meet the public demand because the public is the ultimate beneficiary of the DTH technology and all advancements in the electronic media. A consequence of auctioning the DTH license may lead to revenue generation and foreign participation but it certainly cannot be the overriding factor motivating PEMRA to launch the DTH technology. It also cannot justify the continuation of the restriction on broadcast media to operate a DTH license as PEMRA is obligated to ensure that the public interest is served through its decisions. We are of the opinion that PEMRA has failed to put into place a regulatory framework which would enable it to measure, monitor and regulate ownership concentration in the electronic media. In this case, Rules 13(3) and (4) of the Rules and Regulations 2.11 and 3.23 of the DTH Regulations do not serve the public interest by ousting broadcasting media from participating in the DTH license nor is there any reasonable nexus of the ouster with the intent of Section 23(2) of the Ordinance. In our opinion, PEMRA has abdicated from its functions as a regulator and instead transgressed into the domain of the legislature which is not permissible under the law.

31. PEMRA was not able to show the mode or manner in which it measures concentration nor could it explain the regulatory framework which balanced the advantages and disadvantages of vertical integration. To achieve its regulatory objective a detailed exercise should have been carried out identifying the standards and threshold where ownership concentration would be deemed to have become

undue. Concentration can be measured through any number of factors including economic, geographic, or linguistic factors. It can be measured with a diversity index or a market share index and so on. Whatever be the method, PEMRA had to develop standards to measure concentration in the market. We find that this exercise was vital to effectuate the intent of the law because by not imposing any prohibition the Section permits vertical integration as it offers advantages which a media enterprise may want to take the benefit of. Vertical integration offers greater efficiency and enhanced coordination for the media enterprise. It reduces cost and provides the benefit of economies of scale to the business. In this way by prohibiting vertical integration between broadcast and distribution PEMRA has also denied the Petitioner of the advantages of vertical integration which in turn prejudices its right to do business. The legislature in its wisdom did not deem it necessary to deny vertical integration as it relates to the means and ways in which a lawful business can expand and grow and improve the quality of the services offered in the media market. Therefore we are of the opinion that there is no ambiguity in the requirements set out by the law and hence the boundaries within which the rule making framework was to operate. PEMRA was to frame rules to regulate the sector as per the arrangement prescribed under Section 23(2) of the Ordinance and not to impose restrictions which the law does not envision.

32. Therefore to our mind PEMRA has gone beyond the delegated authority and altered the legal structure by prohibiting broadcast media from integration with distribution services. If the intent of the law was to prohibit vertical integration it would not have required PEMRA to define the circumstances which create undue concentration of ownership. The legislature would have prescribed the restriction in the stated Section as it would have seen the wisdom in keeping broadcast media separate from distribution services. Where the rules and regulations go beyond the prescribed mandate the august Supreme Court of Pakistan has held in the case titled Zarai Taraqiati Bank Limited and others v. Said Rehman and others (2013 SCMR 642) that:

The "rules' and "regulations" framed under any Act are meant to regulate and limit the statutory authority. All statutory authorities or bodies derive their powers from statutes which create them and from the rules or regulations framed thereunder. Any order passed or action taken which is in derogation or in excess of their power can be assailed as ultra vires. Rules and regulations being forms of subordinate legislation do not have substantial difference as power to frame them is rooted in the statute. Statuary bodies are invariably authorized under the Act to make or adopt rules and regulations not inconsistent with the Act, with respect to such matters which fall within their lawful domain to carry out the purpose of the Act.

In the Suo Motu Case No.11 of 2011, in the matter of (Action taken on the news clipping regarding scandal. of billions of rupees of National Police Foundation Land) (PLD 2014 SC 389), the august Supreme Court of Pakistan held that:

Rulemaking body cannot frame rules in conflict with or in derogation of the substantive provisions of the law or statute, under which the rules are framed. Rules cannot go beyond the scope of the Act. No rule can be made which is inconsistent with the parent statute, whereas, no regulation can be framed which is inconsistent

with the parent statute or the rules made thereunder and the provisions of these rules or regulations, as the case may be, to the extent of such inconsistency with the parent statute or rules shall be void and inoperative.
It was also held by the august Supreme Court of Pakistan in the case titled Mian Zaiuddin v. Punjab Local Government and others (1985 SCMR 365) that:
Rule framed under statute could not go beyond and overreach statute itself. To make implementation of statutory provision, consistent harmonious directly effect must be given to requirement of Rule.
In 2005 SCMR 186 (supra) the august Supreme Court of Pakistan held that:
If the rules framed under the statute are in excess of the provisions of the statute or are in contravention of or inconsistent with such provisions then those provisions must be regarded as ultra vires or the statute and cannot be given effect to.
It was further held in the aforesaid case that:
In the case of statutory rules the Court can always examine the question as to whether the same are inconsistent with the statute under which they are made.
The counsel for PEMRA argued that this Court cannot look into the wisdom of the policy decision of PEMRA with respect to permissible levels of concentration of market power as it is based on an appreciation of facts that pertain to the structure of the electronic media. However, we find that this argument of the learned Counsel is without any basis as this Court can examine whether PEMRA has exceeded its statutory mandate and formulated a policy which is against the authority delegated to it under the Ordinance.
33. In view of the aforesaid, while allowing this Petition, we find that Rules 13(3) and (4) of the Rules along with Regulations 2.11 and 3.23 of the DTH Regulations have gone beyond the authorized mandate of Section 23(2) of the Ordinance and are inconsistent with the intent of the Ordinance, hence declared to be without lawful authority of no legal effect and are hereby struck down. Needless to mention that the Rules and DTH Regulations shall be made as per the intent of the Ordinance and not in conflict with the Ordinance.
(Sd.)
Ayesh A. Malik, J
(Sd.)
Abid Aziz Sheikh, J
(Sd.)

SHAHID KARIM, J.--- Shahid Karim, J
Section 23:
I have seen, in draft, the judgment to be delivered by Ayesha A. Malik, J, and agree with the conclusions drawn. I have added a note owing to the importance of the issue involved:

2. The challenge mounted by Independent Newspaper Corporation (Pvt.) Ltd. (hereinafter INC) is predicated on the cardinal principle vouched by respectable authority. It says that while construing a grant of delegated legislative power, the delegatee may not act beyond the scope of the primary legislation.

3. To begin with, in my opinion, the key words are 'In granting a license' used in subsection (2) of section 23 of PEMRA Ordinance, 2002. This presupposes that the Authority has been conferred a power to grant licenses and Rules 13(3) and (4) seem to have taken that power away at least in respect of broadcast licensees who wish to apply for distribution services. So this in my estimation is the first way in which the Rules travel beyond the primary law and, in the ultimate analysis, the most critical one to exercise a gravitational pull on the outcome that this Court conceives.

4. Section 23 is the primary source of power to regulate undue concentration of media ownership and it is tied up with the stage when the license is being granted. It reads thus:
23. Exclusion of monopolies.--(1) No person shall be entitled to the benefit of any monopoly or exclusivity in the matter of broadcasting or the establishment and operation of broadcast media or distribution service or in the supply to or purchase from, a national broadcaster of air time, programmes or advertising material and all existing agreements and contracts to the extent of conferring a monopoly or containing an exclusivity clause are, to the extent of exclusivity, hereby declared to be inoperative and of no legal effect.
(2) In granting a licence, the Authority shall ensure that open and fair competition is facilitated in the operation of more than one media enterprise in any given unit of area or subject and that undue concentration of media ownership is not created in any city, town or area and the country as a whole:
Provided that if a licensee owns, controls or operates more than one media enterprise, he shall not indulge in any practice which may impede fare competition and provision of level playing field.

5. The first duty of the Authority encapsulated in first part of section 23 (subsection 2) is to ensure that open and fair competition is facilitated in the operation of more than one 'media enterprise' in any given unit of area or subject. Media enterprise is defined to include both broadcast media and distribution services. The definition is couched in section 2 (1) of PEMRA Ordinance, 2002, to mean:
"media enterprise" means an enterprise concerned with the publication of a printed newspaper of a broadcast media or distribution service."

6. Section 23 merely gives expression to a form of anti-monopoly clause. It obliges the Authority to facilitate more media enterprises than one to operate in any given unit of area or subject. It has relation to section 18 and the categories of licenses granted under it. For instance, in granting 'license for distribution services, the law requires for more than one media enterprise' to be facilitated to operate in any given unit of area. Media enterprise, to reiterate, includes both broadcast and distribution and thus far the law permits and in fact encourages the participation of multiple media enterprises at the time of granting license.

7. The second part 'and that undue concentration of media ownership is not created in any city, town or area and the country as a whole,' is a limit on the power and

duty of the Authority yet reaffirms the duty imposed by the first part by differing semantics. In my opinion, section 23 is all about undue concentration of media ownership. Thus subsection (2) has to be read as a whole and the obligation on the Authority to ensure open and fair competition to facilitate operation of more than one media enterprise is merely an attempt to rule out undue concentration of media ownership. If the Authority succeeded in ensuring open and fair competition, undue concentration of media ownership will wither away. The power to grant a license includes the power to deny it. Thus if a media enterprise is already operating in any given unit of area, a license to a new media enterprise may be refused on the ground that it will give rise to undue concentration of media ownership in that unit of area or subject. It is a fallacy to urge to read 'and' as disjunctive or conjunctive. It does not really matter as subsection (2) deals with one subject i.e. undue concentration of media ownership and the first and second parts, separated by the term 'and', are nuances of the same subject.

8. There are a myriad of situations that can be conjured up and which the Authority may confront while ensuring open and fair competition. A broadcast media or distribution service with financial muscle may seek to have complete sway over the field and thus the Authority must ensure that the smaller media enterprises are protected. This will entail a review in terms and conditions of license over time and at the time of granting a license.

9. What is meant by 'undue concentration of media ownership'? The term has not been defined and the legislature intends the meaning to be culled out by all persons tasked to construe it, from an entire reading of the Ordinance, 2002 and the Rules, 2009, cumulatively. But firstly, section 23 itself gives an insight into the concept. Undue concentration of media ownership must not be created in any city, town or area and the country as a whole. At first blush, it means that a person must not be allowed control or sway on different facets of electronic media in such a way that there is concentration of power of that person over any city, town or area, and the country as a whole. It will be seen that undue concentration of media ownership has been used in relation to geographical areas by the use of the words 'is not created in any city, town or area and the country as a whole.' What does it signify? Clearly that the Authority is obliged to ensure against undue concentration vis a vis geographical units and not in respect of vertical integration. It merely means that for any city, for example, different categories of licenses must not be issued to media enterprises which are directly or indirectly controlled or owned by the same set of directors or partners. This would lead to undue concentration of media ownership. This has been achieved in the United States by the issuance of 'chain broadcasting', regulations and licensing policies on multiple ownership of broadcast stations, amongst others. An elaboration of this concept can be gleaned from Rule 13(1) of the Pakistan Electronic Media Regulatory Authority Rules, 2009 (Rules, 2009). Rule 13(1) says:

13. Media ownership concentration and exclusion of monopolies.- (1) To ensure that fair competition is facilitated, media diversity and plurality are promoted in the

society and undue concentration of media ownership is not created. Maximum number of licences that may be issued to a person or any of its directors or partners where such person is a company or firm, who is directly or indirectly, controlling, owning or operating more than one media enterprise, shall not exceed a total of four satellite TV, four FM Radio licences and two landing rights permissions.

10. The above rule is within the permissible limits of Section 23 and section 39(d) and (e) of PEMRA Ordinance, 2002 and defines the circumstances which constitute undue concentration of media ownership. At the heart of this determination is the urge to facilitate fair competition and to promote media diversity and plurality. Thus Rule 13(1) settles the maximum number of licenses that a person may be issued who operates more than one media enterprise. Rule 13(1) does not oust but limits the grant of licenses thereby ensuring against undue concentration of media ownership. It is fantastic indeed that while the Authority chose to regulate grant of licences for horizontal integration, it abdicates that power in its entirety in case of vertical integration.

11. But this does not mean at all that a licensee of broadcast media cannot apply for and be granted a license for distribution services. This would be legislating and not interpreting the law. This begs the question; what was there to stop the legislature from providing that the issuance of a license for distribution services to a licensee of broadcast media will constitute undue concentration of media ownership? The theme that permeates the law is media diversity, plurality and the need to enlarge the choice available to the people of Pakistan in the realm of media. This can legitimately be achieved by ensuring that concentration of media ownership does not occur for a particular geographical area so as to become undue. So what needs to be ensured is that the people of a city etc. and ultimately the country as a whole do not suffer on account of undue concentration of media ownership. The DTH license is still to be auctioned and it is well-neigh impossible to gauge whether issuing of a license to the INC will result in undue concentration of media ownership for a particular geographical area as also to judge beforehand that the INC (and the directors and partners controlling it) hold enough categories of different licensees in that area to be guilty of the vice of undue concentration of media ownership. This is all too presumptuous at this stage and it was certainly peremptory on the part of Authority to have completely ousted INC and others similarly placed.

12. PEMRA states that such an intention is clearly evident from a reading of section 23. We are afraid, such an intention is conspicuously missing from section 23 and this contention is indefensible.

13. What is the linchpin of the logic behind 'undue concentration of media ownership'? It is relatable to individual media enterprises and not to a whole category of electronic media. It would be anathema to the entire concept if all the media enterprises belonging to a category were debarred from applying for a license on the pretext that it would cause 'undue concentration of media ownership'. It

would be utterly irrational and disproportionate and would run counter to the policy of the law. The policy of law is to weigh at the time of grant of license to a media enterprise whether by issuance of license thereby to that particular applicant, undue concentration of media ownership will not occur. Examples will easily abound where a broadcaster having a very small share in the market will not be guilty of undue concentration of Media ownership if issued a distribution license. The question is: 'why should that media enterprise be pre-judged and ousted from applying at all?'

14. The proviso to subsection (2) of section 23 lends actuality to the analysis. It puts paid to the argument of PEMRA that section 23 permits the prohibition brought out in Rules 13(3) and (4). The proviso enacts that:
Provided that if a licensee owns, controls or operates more than one media enterprise, he shall not indulge in any practice which may impede fair competition and provision of level playing field:"

15. Once again the ineluctable inference while construing the proviso is that there is no bar on a licensee to own, control or operate more than one media enterprise. PEMRA wants us to read the proviso in such a manner so as to hold that it applies to all licensees except licensees of broadcast media. This interpretation cannot be countenanced. It has been said that:
"Whatever temptations the statesmanship of policymaking might wisely suggest, construction must eschew interpolation and evisceration. The judge must not read in by way of creation."
Felix Frankfurter, Some reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 533 (1947).

16. This rule, known as the Omitted case Canon, has been elaborated upon in Reading Law. The Interpretation of Legal Texts by Antonin Scalia and Bryan A. Garner, in the following way:
"Nothing is to be added to what the text states or reasonably implies (casus omissus pro omisso habendus est). That is, matter not covered is to be treated as not covered."
The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it. The judge should not presume that every statute answers every question, the answers to be discovered through interpretation. As the noted lawyer and statesman Elihu Root said of the judge: "It is not his function or within his power to enlarge or improve or change the law." Nor should the judge elaborate' unprovided-for exceptions to text; as Justice Blackmun noted while a circuit judge: "If the Congress had intended to provide additional exceptions, it would have done so in clear language."

17. As stated in the preamble, the Ordinance, 2002 is all about diversity and plurality and encourages participation of more media enterprises at the time of grant of license. This must, however, be counter balanced by guarding against undue concentration of media ownership. But the primary purpose of law is to take all

measures for diversity and plurality. Undue concentration of media ownership is a limit and not the purpose and so must be construed as such. Rules 13(3) and (4) stultify the purpose of the law which emphasises and encourages participation of all eligible media enterprises at the time of grant of license.

18. Lord Bingham in his book 'The Rule of Law' said, 'Rules are forged in the furnace of everyday experience.' The Rules 13(3) and (4) on the contrary, are not at all forged in the furnace of everyday experience. PEMRA drew a distinction to exist between ex-ante ownership regulation and ex-post competition regulation. Rules 13(3) and (4) in its opinion, is an illustration of ex-ante ownership regulation. Thus, competition regulation and ownership regulation are two distinct forms of regulation. In his written brief, this was explained by Mr. Salman Akram Raja, Advocate, as follows:
"...Competition regulation is generally ex post and seeks to prohibit anti-competitive behaviour and punish entities that have indulged in such behaviour. It is accepted that competition regulation alone cannot achieve the diversity and plurality that is desirable in the media sector. Consequently, ownership restrictions are widely imposed so as to ensure diversity and remove the possibility of suppression of plurality and conflict of interest. Reference may kindly be made to the Articles placed at Sr. Nos. 3 and 4 in Paper Book-I as well as at Sr. No. 7 of Paper Book-III submitted by the Respondent PEMRA."

19. The above statement is generally true and acceptable. It is though difficult to accept the restrictions placed in Rules 13(3) and (4) to be caught by the above statement and a mere reflection of it. Ownership restriction can certainly be prescribed by PEMRA by way of 'defining the circumstances which would give rise to undue concentration of media ownership.' And this will then have to be weighed at the time of grant of license to an applicant whose application will be analysed on the touchstone of the circumstances so defined. No two applicants will have the same status and position nor will they all suffer from the same set of disabilities/grounds. Having defined the circumstances, it is inconceivable that PEMRA will consider all applicants through the same lens. The analyses will have to be ad hoc and on a case to case basis.

20. Section 23 is an embodiment of ex ante ownership regulation. But the whole argument of PEMRA runs counter to the scheme of section 23. The fulcrum of section 23 is the power of the Authority to grant a license and the right of a person to apply for it. While deciding to grant a license, the Authority will necessarily embark upon the exercise of ex ante ownership regulation. There is no denying that power to vest in the Authority and to base its decision upon empirical data to deny a license to an applicant on the ground that in so issuance of license, there shall be undue concentration of media ownership in any city, town or area. There is enough power that resides in the Authority at that stage to fulfill its goal of ex ante ownership regulation.

21. PEMRA agreed that the Ordinance, 2002 deals with two sets of potential applicants who may be 'denied a license.' The applicants we are concerned with are those that cause undue concentration of media ownership in terms of Section 23: According to PEMRA.
B) The Ordinance of 2002 deals with two sets of potential applicants who may be denied a license:
Firstly, applicants who suffer from any of the disabilities/ grounds for ineligibility specified in Section 25 of the PEMRA Ordinance, 2002. Four specific grounds of ineligibility are specified in the aforesaid Section 25. These grounds bar the grant of a license to a person suffering from any of the ineligibility specified therein, regardless of whether the grant of license to such a person would have any adverse consequences for either open and fair competition or undue concentration of media ownership.
Secondly, applicants who do not suffer from any of the disabilities specified in Section 25, but the grant of a licence to them is likely to damage competition and/or cause undue concentration of media ownership in terms of Section 23 of the Ordinance of 2002."

22. There can be no question of denial of a license if there is no application. For, a license can only be denied if a media enterprise or a person is permitted to apply. Sections 13(3) and (4) forecloses. all such applications and thus no question of denial of license arises.

23. This brings us to Section 39 from which flows the power to make rules. Section 39 reads as under:
"39. Power to make rules.- (1) The Authority may, with the approval of the Government, by notification in the official Gazette, make rules to carry out the purposes of this Ordinance.
(2) In particular, and without prejudice to the generality of the fore-going power, such rules may be provided for all or any of the following matters, namely:-
a) to prescribe the forms for the licences for working, installing, operating, or dealing in transmission broadcast or distribution apparatus and the manner in which applications for the licence shall be granted;
b) to prescribe the terms and conditions of the licence including fee to be charged in connection with the issuance of licences and related matters;
c) to prescribe standards and measure for the establishment of broadcast media, stations, installation of broadcasting, distribution service or teleporting equipment, transmitters, receivers, boosters, converters, distributors and common antennae;
d) to prescribe terms and conditions for the broadcast media or distribution service operators who own, control or operate more than one media enterprise; and
e) to define the circumstances constituting undue concentration of media ownership and abuse of powers and anti-competitive practices by media companies.

24. The power of the Authority to make rules is to 'carry out the purposes of this Ordinance.' Thus, in the context of Section 23, the power can only be exercised to ensure that undue concentration of media ownership does not occur in issuing a

license to an applicant. As a guideline, the Authority may, therefore, define those circumstances by clause (e) of subsection (2) of Section 39. This is the true construction on a combined reading of Section 23, Sections 39(1) and (2)(e). Since Section 23 obliges the Authority to ensure against undue concentration of media ownership in granting a license, the power to define circumstances cannot be used in a manner that has the effect of debarring a person from applying altogether. In my opinion, to define circumstances can only mean to lay down a set of parameters for the Authority to follow while considering an application for the grant of a license. It cannot be taken to mean, by any stretch of imagination, to empower the Authority to shut the door on a whole category of media enterprise.

Delegated Legislation:

25. The position regarding judicial review of delegated legislation (and enactment of secondary legislation hereby) is clear. The courts have the authority to review subordinate legislation if it is satisfied that in making it, the delegatee acted out with the legislative powers conferred upon it. In F. Hohman La Roche and Co v. Secretary of State for Trade and Industry [1975] AC 295, Lord Diplock elaborated the rule thus:

"In constitutional law a clear distinction can be drawn between an Act of Parliament and subordinate legislation, even though the latter is contained in an order made by statutory instrument approved by resolutions of both Houses of Parliament. Despite this indication that the majority of members of both Houses of the contemporary Parliament regard the order as being for the common weal, I entertain no doubt that the courts have jurisdiction to declare it to be invalid if they are satisfied that in making it the Minister who did so acted outwith the legislative powers conferred upon him by the previous Act of parliament under which the order is ultra vires by reason of its contents (patent defects) or by reason of defects in the procedure followed prior to its being made (latent defects)."

26. This point has been explained by Sir John Donaldson MR in RV Her Majesty's Treasury, Ex p Smedley [1985] 1 QB 651 (666-667) and by Lord Phillips in R (Asif Javed) v. Secretary of State for Home Department [2001] EWCA Civ 789. In a recent judgment of the United Kingdom Supreme Court, Bank Mellat v. Her Majesty's Treasury [2013] UK SC 39, Lord Sumption put the rule as follows:

"The position in relation to secondary legislation is necessarily different, because a statutory instrument is made under powers conferred by statute. These powers are accordingly subject to whatever express or implied limitations or conditions can be derived from the parent Act as a matter of construction. In R v Electricity Commissioners Ex p London Electricity Joint Committee Company (1920) Limited [1924] 1 KB 171, 208, Lord Atkin observed at a very early stage in the development of public law that he knew of "no authority which compels me to hold that a proceeding cannot be a judicial proceeding subject to prohibition, or certiorari because it is subject to confirmation or approval, even where the approval has to be that of the Houses of Parliament."It has sometimes been suggested that this applies only where the ground of objection to a statutory instrument is that it is wholly outside the power conferred by the Act. This was the view expressed by Lord

Jauncey and affirmed by the Inner House in City of Endinburgh District Council v Secretary of State for Scotland 1985 SC 261. He considered that where Parliament had reserved the right to consider the merits (as opposed to the vires) of a statutory instrument, was not open to the courts to review their rationality or their procedural fairness."

27. He went on to hold that this distinction was not sustainable.

28. Let us see the practical effect of the argument that Mr. Salman Akram Raja, Advocate invites this Court to accept. Quite simply, it will make Section 23 redundant. Since the broadcast media has been debarred on the threshold, only those persons with no media ownership at all will apply. Since those persons have little or no prior media ownership, no question regarding undue concentration of media ownership is likely to arise. In the context of the instant case, Section 23 will not engaged. Can this be the intention of the legislature and the policy of law? Certainly not! By rules, therefore, a provision of the primary 'legislation cannot be rendered dormant and redundant.

29. PEMRA invokes to its aid the Consultation Paper on issue relating to Media Ownership by the Telecom Regulatory Authority of India, on February 15, 2013. At first blush, this paper is peculiar to India and the Rules which govern such matters. It is otiose to invoke the contents of this Consultation paper to support PEMRA's case. The TRAI in India does not prohibit or block the broadcast media from applying for a distribution service license. There are safeguards and controls put in place to regulate media ownership. The Consultation paper, too, does not suggest that the broadcasters be ousted completely by the Rules. It merely suggests 'controls' to be put in place for 'Vertical Integration'. We do not find it to be relevant at all. To our mind, the only relevance that the study had was to leave us wondering why such a study was not carried out by PEMRA before enacting Rules 13(3) and (4). It is certainly not PEMRA's case that the study formed the basis of its decision which culminated in Rules 13(3) and (4), for the Consultation Paper of TRAI recommends no such thing.

30. FCC v National Citizens Comm. For Broadcasting, 436 U.S. 775 (1978) was a paradigm case and PEMRA heavily relied upon it. The backdrop of the precedent was that "After a lengthy rulemaking proceeding the Federal Communications Commission (FCC) adopted regulations prospectively barring the initial licensing or the transfer of newspaper-broadcast combinations where there is common ownership of a radio or television broadcast station and a daily newspaper located in the same community." It was held by the U.S Supreme Court that:
"Diversification of ownership has not been the sole consideration though relevant to the public interest, however, the Commission's other, and sometimes conflicting, goal has been to ensure "the best practicable service to the public." Ld., at 394. To achieve this goal, the Commission has weighed factors such as the anticipated contribution of the owner to station operations, the proposed program service, and the past broadcast record of the applicant - in addition to diversification of

ownership- in making initial comparative licensing decisions. See id., at 395-400. Moreover, the Commission has given considerable weight to a policy of avoiding undue disruption of existing service. As a result, newspaper owners in many instances have been able to acquire broadcast licenses for stations serving the same communities as their newspapers, and the Commission has repeatedly renewed such licenses on findings that continuation of the service offered by the common owner would serve the public interest."

31. Thus it was recognized that there was no obligation that diversification should be given controlling weight in all circumstances and in some cases controlling weight be given to the goal of achieving the best practicable service to the public. The Rules related to multiple ownership. In FCC, the Court alluded to the Commission's licensing policies which had long acted on the theory of diversification of mass media ownership service viewpoints, as well as by preventing undue concentration of economic power. More importantly, that was to be part of the process at the time of grant of license and in making. initial comparative licensing decisions. The problem was to be dealt with on an ad hoc basis and to see whether it would serve public interest or not. The overwhelming opinion was that if public interest was the controlling or overriding factor then it was best to leave the decision to be made on an ad hoc basis and not by rule-making which completely takes away the power to weigh public interest. Implicit in section 23 is the element of public interest which permeates it. Considerations at the time of grant of license and its renewal may vary considerably on the touchstone of public interest. This may be illustrated by reference to the Commission's policy statement concerning comparative hearings involving regular renewal applications (at footnote 5) and the following observations:
"Citing considerations of predictability and stability, the statement adopted the policy that, where an incumbent's program service "has been substantially attuned to meeting the needs and interests of its area," the incumbent would be granted an automatic preference over any new applicant without consideration of other factors - including diversification of ownership - that are taken into account in initial licensing decisions."
"The court agreed with the Commission, however, that "incumbent licensees should be judged primarily on their records of past performance." Id., at 44, 447 F.2d, at 1213. The court stated further that "superior performance [by an incumbent] should be a plus of major significance in renewal Page 783 proceedings." Ibid. (emphasis in original). After the instant regulations were promulgated, the Commission adopted a new policy statement in response to the Citizens Communications decisions, returning to a case-by-case approach in which all factors would be considered, but in which the central factor would still be the past performance of the incumbent."

32. Thus a distinction was drawn between the initial and renewal licensing decisions. This assumes significance in the context of vertical integration and a decision on granting distribution license. Would it not be proper to consider the application of an incumbent having a broadcast license and to refuse or grant a

license primarily on its record of past performance? This will serve the public interest and the element of diversification of ownership can also be considered alongside other considerations. This will make the decision broad-based as also comport with the tenor and purpose of section 23. Particularly poignant, from our point of view, are the telling observations regarding experience and "long record of service" in public interest of the incumbents:

"In the instant proceeding, the commission specifically noted that the existing newspaper-broadcast cross-owners as a group had a "long record of service" in the public interest; many were pioneers in the broadcasting industry and had established and continued "traditions of service" from the outset. Order, at 1078. Notwithstanding the Commission's diversification policy, all were granted initial licenses upon finding that the public interest would be served thereby, and those that had been in existence for more than three years had also had their licenses renewed on the ground that the public interest would be furthered. The Commission noted, moreover, that its own study of existing co-located newspaper-television combinations showed that in terms of percentage of time devoted to several categories of local programming, these stations had displayed" an undramatic but nonetheless statistically significant superiority" over other television stations. Id., at 1078 n. 26. An across-the-board divestiture requirement would result in loss of the services of these superior licenses, and - whether divestiture caused actual losses to existing owners, or just denial of reasonably anticipated gains- the result would be that future licensees would be discouraged from investing the resources necessary to produce quality service."

"At the same time, there was no guarantee that the licensees who replaced the existing cross-owners would be able to provide the same level of service or demonstrate the same long-term commitment to broadcasting. And even if new owners were able in the long run to provide similar or better service, the Commission found that divestiture would cause serious disruption in the transition period. Thus, the Commission observed that new owners "would lack the long knowledge of the community and would have to begin raw," and-because of high interest rates - might not be able to obtain sufficient working capital to maintain the quality of local programming."

33. Thus the holding in FCC, on the contrary, bolsters the case-for declaring ultra vires the provisions of Rules 13(3) and (4).

Constitutional challenge:

34. The INC argued that the Rules 13(3) and (4) impinge upon their rights enshrined in Articles 18, 19 and 19A of the Constitution. In view of our holding that the Rules are out with the authority conferred on PEMRA by the Ordinance, 2002, we do not feel inclined to weigh and determine the constitutional aspects of the matter. This is based on the entrenched principle of judicial restraint. Brandeis, J. in Ashwander v Tennessee Valley Auth. 297 US 288, 347 (1936), laid the Rule thus:

"If a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."

35. Also in United States ex rel. Attorney Gen. v. Delaware and Hudson Co., 213 U.S. 366 (1909), White, J. held that:
"Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."

36. I agree that the petition be allowed.
(Sd.)
Shahid Karim, J

KMZ/I-1 Petition allowed.

2017 P T D 761
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
Messrs HAFIZ STEEL FURNACE and 4 others
Versus
DIRECTORATE OF INTELLIGENCE AND INVESTIGATION FBR and 2 others
Custom Reference No.3 of 2017, decided on 24th January, 2017.

(a) Customs Act (IV of 1969)---
----S. 156(1)(89)---S.R.O. No.499(I)/2009 dated 13-06-2009---Smuggled goods, confiscation of---Importer had admitted smuggling of the goods as he had requested for their release against payment of duties and tax along with some suitable fine---Revenue department objected to the release of the goods as the same fell within the ambit of "smuggled goods" hence, their release would be derogatory to S.R.O. No.499(I)/2009 dated 13th June, 2009---Order of adjudicating authority with regards to outright confiscation of the smuggled goods in terms of S. 156(1)(89) of the Customs Act, 1969 was upheld---Reference was disposed of accordingly.

(b) Customs Act (IV of 1969)---
---S. 156(1)(89)---S.R.O. No.499(I)/2009 dated 13-06-2009---Confiscation of vehicle transporting smuggled goods---Legality---Trailer/transport vehicle (on which smuggled goods were being transported) could not be confiscated as a strict and necessary consequence, in absence of any evidence of involvement of the owner or driver thereof in the impugned offence---Outright confiscation of trailer, in the present case, tantamount to travesty of justice---High Court directed that the trailer should be released unconditionally to its lawful owner---Reference was disposed of accordingly.

(c) Customs Act (IV of 1969)---
----S. 196---Reference before High Court---Scope---While exercising jurisdiction in terms of S. 196 of the Customs Act, 1969 the Court was required to examine only question of law, which may arise from the order passed by Customs, Excise and Sales Tax Appellate Tribunal, whereas, the question of fact could not be examined under its reference jurisdiction.

Messrs Pak Suzuki Motor Company Limited, Karachi v. Collector of Customs Appraisement Collectorate, Custom House, Karachi 2015 PTD 2600 ref.
Javed Saleem for Applicants.

ORDER

This is a Reference under Section 196 of the Customs Act, 1969 (the "Act").
2. Following question of law is proposed for our opinion, which is asserted to have arisen out of judgment dated 22.11.2016 of the Customs Appellate Tribunal Bench-II, Lahore (the "Appellate Bench"):

QUESTION OF LAW

Whether the learned Tribunal acted in violation of its own orders dated 16.08.2016, whereunder, the collector of Customs, Multan was directed "to constitute a committee under the auspices of the relevant Deputy Collector and the said committee shall conduct a detailed re-examination of the impugned vehicle rims with regards to their size, condition and make/origin and a report thereof shall be submitted before this tribunal...." But the committee merely recorded its "conclusion by consensus" to the effect that "The examined consignment is comprising of totally old and used wheel rims of different sizes 12, 13, 14 and 15 without packing and without marking of the country origin". The said report of the committee could not be taken as "a detailed re-examination" in the light of the Tribunal's order dated dated 16.08.2016 but still the learned Tribunal relied, upon the said report in the impugned judgment?

3. The learned Appellate Bench has rightly observed in para-graph 11 of the impugned judgment that there is an admission on the part of the Applicants to have the smuggled goods as the learned counsel for the Applicants requested for the release of impugned rims against payment of duties and taxed along with some suitable fine but on the other hand the learned counsel for the Respondents objected to the release on the context that vehicle rims fall within the ambit of smuggled goods hence, their release would be derogatory of S.R.O. 499(I)/2009 dated 13th of June 2009. We agree with the findings of the learned Appellate Bench which in the impugned judgment in paragraph 18 has observed that the transport vehicle cannot be confiscated as a strict and necessary consequence of smuggled goods, in absence of any evidence of involvement of the owner or driver thereof in the impugned offence, consequently outright confiscation of impugned trailer in the instant case tantamount to travesty of justice. It was further observed that the order of the adjudicating authority with regards to outright confiscation of the impugned vehicular rims in terms of Section 156(1)(89) is upheld. However, the impugned vehicle/trailer carrying registration No.TLF-300 is ordered to be released unconditionally to its lawful owner.

4. We have heard that learned counsel for the Applicants and find that the question of law as argued by the Applicants does not arise in this case as the interpretation given by the Appellate Tribunal is clearly in accordance with law. Reliance in this regard is placed on the case titled Messrs Pak Suzuki Motor Company Limited, Karachi v. Collector of Customs Appraisement Collectorate, Custom House, Karachi (2015 PTD 2600) in which it was held as follows:--

"We may observe that while exercising jurisdiction in terms of section 196 of the Customs Act, 1969 the Courts are required to examine only question of law, which may arise from the order passed by Customs, Excise and Sales Tax Appellate Tribunal, whereas, the question of fact cannot be examined under its reference jurisdiction. Reference in this regard can be made to the case of Gold Trade Impex v. Appellate Tribunal of Customs, Excise and Sales Tax, Excise and Sales Tax reported in 2012 PTD 377, wherein it has been held as under:--

"18. Before giving our opinion on the common questions proposed through instant reference applications, we may observe that in terms of section 196(1) of the Customs Act, 1969 and in view of the judgments of superior Courts on the subject, only substantial questions of law, arising out of the order of the Tribunal, can be referred for opinion of this Court through reference application whereas questions of disputed facts cannot be examined by this Court under reference jurisdiction "A point of law" could not be equated with expression "question of law", whereas a question of law referred for opinion of this Court in real scene must be a disputed or disputable question of law. We may further observe that the questions of law referred for opinion by this Court must be formulated in such a manner that the reply to such question referred to this court may be either in affirmative or negative and it should normally settle a pattern of guidance both for the Revenue as well as the assessee. Factual, controversies should not be allowed to be converted into legal issues only by employing legal language in such a manner which is usual to the forming of such questions. References in this regard can be made to the case of Commissioner of Income Tax v. Messrs Immion International, Lahore 2001 PTD 900 and Japan Storage Battery Limited v. Commissioner Income Tax 2003 PTD 2849. Further reliance can be made to the cases reported as Collector of Customs, Port Muhammad Bin Qasim, Karachi v. Kaghan Ghee Mills (Pvt.) Ltd. reported in 2008 SCMR 1538 and Collector of Customs v. Qasim International Container Terminal (Pak.) Ltd. reported in 2013 PTD 392 (SHC)."

5. Under the circumstances, we decline to exercise our jurisdiction. Reference application is decided against the Applicants.

6. Office shall send a copy of this order under seal of the Court to the Appellate Tribunal as per Section 196(5) of the Act.

MWA/H-1/L Order accordingly.

2017 P T D 768
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
COMMISSIONER OF INCOME TAX
Versus
PAK CHINA CHEMICALS (AOP)
P.T.R. No.283 of 2007, decided on 10th January, 2017.

Income Tax Ordinance (XXXI of 1979) [since repealed]---

----Third Sched. Rr. 5A, 5B & 5C---Depreciation allowance---Association of Persons (AOP)---Whether the term 'industrial undertaking' as used in Rr. 5A, 5B & 5C of the Third Schedule to the Income Tax Ordinance, 1979 included an Association of Persons (AOP)---Rule 5B of the Third Schedule to the Income Tax Ordinance, 1979 was applicable to industrial undertakings; R. 5C of the Schedule, applied to only those industrial undertakings as referred to in R. 5A---Rule 5A of the Schedule was applicable only to the industrial undertakings owned and managed by a company---Association of Persons(AOP) being not a limited company, therefore, it was not entitled to the benefit of R.5C of the Third Schedule of Income Tax Ordinance, 1979.

Sarfraz Ahmad Cheema, with Asim Ahmad CIR LTU-I and Dr. Ishtiaq Ahmad CIR, LTU for Applicant.

ORDER

C.M. No.468 of 2016
This is an application for restoration of the titled Reference, which was dismissed for non-prosecution on 02.03.2015.
C.M. No.469 of 2016

2. This is an application for condonation of delay in filing the application for restoration of the titled Reference.

3. For the reasons stated in the CMs duly supported with an affidavit, both the applications are allowed, the delay is condoned and the titled Reference is restored to its original number and is fixed for hearing today with the consent of the learned counsel for the Applicant.
Main Case

4. This is a Reference under Section 133 of the Income Tax Ordinance, 2001.

5. Following question of law is proposed for our opinion, which is asserted to have arisen out of order dated 12.12.2006 passed by the Income Tax Appellate Tribunal Lahore Bench, Lahore ("Appellate Tribunal"):--

"Whether on the facts and circumstances of the case the term "Industrial Undertaking" as used in Rules 5A, 5B and 5C of the Third Schedule to the RO, 1979 includes an "AOP"?

6. The impugned order finds that Rule 5B of the Income Tax Ordinance, 1979 ("Ordinance") is applicable to industrial undertakings. Therefore since the Respondent is an industrial undertaking, the Assessing Officer was not justified to hold that the facility could not be availed by the Respondent. With respect to Rule 5C of the Ordinance, the impugned order finds that the benefit is available to only those industrial undertakings as referred to in Rule 5A of the Ordinance. Rule 5A is applicable only to the industrial undertakings owned and managed by a company. Since the Respondent was not a limited company, therefore, it was not entitled to the benefit of Rule 5C of the Ordinance.

7. We have heard the learned counsel for the Applicant and find that the question of law as argued by the Applicant does not arise in this case as the interpretation given by the Appellate Tribunal is clearly in accordance with law.

8. Under the circumstances, we decline to exercise our jurisdiction. Reference application is decided against the Applicant Department.

9. Office shall send a copy of this order under seal of the Court to the Appellate Tribunal as per Section 133(5) of the Income Tax Ordinance, 2001.

MWA/C-1/L Reference answered.

2017 P T D 774
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
CRESCENT SUGAR MILLS AND DISTILLERY LTD.
Versus
COMMISSIONER INLAND REVENUE, ZONE-III, LAHORE and others
I.T.R. No.320 of 2016, decided on 31st January, 2017.

Income Tax Ordinance (XLIX of 2001)---

----S.133---Reference to High Court---Scope---Question of law---Grounds raised as questions of law had been repeatedly urged before all other forums and were considered in all the orders---No question of law was made out, High Court declined to exercise its jurisdiction under S.133 of the Income Tax Ordinance, 2001---Reference was decided against the taxpayer.

Khurram Shahbaz Butt for Applicant.
Dr. Ishtiaq Ahmad Khan, Commissioner Inland Revenue, Lahore for Respondents.

ORDER

This is a Reference under Section 133 of the Income Tax Ordinance, 2001 ("Ordinance").

2. Following question of law is pressed for our opinion, which is asserted to have arisen out of order dated 23.5.2016 passed by the Appellate Tribunal Inland Revenue, Lahore ("Appellate Tribunal"):--
"Whether on the facts and in the circumstances of the case, the learned Appellate Tribunal has misdirected itself in upholding the addition under sections 21(c) and 21(m) of the Ordinance, by ignoring firstly that the tax payer/petitioner enjoys special tax year, secondly that the accounts are maintained on accrual basis as required under section 32 of the Income Tax Ordinance and thirdly that the statements furnished under section 149 record tax deduction on actual payment and financial year basis?"

3. The basic facts of the case are that the accounts of the Applicant were subject to audit, after which a show-cause notice was issued to the Applicant for amendment in the assessment. The Applicant contested the demand made after amending the assessment order and the Deputy Commissioner Inland Revenue (Audit), Lahore vide order dated 28.1.2013 dismissed the objections of the Applicant and assessed the total tax payable. Against this order, the Applicant filed an appeal before the Commissioner Inland Revenue (Appeals), Lahore who dismissed the appeal of the Applicant vide order dated 18.11.2014 on the ground that the Applicant did not produce any documentary evidence in support of its contentions. The Applicant filed an appeal before the Tribunal which also dismissed the appeal of the Applicant vide order dated 23.5.2016 for the same reasons.

4. The grievance of the Applicant is that there was a differential on the tax paid with reference to the salary and wages. The differential was explained with reference to the special tax year enjoyed by the Applicant and that the Applicant works on accrual basis under Section 32 of the Ordinance. This was clearly reflected in the statement filed by the Applicant under section 149 of the Ordinance where all deductions were evidenced. Therefore there was a plausible reason explaining the tax differential. Learned counsel for the Applicant has essentially stressed on the fact that both these points have not been duly considered by the Respondents.

5. On behalf of the Respondents it was argued that the matter in issue is factual requiring appraisement of evidence. The Applicant was unable to justify its claim on the basis of the reasons evidenced before this Court. Therefore the Applicant is not entitled to the relief claimed.

6. We have heard the learned counsel at length and gone through the record and find that not only were both grounds agitated repeatedly before all forums but they were considered in all the orders. We also note that the Applicant could not justify the differential in the salaries and wages on the basis of the special calendar year and so far as the argument that it works on actual basis it is not relevant for the purposes of salaries and wages. Therefore we are of the opinion that no question of law is made out.

7. Under the circumstances, we decline to exercise our jurisdiction. Reference application is decided against the Applicant.

KMZ/C-3/L Order accordingly.

2017 P T D 793
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
COLLECTOR OF CUSTOMS
Versus
Messrs ALBA INTERNATIONAL
Custom Reference No.1 of 2017, decided on 17th January, 2017.

Customs Act (IV of 1969)---

----S.196---Reference to High Court---Jurisdiction of High Court under S.196 of the Customs Act, 1969---Nature and scope---Department contended that certain questions of law had arisen out of the order of Appellate Tribunal---Interpretation given by the Appellate Tribunal in its order being clearly in accordance with law, no question of law arose---High Court declined to exercise its jurisdiction under S.196 of the Customs Act, 1969---Reference was decided against the taxpayer, accordingly.

Pfizer Laboratories v. Federation of Pakistan PLD 1998 SC 64 rel.
Javed Athar for Applicant.

ORDER
This is a Reference under Section 196 of the Customs Act, 1969 (the "Act").

2. Following question of law is proposed for our opinion, which is asserted to have arisen out of order dated 06.09.2016 of the Customs Appellate Tribunal Bench-II, Lahore (the "Appellate Bench"):--

QUESTION OF LAW

Whether in the, facts and under circumstances of case, the learned Customs Appellate Tribunal was justified to hold that substantive right of the respondents to claim refund of the recovered/ retained money by the state flows automatically as an absolute right whereas the application filed by the respondent for issuance of refund was barred by time limitation by 05 years, 01 month and 28 days?

3. Brief facts of the case are that the Respondent imported a consignment from Malaysia and filed G.D. dated 20.05.2007 declaring the 'goods as Paper Board valuing 11780 US $. Representative samples were sent to the Lahore Dry Port Laboratory for test in which variations were found. A show-cause notice was issued to the Respondent for recovery of Rs.13,60,025/- along with sales tax etc. for mis-declaration. After adjudicating proceedings Order-in-Original was passed and the goods were put to auction by the Custom Authorities. Feeling aggrieved thereby the Respondent filed writ petition before this Court which issued restraining order dated 13.04.2010 despite that the goods were delivered to the bidder vide delivery Order dated 10.04.2010. The Respondent then filed claim of refund of the sale proceeds vide application dated 08.06.2015 which was dismissed due to barred by time and appeal thereagainst was also dismissed. The Respondent then filed an appeal before

the Appellate Bench which accepted the same vide the impugned order. Hence, the instant application.

4. Arguments heard record perused.

5. We agree with the findings of the learned Appellate Bench which in the impugned order in paragraph 16 has observed that subsection (1) of Section 33 of the Act creates an exception with regards to customs duties or charges inadvertently paid or over paid while keeping a statutory silence over the other species of refunds. It was further observed that in case the Appellant is denied refund, the retention of illegally retained money by the State would tantamount to violation of the constitutional mandate enshrined under Article 77 of The Constitution of the Islamic Republic of Pakistan, 1973, thus Appellant's right to refund cannot be diluted or affected by any plea such as the application of objects of limitation envisaged under Section 33 of the Act.

6. The Honourable Supreme Court in Pfizer Laboratories v. Federation of Pakistan, (PLD 1998 Supreme Court 64) has held that if one party under a mistake whether of fact or law paid some money to another party (which includes a Government Department) which was not due by law or contract or otherwise, that must be repaid in view of section 72, Contract Act, 1872. If, however, the customs duty or any other levy was realized and its realization was outside the Statutory Authority, the provision providing limitation of six months was not attracted.

7. We have heard that learned counsel for the Appellant and find that the question of law as argued by the Applicant does not arise in this case as the interpretation given by the Appellate Tribunal is clearly in accordance with law and the judgment of the Pfizer case supra.

8. Under the circumstances, we decline to exercise our jurisdiction. Reference application is decided against the Applicant Department.

9. Office shall send a copy of this order under seal of the Court to the Appellate Tribunal as required under the law.

KMZ/C-4/L Order accordingly.

2017 P T D 803
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
MUHAMMAD ASLAM
Versus
FEDERATION OF PAKISTAN and others
I.C.A. No.90 of 2017, decided on 1st February, 2017.

Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction of High Court---Scope---Show-cause notice---Petitioner had impugned the order whereby his Constitutional petition against show-cause notice issued by authorities was dismissed---Validity---No adverse order had been passed against the petitioner and the petitioner should have filed reply and legal objections to the show-cause notice, which would be decided by the authorities---Apprehension that under garb of show-case notice, coercive action would be taken against the petitioner was nothing but an apprehension and High Court in its Constitutional jurisdiction did not act upon mere apprehension---Show-cause notice was just a notice and no substantive right had been infringed---Intra-court appeal of petitioner was dismissed, in circumstances.

Deputy Commissioner of Income Tax/Wealth Tax, Faisalabad and others v. Messrs Punjab Beverage Company (Pvt.) Ltd. 2007 PTD 1347 rel.
Basharat Ali Janjua for Petitioner.

ORDER

Through this ICA, the Appellant has impugned order dated 19.1.2017 passed by the learned Single Judge in W.P. No.1521/2017.

2. The basic grievance of the Appellant is that show-cause notice was issued to the Appellant on 19.5.2016 which show cause notice as per the arguments of the learned counsel was illegal and could not be issued.

3. At the very outset, learned counsel was confronted with the fact that it is just a show cause notice in which the Appellant was asked to submit his reply and relevant documents. Learned counsel argued that the reply and relevant documents have been submitted, however the matter is still pending.

4. Under the circumstances at this stage no adverse order has been passed against the Appellant. The Appellant should file his reply and any legal objection that he may have can be decided by the Respondents. The Appellant apprehends that under the garb of show cause notice, the Respondents will take coercive action against the Appellant. This is nothing but an apprehension by the Appellant and this Court in constitutional jurisdiction does not act upon mere apprehension. Furthermore it is just a notice and no substantive right is being infringed. The Hon'ble Supreme Court

of Pakistan has held in the case titled Deputy Commissioner of Income Tax/Wealth Tax, Faisalabad and others v. Messrs Punjab Beverage Company (Pvt.) Ltd. (2007 PTD 1347) that tendency of by-passing the remedy provided under law, and resort to Constitutional jurisdiction of High Court was deprecated. In view of the contents of the notice the Department only contemplates to take action against them. The petitioner instead of rushing to the High Court and consuming sufficient time should have submitted reply before invoking the jurisdiction of the High Court. We have held in the judgment that such practice is to be deprecated because if merely on the basis of show-cause notice proceedings are started then in such position department would never be in a position to proceed with the cases particularly the recovery of revenue etc. Thus keeping in view the circumstances of the case we are of the opinion that respondent had wrongly availed remedy under Article 199 of the Constitution.

5. Under the circumstances, the instant appeal is dismissed. The impugned order dated 19.1.2017 passed by the learned Single Judge is maintained.

KMZ/M-11/L Appeal dismissed.

P L D 2017 Lahore 370
Before Ayesha A. Malik, J
Ch. SABIR ALI---Petitioner
Versus
CITY DISTRICT GOVERNMENT and others---Respondents
Writ Petition No.10795 of 2015, decided on 15th February, 2017.

Punjab Local Government Act (XVIII of 2013)---

----Ss. 87, 2(ss), 115 & 141---Punjab Local Government (Commercialization) Rules, 2004, R.5(2)---Constitution of Pakistan, Art. 140A---Local Government---Functions of Metropolitan and Municipal Corporations---Local Government Taxation---"Public place", definition of---Setback requirements for the roads selected for commercialization---Regulation of parking fees by Local City District Government through the local Parking Company established by City District Government---Petitioners, who were private contractors running various parking stands within or around commercial buildings, inter alia, impugned notification issued by Local City District Government, whereby parking fee rates to be charged by petitioners were notified and fixed---Contention of the petitioners was that being private contractors, they could not be regulated by the Local City District Government or its Parking Company---Validity---"Public place" was defined under S. 2(ss) of the Punjab Local Government Act , 2013 to mean any building, premises or place to which the public had access and said definition clarified that the same would include a private place to which the public had regular and continuous access---Any place where the public would have a right of access on a regular and continuous basis fell within the meaning of "public place", hence parking in public places fell within the scope of the Local City District Government and its Parking Company---Private parking-stand operating in a public place was bound to collect parking rates notified by the City District Government and would be regulated by the Local City District Government Parking Company, since it controlled and monitored parking at public places---All parking stands, in the present case, were located in public places as they were either shopping malls, business centers or hospitals and such areas which were accessed by the public, regularly on a daily basis within which the facility of parking must be provided, therefore the argument that the petitioners were private contractors operating parking spaces within private premises was factually and legally incorrect---Test as per the Punjab Local Government Act, 2013 was whether the parking space fell within the meaning of a "public place"---Punjab Local Government (Commercialization) Rules, 2004, provided that building owners were required to provide proper provision for parking within the building premises, and the "setback area" had been surrendered in favour of the City District Government for such purpose and thus so far as the setback area was concerned: the same fell within the regulatory control of the Local City District Government---High Court observed that moving forward local City District Government established Parking Company shall devise a parking policy and plan parking spaces within the city, which policy must be robust and was not reactive in nature, but catered to the requirement of the city and furthermore, that the same

should change and evolve with changing patterns in the usage of private and public vehicles and would consider the traffic issues; and furthermore, that the Parking Company shall work in close liaison with the traffic police so that parking spaces had the least impact on the flow of traffic---Constitutional petitions were disposed of, accordingly.

Petitioner in person.
Mian Abdul Aziz, Talaat Farooq Sheikh, Mian Irfan Akram for Petitioners in connected Writ Petitions and Ms. Noor Aitzaz, vice counsel for Petitioner in W.P. No.26939 of 2015.
Ch. Sultan Mahmood, A.A.G.
Salman Mansoor for Respondent LDA.
Ms. Lubna Altaf for Lahore Parking Company Respondent No.8.
Date of hearing: 20th December, 2016.

JUDGMENT

AYESHA A. MALIK, J.---This single judgment decides upon the issues raised in the Writ Petitions detailed in Schedule "A" appended with this judgment as common question of law and facts are involved in these petitions.

2. The basic and common issue in all these petitions pertains to parking stands within the City of Lahore. The Petitioners are private contractors who run parking stands within or around commercial buildings and their case is that they cannot be regulated by the City District Government, Respondent No.1 or by the Lahore Parking Company, Respondent No.8.

Facts

3. The Petitioners before the Court are all contractors, who have been contracted to run a parking stand within private premises. The parking stands are located in commercial buildings such as Pace Mall, Hafeez Centre, Siddique Trade Centre, Chen One as well as Hospitals like Surgimed. The case of the Petitioners is that they manage the parking stands within private premises, hence they are not obligated to pay the parking fee levied by the City District Government.

4. The issue is of immense importance and in the interest of the public at large. There is a large increase in the number of cars and motorbikes and a shortage of parking spaces be it public or private, within the city. Also parking is not properly regulated hence the problem of availability of parking, wrong parking and encroachments have multifolded.

The Arguments

5. The Petitioners are aggrieved by the notification dated 02.04.2014 issued by the City District Government, Lahore wherein they have notified the parking fee rates to be charged at the notified places. The case of the Petitioners is that they run private parking stands in private premises and therefore, cannot be regulated by the

City District Government or Lahore Parking Company ("LPC"). It is also their case that the revised rates which have been fixed by the City District Government are not applicable to them. Learned counsel for the Petitioners argued that the Petitioners are all contractor, who have been given parking contracts in private areas. They have agreed upon an annual amount for the parking area they manage and are responsible for managing the parking stands and providing the required facilities within the parking stands. Therefore, the rates fixed by the City District Government are not applicable to the Petitioners. Hence they have filed the instant petitions.

6. Report and parawise comments have been filed by the City District Government. On behalf of the City District Government, it is argued that parking falls within the jurisdiction of City District Government under Section 115 of the Punjab Local Government Act, 2013 ("Act"). It is further argued that the owners of the buildings are required to maintain mandatory parking space for the public. Further they provided affidavits to the effect that the setback area is surrendered in favour of the Tehsil Municipal Administration, Town Municipal Administration or City District Government, as the case may be, for the purposes of regulating the said space under the notification dated 02.10.2012. Learned counsel further argued that the rates are fixed for the benefit of public at large, hence all contractors whether they are running a private parking stand/place or public parking stand are required to apply the rates. He explained that parking is a serious issue in the metropolis and requires regulation. It is their case that the City District Government is fully empowered under the Ordinance to regulate parking and fix its rates.

7. Report and parawise comments on behalf of LPC have also been filed. It is their case that LPC is a public limited company established under the Companies Ordinance, 1984 wholly owned by the City District Government, Lahore. The basic purpose for establishing the company is to provide comprehensive management and operations of parking facilities in order to resolve parking problems in the city of Lahore and to ensure that parking arrangements are made available to the public for their benefit. It is also their case that they can collect the parking fee fixed by the City District Government and utilize amounts to improve parking in Lahore. It is their case that since they are a regulatory body, they are required to ensure that parking facilities are available to the public at large and to regulate all parking spaces whether public or private.

8. A report was called for from Chief Traffic Police Officer, Lahore on 03.06.2015. In terms of the report filed on 13.06.2015 it was pointed out that one of the core issues within the City of Lahore is of wrong parking and encroachment in pursuance thereof. The traffic police has taken action against wrong parking by issuing tickets and taking action against encroachers. However, with the unprecedented growth of motor vehicles in the Provincial Capital there is a lot to be done to monitor and supervise parking. In this regard as per the report, certain recommendations have been provided for matters which fall within the domain of the Traffic Police. However, the recommendations do not relate to the authority of the City District

Government to fix parking fee for parking stands. The report highlights the lack of coordination with the Traffic Police while earmarking parking spaces. Consequently wrong allocation of space as parking stands is a major factor contributing to heavy traffic in certain areas.

The Law

9. The basic issue involved in these Petitions is with respect to the powers of City District Government to regulate parking stands established within private premises. The relevant law on the subject is as follows:-

Section 87 of the Act

87. Functions of Metropolitan and Municipal Corporations.-(1) The Metropolitan Corporation and a Municipal Corporation shall-

(a) approve spatial plans, master plans, zoning, land use plans, including classification and reclassification of land, environment control, urban design, urban renewal and ecological balances;

(b) implement rules and bye-laws governing land use, housing, markets, zoning, environment, roads, traffic, tax, infrastructure and public utilities;

(c) approve proposals for public transport and mass transit systems, construction of express ways, fly-overs, bridges, roads, under passes, and inter-town streets;

(g) exercise control over land-use, land sub-division, land development and zoning by public and private sectors for any purpose, including for agriculture, industry, commerce markets, shopping and other employment centers, residential, recreation, parks, entertainment, passenger and transport freight and transit station;

(k) provide, manage, operate, maintain and improve the municipal infrastructure and services, including-

(v) roads and street;

(vi) traffic planning, engineering and management including traffic signaling systems, signs on roads, street markings, parking places, transport stations, stops, stands and terminals;

(t) approve taxes and fees;

(v) collect approved taxes, fees, rates, rents, tools, charges, fines and penalties;

(2) The Metropolitan Corporation and a Municipal Corporation may entrust any of its functions to a person, an authority, agency or company through a contractual arrangement, on such terms and conditions as may be prescribed.

Item 99 of Eighth Schedule (Section 148) of the Act:

Traffic control. (1) A local government shall, by bye-laws, makes such arrangements for the control and regulation of traffic as may be necessary to prevent danger to and ensure the safety, convenience and comfort of the public.

(2) All local government may provide for parking motors on such public places as may be determined by it.

Section 148 of the Act. Notwithstanding any specific provision of this Act, a local government shall perform its function conferred by or under this Act and exercise such powers and follow such procedure as are enumerated in Eighth Schedule.

Section 115. Taxes to be levied.-(1) Subject to this Act, a local government may, by notification in the official Gazette, levy and tax, fee, rate, rent, toll, charge or surcharge specified in Third Schedule.
(2) The Government shall vet the tax proposal prior to the approval of the tax by the local government in order to ensure that the proposal is reasonable and in accordance with law.
(3) The Government shall vet the tax proposal within thirty days from the date of receipt of the proposal failing which it shall be deemed to have been vetted by the Government.
(4) A local government shall not levy a tax without previous publication of the tax proposal and inviting and hearing public objections.
(5) A local government may, subject to provision of subsection (1) increase, reduce, suspend, abolish or exempt any tax.

The Legal Frame Work

10. The power of the Local Government is provided for under Article 140-A of the Constitution of Islamic Republic of Pakistan, 1973, which is reproduced below:-
"140A. (1) Each Province shall, by law, establish a local government system and devolve political, administrative and financial responsibility and authority to the elected representatives of the local governments.
(2) Election to the local government shall be held by the Election Commission of Pakistan."
In terms thereof, the local government is the competent constitutional system of government to provide for the effective delivery of services, including parking and traffic planning as provided under Section 87 of the Act. Over the years urban growth and development has moved at a fast pace due to the changed occupational pattern within communities. Resultantly, urbanization and urban population growth required planning and regulation at the local level so that citizens are facilitated and enjoy quality living. Parking is an essential component of the transportation system and with a rise in the number of vehicles it is necessary to have a planned parking policy which aims to increase the capacity of public transport, reduce traffic levels especially at specified times of the day when traffic congestion is at its peak and finally encourage and develop the use of different modes of transportation. In this regard, public transport, traffic management and parking policy are interlinked and may serve the wider environment, social and economic objectives. Section 87 specifically provides that the metropolitan and municipal corporation shall make rules to regulate traffic and roads, to plan traffic and all related matters such as traffic signals, sign on the roads and parking places. Therefore, parking falls squarely within the ambit of the City District Government, Lahore.

11. The City District Government is also empowered to levy and revise the rate of parking fee. Therefore, not only it can allocate areas for parking purposes but it can also levy parking fees. Section 115 of the Act empowers a Local Government to impose taxes and fees specified in the third schedule. The third schedule Part-1 (11)

provides for the power to levy parking fee. Therefore, the competent authority to levy parking fee is the City District Government.

12. Section 141 of the Act allows for the making of a legal entity to act as an agent of the Local Government for performance of any of its functions. In pursuance thereof the LPC Respondent No.8 was established in the year 2012 by the City District Government. As per the Memorandum of Association of the Company, its main objective is the development of parking for the benefit of people living within the territorial limits of Lahore City and to provide sustainable, efficient and affordable parking services for the citizens of Lahore. Essentially it is required to provide facilities which improve the existing parking system and related facilities. They have also been authorized to collect parking fees through tickets and other means so as to utilize the fees to improve parking spaces and facilities. In this regard the City District Government has transferred all its obligations and functions to the LPC for operating and collecting revenue from the parking sites in Lahore vide agreement dated 19.12.2012. Whereafter the LPC has taken over all parking sites within Lahore city to achieve its objectives. In terms of the understanding between the City District Government and the LPC parking fee is to be collected against public parking and a list of public parking sites has been handed over to the LPC to regulate it. The City District Government delegated its function to collect parking fees to the LPC means that while the City District Government can notify the parking fees, the LPC can collect the fees from the users of the parking spaces and use the amounts to improve parking in the City of Lahore

Decision

13. The question that has arisen in these petitions is whether private parking spaces can be regulated by LPC and whether the operators of private parking stands are bound to charge the parking fee at the notified rate of the City District Government. The Petitioners have impugned the notification dated 02.04.2014 issued by the City District Government challenging the levy of parking fee on the ground that it is not chargeable or payable by the Petitioners, who are a private contractors running parking stands within private premises. Hence they argued that they are not required to pay parking fee nor can the LPC regulate them or private parking spaces. The first question that arises is whether the competent authority can regulate private parking stands and private contractors such as the Petitioners. Secondly whether the Petitioners are required to collect parking fee at the notified rate. Public place is defined under Section 2(ss) of the Act to mean any building, premise or place to which the public have access. A bare reading of the definition of public place clarifies that it is a place to which the public has access, which will include a private place to which the public has regular and continuous access. Therefore any place where the public will have a right of access on a regular and continuous basis falls within the meaning of public place. Hence parking in public places falls within the scope of the City District Government and LPC. Furthermore, a private parking stand operating in a public place is bound to collect parking rates notified by the City District Government and will be regulated by the LPC because they control and monitor parking in public places. In the instant cases, all the parking stands are

located in public places as they are either shopping malls, business centers or hospitals. These are areas which are accessed by the public, regularly on a daily basis within which the facility of parking must be provided. Therefore the argument that the Petitioners are private contractors operating parking spaces within private premises is factually and legally incorrect. The test as per the Act is whether the parking space falls within the meaning of a public place. In the cases before the Court all the Petitioners are operating parking stands in public places, hence they are bound by the notifications of the City District Government to charge parking fees at the notified rate and are bound by the parking policy of the LPC.

14. In this regard it is also noted that the builders or owners of the commercial complex at the time of approval of site plans agreed to provide public parking within its premises. Counsel for the LDA submitted that this is a mandatory requirement for commercial buildings and within this parking space the owner of the building is required to provide free and accessible parking to the public. Furthermore, Notification No.SOV(LG)35-1/2003 dated 02.10.2004 issued by the Government of the Punjab, Local Government and Rural Development Department notifying the Local Government (Commercialization) Rules, 2004 ("Rules") under Section 5(2) provides that the owner shall submit an affidavit to the effect that the area under setback stands surrendered in favour of the Tehsil Municipal Administration, Town Municipal Administration or City District Government, as the case may be. Section 6(3) of the Rules provides that the respective Tehsil Administration, Town Municipal Administration and City District Government shall maintain a separate head of account and the income thus generated shall be utilized exclusively for the development of parking sites and parking plazas in close proximity of the area mentioned in sub-Rule (1). Therefore even under the provisions of these Rules the building owners are required to provide proper provision for parking within the building premises, and the setback area has been surrendered in favour of the City District Government for this purpose. Hence, under the Rules the setback area, if used for parking by the Petitioners will be regulated by the City District Government and the LPC. In the Petitions before the Court the parking stands are located within the building premises for public use and along the boundary walls and within the setback area. The owners of the buildings/plazas/hospital cannot use the land earmarked for parking in contravention to the approved building plans and so far as the setback area is concerned that falls within the regulatory control of the City District Government and therefore, the control of the LPC. It is noted that under the Fourth Schedule of the Act using the setback area for purposes not approved is an offence under the Act.

15. The LPC in its arguments before the Court has stated that due to lack of cooperation and clarity, they are only managing and regulating parking as per the list of public parking spaces given by the City District Government. They further explained that they have not devised any mechanism to register parking contractors to standardize their function nor do they have control over private contractors and private parking spaces. In this regard it is clear that LPC is to control and regulate

parking in public places. Therefore, any contractor working within a public place is bound to conform to the requirements of the LPC. Given that the issue of parking and allocation of parking space is serious and in the public interest LPC must adopt a move vigorous and durable approach to parking within Lahore. Due to scarcity of parking spaces they must formulate a parking policy which addresses this issue and devise a mechanism to regulate contractors operating in public places. The report filed by the Chief Traffic Officer, Lahore outlines the gravity of the problems and highlights the lack of coordination between the Traffic Police and the City District Government and LPC. As per the Report, parking stands in many areas have created serious hindrance to the smooth flow of traffic as they have been given space in congested areas where the flow of traffic and given amenities do not justify the operation of the parking stand. It was also pointed out that parking contractors often encroach upon public space, side walls, side roads, service areas and empty plots to allow parking, which is neither permitted nor conducive to the flow of traffic. The City District Government and LPC should contribute efforts with the traffic police and have regular meeting so as to stay abreast with the traffic issues.

16. World over parking is an issue which requires constant regulation and monitoring. There are mobility plans devised to appreciate the flow of traffic and people in terms of the mode of transport used and parking policies devised which regulate parking issues. Road side space is planned not only from the parking aspect but also based on other usages such as buses, taxies, plantation, public crossing etc. In the same way parking spaces are allocated based on traffic flows, area and other modes of transport in order to effectively regulate parking. Hence parking along road side spaces and in public places must be based on some mobility plan and parking policy. In the same way rationalizing parking based on area, usage and public need is vital so as to make available sufficient parking spaces within the city and thereafter to charge parking fee based on some pricing policy. In this regard parking rates at specified times of the day or days of the week for specified duration can vary for efficient parking management instead of aiming to simply generate revenue by prescribing a flat rate. These functions of planning and regulating fall within the scope of the City District Government under Section 87 of the Act which function has been delegated to the LPC. Moving forward LPC shall devise a parking policy and plan parking spaces within the city of Lahore, which policy must be robust and is not reactive in nature, but caters to the requirement of the City. The policy should change and evolve with the changing patterns in the usage of private and public vehicles and should consider the traffic issues of the city of Lahore. In this regard, the LPC shall work in close liaison with the traffic police so that parking spaces have the least impact on the flow of traffic.

17. In W.P. No.7550/2015 the grievance of the Petitioner is that the service road is being used for parking which has blocked the entire road and causes difficulties to access the buildings. With respect to the prayer in W.P. No.7550/2015 the City District Government should consider the grievance of the Petitioner in consultation with the traffic police and determine whether the parking stand is causing any hurdle in the flow of traffic. This petition is disposed of in the above terms.

18. In view of the aforesaid, W.Ps. Nos.10795, 7550, 12483, 26939, 13551, 11861, 11689 of 2015, 671 of 2016 and 1672 of 2014 are dismissed being devoid of merits.

Schedule-A

Details of Writ Petitions mentioned in Judgment dated 20-12-2016 passed in W.P. No.10795/2015

Sr.No.	W.Ps.Nos.	Parties Name	Counsel Name
1	10795/215	Ch. Sabir Ali v. City District Government etc.	Petitioner in person.
2.	7550/2015	Wafi Associates (Pvt.) Ltd. v. City District Government etc.	Mian Muhammad Tahir, Advocate
3.	1672/2014	Waqar Hussain v. Lahore Development Authority etc.	Mian Irfan Akram, Advocate
4.	12483/2015	Kh. Muhammad Inam v. D.G. LDA etc.	Talaat Farooq Sheikh, Advocate
5.	671/2016	Faqir Muhammad v. City District Government etc.	Mian Abdul Aziz, Advocate
6.	26939/2015	Muhammad Nadeem Khan v. Province of Punjab, etc.	Ms. Noor Aitzaz, Advocate vice counsel for the Petitioner
7.	13551/2015	Muhammad Irshad Ahmad v. City District Government etc.	Nemo
8.	11861/2015	Anwar ul Haq v. City District Government etc.	Nemo
9.	11689/2015	Abdul Jabbar v. Province of Punjab, etc.	Nemo

KMZ/S-14/L Order accordingly.

2017 P L C (C.S.) 348
[Lahore High Court]
Before Ayesha A. Malik, J
ABDUL SHAKOOR
Versus
LAHORE HIGH COURT, LAHORE and others
Writ Petition No.32561 of 2016, decided on 2nd December, 2016.

Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction of High Court---Scope---Petitioner, a judicial officer, sought adjustment of his seniority and pro-forma promotion---Validity---Case of the petitioner was considered and rejected by the Chief Justice of the High Court and no rule had been violated nor any Fundamental Right had been infringed---All actions and orders taken by the High Court or Supreme Court or by any judge thereof in the exercise of functions and powers of his office were not amenable to Constitutional jurisdiction of High Court---Constitutional petition was dismissed, in circumstances.
Asif Saeed v. Registrar Lahore High Court PLD 1999 Lah. 350 and Muhammad lqbal and others v. Lahore High Court through Registrar and others 2010 SCMR 632 distinguished.
Abrar Hussain v. Government of Pakistan and another PLD 1976 SC 315 rel.
N.A. Butt for Petitioner.
Ch. Sultan Mahmood, A.A.G.

ORDER

AYESHA A. MALIK, J.--- Through this petition, the Petitioner seeks proforma promotion and pensionary benefits.

2. The case of the Petitioner is that he was not promoted in the year 2014 whereas Respondents Nos.2 and 3 were promoted as Deputy Registrar ("DR") who were junior to him. The Petitioner filed a representation which was heard and declined without assigning any reason. Thereafter, the Petitioner retired from service without being promoted. The Petitioner now prays that the seniority of Respondents Nos.2 and 3 be readjusted and he be given proforma promotion.

3. At the very outset, the question of maintainability of the instant petition was put before the learned counsel. He argued that the petition is maintainable on the strength of the judgment passed by the Hon'ble Supreme Court of Pakistan in Constitution Petition No.03 of 2014 and C.M.A No.8540 of 2015. He argued that in the stated judgment it is held that a writ against the High Court is maintainable and that the earlier law laid down in the cases titled "Asif Saeed v. Registrar Lahore High Court" (PLD 1999 Lahore 350) and "Muhammad lqbal and others v. Lahore High Court through Registrar and others" (2010 SCMR 632) has been declared as per incuriam.

4. The judgment relied upon essentially looked at the process for appointments, absorptions and transfers made in the Islamabad High Court, which was stated to be in violation of the Service Rules of the Islamabad High Court. In that case, the Hon'ble Supreme Court of Pakistan held that a writ may lie against an administrative/ consultative/ executive order passed by the Chief Justice or the Administration Committee, involving any violation of the Rules framed under Article 208, causing infringement of the fundamental rights of a citizen. Admittedly, the case at hand deals with the terms and conditions of service as the Petitioner is seeking proforma promotion. His case was considered and rejected by the Hon'ble Chief Justice of this Court. No rule has been violated nor any fundamental right has been infringed. Reliance on the judgment of the august Supreme Court of Pakistan is also misplaced as the judgment of the august Supreme Court of Pakistan does not declare that every administrative order is amenable to writ jurisdiction. The judgment considered the violation of the High Court Rules and the powers exercised thereunder and found the petition to be maintainable on the ground that there was illegal exercise of power which impinged upon the statutory rights of the citizens and employees of the High Court. The case of the Petitioner is not only distinguishable but also against the dicta laid down in the case titled "Abrar Hussain v. Government of Pakistan and another" (PLD 1976 SC 315) wherein it was held that all actions and orders taken by the High Court or Supreme Court or by any Judge thereof in the exercise of the functions and powers of his office are not amenable to writ jurisdiction.

5. Petition is dismissed.

KMZ/A-3/L Petition dismissed.

2017 P L C (C.S.) 358
[Lahore High Court]
Before Ayesha A. Malik and Muhammad Ali, JJ
ADDITIONAL CHIEF SECRETARY, GOVERNMENT OF PUNJAB, LAHORE and others
Versus
MANSOOR-UL-HAQ
I.C.A. No.643 of 2011, heard on 30th November, 2016.

Punjab Services and General Administration Department (S&GAD) Allotment Policy (as amended on 19.01.2009)---

----Cl. 15---Government housing to public employees---Vested right---Scope---Vested right/Maturity of waiting period for government housing, could not be washed away by making amendment in housing allotment policy---Provincial Government impugned order of Single Judge of High Court in Constitutional petition where it was held that the respondent employee had a vested right for allotment of a house under Punjab Services and General Administration Department (S&GAD) Allotment Policy as amended on 19.01.2009, and that the said Allotment Policy would apply prospectively and not retrospectively---Validity---Said policy would have a prospective effect as the "maturity of turn" accrued under the policy before said amendment, would carry forward and not be washed away by the amendment---Time spent waiting under the allotment policy could not be vitiated simply because of an amendment, as doing so would prejudice rights of employees whose turns had matured under the Allotment Policy after waiting a number of years --- Intra-court appeal was dismissed, in circumstances.

Agha Nadeem v. Additional Secretary Welfare and 3 others 2014 PLC (C.S.) 268 distinguished.
Chief Secretary Punjab, Lahore and others v. Mr. Fazal Karim I.C.A. No.592/2011 ref.
Ch. Sultan Mehmood, AAG along with Wasiq Abbas, Law Officer, Estate Office, S&GAD for Appellants.
Ch. Imran Raza Chadhar for Respondent.
Date of hearing: 30th November, 2016.

JUDGMENT

AYESHA A. MALIK, J.--- Through this ICA, the Appellants that is the Government of Punjab has impugned judgment dated 10.10.2011 passed by the learned Single Judge in W.P. No.5259/2011.

2. The relevant facts of the case are that the Respondent who is a member of the Establishment of the Lahore High Court, Lahore applied for the allotment of official residence in the year 2001 while he was serving as Assistant Registrar BS-17. At that time when he applied he was at Serial No.743 of the waiting list in 3-4 rooms

category. Over a passage of eight years, the Respondent reached Serial No.396 in the year 2008. On 14.1.2008 the post of Assistant Registrar was up graded to BS-18. Consequently the Respondent was entitled to 'C' category residence under the Allotment Policy of S&GAD, 1997 ("Allotment Policy"). On 19.1.2009, the Appellants amended the Allotment Policy ("Amended Policy"), such that the Respondent and other employees of Lahore High Court who had applied prior to the Amended Policy were no longer entitled to 'C' category residences. The Respondent along with others were asked to get themselves registered afresh for allotment of residences under the Amended Policy. The Respondent applied afresh on 1.4.2015 when he was placed at Serial No.800 in the 'C' category residence waiting list. It is noted that at this time the Respondent was promoted to BS-19 as Deputy Registrar and under the Amended Policy became entitled to 'C' category residence. The Respondent being aggrieved challenged the retrospective effect of the Amended Policy before this Court, since he was placed at the bottom of the list for allotment of residence despite the maturity of his turn.

3. The grievance of the Appellants is that the impugned judgment declared that the Respondent has a vested right for the allotment of official residence under the Amended Policy and consequently directed the Appellants to grant 'C' category residence to the Respondent and all other employees who have registered themselves prior to the Amended Policy on the basis of the maturity of their turn since 2001. Learned Law Officer argued that the Respondent does not have a vested right for allotment based on clause 15 of the Allotment Policy of S&GAD 1997, amended on 19.1.2009 which categorically provides that the Provincial Government has no legal obligation to provide residential accommodation to any Government servant and no Government servant has any vested legal right or claim to the allotment of Government owned residential accommodation. In this regard, he has also relied upon the judgment of this Court cited at Agha Nadeem v. Additional Secretary Welfare and 3 others (2014 PLC (C.S.) 268). It is their case that the Respondent is entitled to residence on maturity of his turn and not before that. Currently he is placed at Serial No.720 of the waiting list and must wait his turn for residence.

4. Learned counsel for the Respondent pleaded that the Respondent applied for official residence under the Allotment Policy in the year 2001. The Respondent's entitlement accrued over the years under the Allotment Policy and was placed at Serial No.396 in the year 2008 from Serial No.743. Learned counsel argued that the Respondent has been waiting for 16 years for official residence and under the garb of an amendment to the Allotment Policy, the Appellants deprived the Respondent of the maturity of his turn on the waiting list and required him to apply afresh under the Amended Policy. Learned counsel referred to I.C.A. No.592/2011 titled Chief Secretary, Punjab, Lahore and others v. Mr. Fazal Karim, wherein the same Amended Policy was under challenge and the Appellants accepted the case of the respondent in that case and made a statement before the Court that they are ready, to provide the respondent, Reader of the Lahore High Court, official residence. Learned counsel submitted that the policy in question was the same, the right to

allotment was the same. In that case the Appellants agreed to the allotment as per the prayer of the respondent yet are discriminating against the present Respondent. Learned counsel submitted that the Appellants cannot be allowed to take up two different positions in a similar case to the detriment of the Respondent.

5. Heard and record perused.

6. The judgment under challenge in the instant case has declared that the Amended Policy will apply prospectively and not retrospectively, hence will not be applicable to those employees who applied prior to the proclamation of the Amended Policy. The Appellants have challenged this declaration on the ground that the Respondent does not have a vested right for government residence under the Amended Policy. We are of the opinion that the declaration with respect to the effectiveness of the date of the amendment made in the Amended Policy is in accordance with law and the Amended Policy will have prospective effect and will not apply retrospectively. This means that the maturity of turn accrued under the Allotment Policy is not washed away by the Amended Policy and will carry forward under the Amended Policy. Consequently the Respondent will retain his maturity in turn on the waiting list under the Amended Policy. Even otherwise, there is nothing in the Amended Policy which provides that it will have retrospective effect, hence by way of an amendment, the period of waiting spent under the Allotment Policy cannot be denied because the maturity of turn under the Allotment Policy is a right which has accrued in favour of the Respondent. The said right recognizes and protects the time spent in waiting for his turn to mature under the Allotment Policy. This right cannot be vitiated simply because of an amendment because if that were the case then with every amendment, the Government could deny and deprive employees of their turn for allotment of residence. Such an interpretation would prejudice the rights of employees whose turns have matured under the Allotment Policy after waiting for considerable number of years. In this case, the Respondent applied for official residence in 2001 and his right to be given official residence under the policy matured over a period of time, such that he was placed at Serial No.396 in the year 2008. The Amended Policy required fresh applications to be made for allotment of government residence. Essentially the Appellants nullified the waiting period of nine years whereby the Respondent had acquired maturity of his turn. Furthermore the right of maturity of turn is different from a vested right as argued by the learned Law Officer. The Respondent was not agitating based on a vested right for allotment of government residence. He wanted the maturity of turn accrued in his favour to be retained under the Amended Policy. This maturity of turn cannot vitiate with every amendment as it would give the Government the ability to deprive officers of residence and could also mean that those who apply for the first time under the Amended Policy could get government residence before someone who has been waiting for long fifteen years. Furthermore, the judgment relied upon by the learned Law Officer 2014 PLC (C.S.) 268 (supra) is distinguishable as it is based on different facts. In that case the issue was with respect to retaining official residence whereas in the instant case the Respondent claims maturity of his turn in the relevant category for provision of official residence under the Amended Policy.

Therefore, we are of the considered opinion that the case of the Respondent does not fall under clause 15 of the Amended Policy but the maturity of turn is a right which has accrued in his favour on account of the Allotment Policy itself. By amending the Allotment Policy the Appellants deprived the Respondent of the maturity of his turn which they could not do. The period of time spent waiting under the Allotment Policy could not be vitiated by the Amended Policy and the right that has matured under the Allotment Policy for grant of residence cannot be taken away.

7. The next question that arises is what type of residence the Respondent is entitled to under the Amended Policy. The basic grievance of the Respondent was that he is entitled to 'C' category residence since 2008 but is being denied the same. The Appellants contended that he is not entitled to 'C' category residence on account of the Amended Policy. The position today is that admittedly the Respondent is entitled to 'C' category residence under the Amended Policy, however, on account of the fresh applications made on 1.4.2015, he was placed at Serial No.800 and at present is at Serial No.720 meaning thereby that he has to wait till his turn matures for the residence which may take several years. In this regard, the learned Law Officer explained that the Respondent is on the waiting list and will be allotted 'C' category residence when his turn will come. We have already held that the Amended Policy cannot take away the maturity of turn. Therefore, the Respondent is entitled to get 'C' category residence based on the maturity of his turn which has accrued in his favour since 2008.

8. Under the circumstances, no case for interference is made out. The appeal is dismissed and impugned judgment dated 10.10.2011 passed by the learned Single Judge is maintained.

KMZ/A-2/L Appeal dismissed.

2017 P L C (C.S.) 488
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
Dr. ABID ALI
Versus
CHIEF SECRETARY, GOVERNMENT OF PUNJAB and 3 others
I.C.A. No.1623 of 2015, decided on 11th January. 2017.

Civil service---
----Contract appointment---Scope---Contract period of employee was not extended and he was terminated from service---Validity--- Employee, after accepting terms and conditions of his contract employment had submitted his joining report--- Service of such employee could be terminated without assigning any reason--- Employee had no right to claim extension in his contract period as a vested right--- Behaviour of employee remained unsatisfactory toward his superior which resulted into his termination---Where employment was on contract, relationship of "Master and Servants" would exist---Constitutional petition would not be maintainable in such matters---Impugned order had been passed in consonance with the spirit of law by the Single Judge of High Court---Intra court appeal was dismissed in limine.
Lt. Col. Rtd. Aamir Rauf v. Federation of Pakistan through Secretary M/o Defence and 3 others 2011 PLC (C.S.) 654 and Nadeem Ahmed v. Pakistan State Oil Company Limited and another 2005 PLC (C.S.) 1447 rel.

Mirza Khalid Mahmood for Appellant.
Ch. Sultan Mehmood, A.A.G.
Dr. Saeed Ahmed Bari, Litigation Officer, L&DD Department.
Zarar Butt, Superintendent Officer of District Livestock Office, Gujrat.

ORDER

Through the instant Intra Court Appeal the Appellant has called in question the legality of impugned order dated 09.10.2015 passed in Writ Petition No.24435/2015 by the learned Single Judge as well as orders dated 29.04.2015 and 29.06.2015 passed by the Respondents Nos.1 and 2. The Appellant has also sought a direction to the Respondents Nos.2 and 3 for extension in his contract period.

2. Brief facts revealing from the instant Appeal are that the Appellant was appointed as Veterinary Officer (H) through Punjab Public Service Commission on contract basis on 22.11.2007. However, the service of the Appellant was terminated vide order dated 28.06.2008 due to his absence w.e.f. 31.05.2008 but later on the termination letter was rescinded on 27.01.2009 and his absence period was converted into leave without pay. The Responded No.4 sent recommendations for extension of contract period of the Appellant vide letters dated 05.05.2009, 17.06.2009 and 01.07.2009 but the matter was kept pending by the Respondents Nos.2 and 3. The Appellant also sent written requests in this regard but ultimately the contract of the other colleagues of the Appellant was extended but the

Appellant's request was declined on 10.02.2012. The Appellant assailed the said order before this Court which directed the Respondent No.2 to pass a speaking order after affording opportunity of proper hearing to the Appellant who dismissed the application of the Appellant vide order dated 29.04.2015 against which the appellant filed representation before the Respondent No.1 which also met to the same fate. Feeling aggrieved thereby the Appellant filed W.P. No.24435/2015 which was dismissed vide the impugned order dated 09.10.2015. Hence, the instant Appeal.

3. Learned counsel for the Appellant argued that the learned Single Judge in Chamber in the impugned judgment has not appreciated the fact of discrimination as the contract period of the other colleagues of the Appellant has been extended while the Appellant has been deprived of the same. Learned counsel also argued that despite order of this Court the Respondent No.2 has not given him proper hearing, as such he has been condemned unheard on the basis of mala fide. Learned counsel also contended that the learned Single Judge has not applied its judicious mind and solely rely on the comments submitted on behalf of the Respondents, as such, the impugned order is liable to be set aside. Learned counsel further pointed out that the fact of absence of the Appellant has been made basis in the impugned order but the Respondents had badly failed to prove the same. Learned counsel also laid much stress on the point that the Respondents have never ever sought any explanation regarding the absence of the Appellant.

4. We have heard the arguments of the learned counsel for the Appellant and learned AAG who supported the impugned orders and examined the record available with this Appeal.

5. The main grievance of the Appellant is that his contract period be extended. The Appellant was appointed on purely contract basis in the Respondents/Department vide appointment letter dated 22.11.2007. The Appellant after accepting the terms and conditions of his contract employment submitted his joining report. Clause-7 of the employment contract, containing certain terms and conditions, explicitly reveals that the services of the Petitioner can be terminated without assigning any reason, hence the Appellant has no right to claim extension in his contract period as a vested right. Moreover, allegedly the behavior of the Appellant remained unsatisfactory toward his superiors which resulted into his termination.

6. It is an established principle that where employment is on contract, there is a relationship of master and servant and in such like cases the Constitutional petition under Article 199 of the Constitution is not maintainable. In case titled Lt. Col. Rtd. Aamir Rauf v. Federation of Pakistan through Secretary M/o Defence and 3 others (2011 PLC (C.S.) 654), it has been held that if an employee working on contract basis is aggrieved of his termination the only remedy available was an action for damages and no direction could be issued to force the unwilling employer to keep the Appellant in service. Similar principle was laid down by the Hon'ble Supreme Court of Pakistan in case titled Nadeem Ahmed v. Pakistan State Oil Company

Limited and another (2005 PLC (C.S.) 1447). In view of the settled principle, the learned Single Judge has rightly held that the Appellant has no vested right on the basis of which he was entitled to relief in a Constitutional petition by holding in paragraph 6 which reads as follows:

"Perusal of the above observations indicates that the Petitioner has started his private business at Sheikhupra and is continuously engaged in the private business. Even otherwise the above findings/ record also clearly establish that he is a habitual absentee. Learned counsel for the Petitioner could not satisfactorily rebut the above factual position. The case of the Petitioner, on the face of it, is distinguishable from his other colleagues. Question of mala fide and discriminatory treatment was not made out in the circumstances. Therefore, the Petitioner cannot seek shelter behind the provisions of Article 25 of the Constitution."

7. We see no illegality or legal infirmity in the impugned order which has been passed by the learned Single Judge in consonance with the spirit of law, as such does not warrant any interference by us.

8. In view of above, the instant Appeal is devoid of any merit and is accordingly dismissed in limine.

ZC/A-6/L Appeal dismissed

2017 P L C (C.S.) 556
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
SAIF UR REHMAN
Versus
FAISALABAD ELECTRIC SUPPLY COMPANY (FESCO) and others
I.C.A. No.39 of 2016, decided on 9th January, 2017.

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

----Notification No.SOR-IV(S&GAD)-5-16/84 dated 18-04-1984---Appointment---Medical examination---Scope---Petitioner was appointed on contract basis but his service was terminated and post was again advertised---Petitioner, after second advertisement qualified for the appointment and was advised to get medically examined---Petitioner was declared medically unfit and department refused to join him in the service---Contention of petitioner, in intra-court appeal was that he was appointed on the basis of a valid medical certificate and declaring him unfit in the second round for the same post was mala fide---Validity---Employee, under the Rules, was not required to produce fresh medical certificate of fitness in circumstances---Subsequent appointment was subject to the condition that there must not be a break in service of the employee---Petitioner was terminated from service on 06-06-2011 and new employment letter was issued on 07-07-2011 with a break in his service of one month---No illegality was pointed out in the impugned judgment passed by the Single Judge of High Court---Intra-Court appeal of employee was dismissed in circumstances.

Rana Ijaz Ahmad for Appellant.

ORDER

Through the instant Intra Court Appeal filed under Section 3 of Law Reforms Ordinance, 1972 the Appellant has called in question the legality of impugned judgment dated 11.12.2015 passed in Writ Petition No.25930/2011 by the learned Single Judge and also sought a direction to the Respondents Nos.1 to 3 to allow the Appellant to join the service on the basis of previous valid medical report w.e.f. 07.07.2011.

2. Brief facts revealing from the instant appeal are that the Appellant was initially appointed as Assistant Line Man (BPS-3) in the Respondents Department under the Employees Children Quota (Category-III) on contract basis vide the Respondents' Memo dated 06.01.2010 and the Appellant gave his joining after being declared medically fit for the job vide medical report issued by the Respondent No.4 dated 27.01.2010. The appointments of the Appellant and others were challenged before this Court through I.C.A. No.602/2010. However, on 18.10.2010 the same were declared ultra vires and directions were issued by this Court to the Respondents to fill the vacancies through transparent process. Therefore, the services of the

Appellant along with others were terminated on 06.06.2011, after about one year and six months. When second time advertisement for the said posts was made the Appellant again qualified and advised to get medically examined from the Respondent No.4 vide Memo dated 07.07.2011 and in pursuance of which the Appellant appeared before the Respondent No.4 who declared the Appellant unfit for induction in service and under the certificate the Respondents Nos.1 to 3 refused the Appellant to join in service. Hence, the instant Appeal.

3. Learned counsel for the Appellant argued that the learned Single Judge in the impugned judgment has not appreciated the fact that in the first round the Appellant was appointed on the basis of a valid medical certificate, therefore, declaring the Appellant unfit in the second round for the same post shows mala fide of the Respondents. Learned counsel also argued that the Appellant was terminated verbally without any written order, as such, the act of the Respondents cannot be said to be legal. Learned counsel also pointed out that the Respondents Department was bound to take the joining of the Appellant without getting second medical report by virtue of A&CS, Rules, 1974 No.SOR.IV(S&GAD)-5-16/84 dated 18th April, 1984 (page-20 of the ICA) (the "Rules") as the same provides that All the appointing authorities are, therefore, advised not to insist on the production of medical certificate of fitness on subsequent appointments in cases where a government servant has already produced medical certificate on his first entry into government service provided that there is no break in his service. Learned counsel also contended that there was no break in service of the Appellant whereas the Respondents have technically retrenched the services of the Appellant and principle of locus poenitentiae apply in the case of the Appellant as the first appointment of the Appellant taken the legal effect and in such circumstances the legal act which is in motion cannot be rescinded. Learned counsel also laid much stress on the point that at the time of first appointment the Petitioner was medically fit but second time he was declared unfit for service, as such, the same creates serious doubt. Lastly, learned counsel maintained that the impugned judgment is liable to be set aside as the same did not deal with the issue of mala fide on the part of the Respondents.

4. We have heard the arguments and examined the record available with this Appeal which shows that the Appellant was firstly appointed as Assistant Line Man under Employee's Children Quota on contract basis (Category-III) by the Respondents Department but after his termination under the decision of this Court, fresh advertisement was made in which he again qualified and was issued employment letter dated 07.07.2011. In clause (ii) under Note: of the said letter it is specifically mentioned that you should appear before Medical Superintendent WAPDA Hospital, Faisalabad to obtain Medical Fitness Certificate during 27.07.2011 to 30.07.2011. It was necessary for the Appellant to get himself medically examined and obtain Medical fitness certificate but the same was issued declaring the Appellant unfit for service, as he had suffered from Hepatitis B, at the time. The contention of the learned counsel for the Appellant, that there is serious doubt in the medical report being contradictory to the previous one cannot be given weightage, as he admittedly was unwell at the time of his medical examination.

5. From the above Rule it is crystal clear that although an employee is not required to produce a fresh medical certificate of fitness in case he is seeking subsequent appointment, however, the same is subject to the condition that there must not be a break in service of the employee. In this regard, none else but the Appellant himself has admitted and sought in his prayer clause that the Respondents Nos.1 to 3 may be directed to allow the Appellant to join the service on the basis of previous valid medical report w.e.f. 07.07.2011. It is worth mentioned that, admittedly the Appellant's services were terminated on 06.06.2011, whereas his subsequent/new employment letter was issued on 07.07.2011, as such there was a break in his service of about one month, when such is the situation then how can the Appellant say that there is no break in his service, therefore, he cannot be benefited of his own reliance i.e. the Rules, which itself goes against him. We, therefore, fully agree with the finding of the learned Single Judge in which he has rightly held at paragraph 6 of the impugned order which reads as follows:
"It is not denied by the Petitioner that he was not suffering from Hepatitis B at the time of first entry medical fitness on 30.07.2011. No ill-will or malice is found on part of Respondent authority in not allowing Petitioner to join the post in question. Even otherwise, qualitative PCR for HBV -- DNA has conclusively proved the diagnoses of Hepatitis B. Qualitative PCR is needed for initiation and monitoring of treatment, which the Petitioner had not opted for."

6. We do not see any illegality in the impugned judgment which has been passed strictly in accordance with law, as such does not warrant any interference by us. Consequently, the Appeal in hand, being devoid of any merit is hereby dismissed in limine.

ZC/S-6/L Appeal dismissed.

2017 P L C (C.S.) 613
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
GOVERNMENT OF PUNJAB and others
Versus
WAQAS ASHRAF
I.C.A. No.886 of 2009, decided on 12th January, 2017.

Punjab Agricultural Produce Markets Ordinance (XXIII of 1978)---

----S. 33---Administrator Market Committee---Removal from office---Petitioner was removed from office of Administrator Market Committee and District Officer Agriculture (Extension) was nominated as Administrator---Constitutional petition filed by the petitioner was allowed by Single Judge of High Court---Validity---Funds of Market Committee were frozen when petitioner was appointed as Administrator and same could only be utilized or released with the approval of the Government---Notification for appointment of petitioner was an interim arrangement till the constitution of Market Committee---Constitutional petition was not maintainable as petitioner did not have any vested right on the basis of which he could claim his entitlement to hold office of Administrator---Government, in pursuance of policy and in the public interest had removed all Administrators who were private persons and brought the office of Administrative under the control of Agricultural Department---Impugned judgment passed by the Single Judge was set aside---Intra court appeal was allowed in circumstances.

Mian Tajammal Hussain and 7 others v. Province of Punjab through Secretary, Agriculture Department 1990 MLD 570 ref.
Ch. Faisal Zafar for Appellant.
Ch. Sultan Mahmood, AAG with Irshad Ali, Litigation Officer, Agricultural Department.
Nemo for Respondent.

ORDER

The Appellants are aggrieved by the judgment dated 16.10.2009 passed by learned Single Judge in W.P. No.11117/2008 on the ground that interpretation given to the exercise of authority under Section 33 of the Punjab Agricultural Produce Markets Ordinance, 1978 ("Ordinance") is contrary to the law.

2. The basic facts of the case are that the Respondent was appointed as Administrator, Market Committee, Gujrat on 19.11.2005 until the constitution of a new Market Committee. He continued to work as Administrator until the issuance of notification dated 23.04.2008, which was impugned in the writ petition. The grievance of the Respondent was that he was functioning as per law as Administrator and there was no justifiable reason for the Government of Punjab to remove him from the office by exercising power under Section 33 of the Ordinance.

3. Learned counsel for the Respondent was not available on the last date of hearing and not even today. This is an old case, therefore, we are inclined to proceed with the matter on the basis of available record.

4. Learned counsel for the Appellant argued that the Respondent was appointed on temporary basis on account of political consideration. The Government of Punjab exercised its power under Section 33 of the Ordinance and removed all Administrators from their post and replaced them with officers of the Agriculture Department in order to ensure the smooth working of the market committee. In the instant case, District Officer, Agriculture (Extension) Gujrat was nominated as Administrator. Learned counsel argued that power under Section 33 of the Ordinance can be exercised in emergency situations where the purpose of the Ordinance was not carried out. Learned counsel further argued that the learned Single Judge failed to take into consideration the record and the facts wherein it is evident that the Respondent along with other Administrators were appointed purely for political consideration and it was on approval of a summary from the Government that their removal was required. Learned counsel argued that all the Administrators at the time were removed in anticipation of reconstitution of the market committee with the help of officers appointed from Agriculture Department. Meaning thereby that the Government removed all political appointees.

5. Vide impugned judgment the learned Single Judge on examining Section 33 of the Ordinance concluded that power could only be exercised in an emergency situation and in the instant case, nothing has been placed on record to justify the exercise of power under Section 33 of the Ordinance. The impugned judgment further held that there is no reason or allegation or illegality having been committed by the Respondent which justifies his removal. Reliance was placed upon the case titled "Mian Tajammal Hussain and 7 others v. Province of Punjab through Secretary, Agriculture Department" (1990 MLD 570).

6. We have heard learned counsel for the parties and gone through the impugned judgment. The basic contention of the Appellants, Government of Punjab is that it is duly authorized to exercise power under Section 33 of the Ordinance if it feels that the purpose of the Ordinance is not carried out. In this case, the justification brought forward is that Administrators were appointed for political consideration including the Respondent and until the constitution of a new market committee in Punjab, the function of the Administrators in the market committee was to be performed by the officers of Agriculture Department. This was stated to be in the public interest to ensure smooth functioning of the market committee. The record shows that at the time when the Respondent was appointed, the funds of the market committee were frozen and could only be utilized or released, with the approval of the Government. The notification itself provided that the appointment was an interim arrangement till the constitution of the market committee. On 23.04.2008 a notification was issued wherein the function of the Administrators was to be performed by the officers of the Agriculture Department such that all private persons were removed from the market committee in the public interest. Based on the record, we are of the opinion

that the writ petition was not maintainable as the Respondent did not have any vested right on the basis of which he could claim his entitlement to hold office of Administrator. The notification dated 19.11.2005 itself stated that the appointment was in interim measure until the constitution of a market committee. The Government of Punjab in pursuance of policy and in the public interest removed all Administrators, who were all private persons and brought the office of the Administrators under the control of Agriculture Department for smooth functioning by constituting a new market committee.

7. Under the circumstances, this Intra Court Appeal is accepted and the judgment impugned dated 16.10.2009 of the learned Single Judge is set-aside.

ZC/G-1/L Appeal allowed.

2017 C L D 772
[Lahore]
Before Ayesha A. Malik, J
MUHAMMAD AYAZ---Petitioner
Versus
GOVERNMENT OF PUNJAB through Chief Secretary and others---Respondents
W.P. No. 1193 of 2017, heard on 1st February, 2017.

(a) Punjab Environmental Protection Act (XXXIV of 1997) [as amended by Punjab Environmental Protection (Amendment) Act (XXXV of 2012)---

----Ss. 16, 22 & 23---Constitution of Pakistan, Art. 199---Constitutional petition---Jurisdiction of High Court---Environment Protection Order---Alternate remedy---Statutory appeal---Scope---Question before the High Court was whether a Constitutional petition impugning actions of Provincial Environmental Protection Agency in pursuance of an Environment Protection Order; was maintainable in view of remedy of appeal available to the petitioner under Ss. 22 & 23 of the Punjab Environmental Protection Act, 1997---Held, that question raised in the Constitutional petition related to interpretation of S. 16 of the Punjab Environmental Protection Act, 1997 and powers of the Provincial Environmental Protection Agency versus power of the Environmental Tribunals to enforce the Environment Protection Order (EPO); and therefore the remedy of appeal under Ss. 22 & 23 of the Punjab Environmental Protection Act, 1997 was not efficacious---Constitutional petition was therefore, maintainable.
Messrs Mega Steel Mills Private Limited v. Government of Punjab through Secretary, Environmental Protection Department, Punjab, Lahore and 6 others 2016 CLC 1095 ref.

(b) Punjab Environmental Protection Act (XXXIV of 1997) [as amended by Punjab Environmental Protection (Amendment) Act (XXXV of 2012)---

----Ss. 16, 17 & 21---"Rio Declaration on Environment and Development", United Nations Conference on Environment and Development, ratified by Pakistan on 1.6.1994---Environment Protection Order ("EPO")---Interpretation of S. 16 of the Punjab Environmental Protection Act, 1997---- Nature of powers of the Environmental Protection Agency to seal a premises for non-compliance of the Environment Protection Order---Precautionary principle in cases of environmental harm---Obligations of the state---Scope---Spirit of S. 16 of the Punjab Environmental Protection Act, 1997 was based on the precautionary principle, which required a relevant agency to anticipate the danger and take immediate steps to prevent harm or danger to the environment---Precautionary principle was essentially a tool for ensuring sustainable development and focused on empowering regulators to act in anticipation of environmental harm and ensure that the same did not occur---Pakistan's commitment to uphold sustainable development and the Precautionary Principle was affirmed through ratifications of the "Rio Declaration"

and several other international instruments---Certain activity if allowed to go ahead, may cause irreparable damage to the environment and if it was stopped, there may be irreparable damage to economic interest and in case of doubt protection of environment would have precedence over the economic interest---Precautionary principle required anticipatory action to be taken to prevent harm and such harm could be prevented even on a reasonable suspicion and it is not always necessary that there should be direct evidence of harm to the environment---State and its officers must employ measures to achieve environmental justice and preserve the environment---Punjab Environmental Protection Act, 1997 emphasized on immediate measures empowering the EPA to protect the environment where there was imminent threat to the public or cause to believe environmental degradation/pollution would be irreversible and in such cases, enforcement mechanism must act immediately to effectively control the harm and prevent any further degradation---Without said power of enforcement; the issuance of an EPO under S. 16(2) of the Act specifically would become redundant and if the EPO required immediate stoppage or immediate removal of the pollutant then allowing the harm and pollution to continue would defeat the purpose of S. 16(2) of the Punjab Environmental Protection Act, 1997.

Messrs Mega Steel Mills Private Limited v. Government of Punjab through Secretary, Environmental Protection Department, Punjab, Lahore and 6 others 2016 CLC 1095; M.C. Mehta v. Union of India Court 1997 (2) SCC 353; AIR 1997 SC 734; Ms. Shehla Zia and others v. WAPDA PLD 1994 SC 693; Adeel-ur-Rehman v. Federation of Pakistan 2005 PTD 172 and Ali Steel Industry v. Government of Khyber Pakhtunkhwa and another 2016 CLD 569 rel.

Ms. Imrana Tiwana and others v. Province of Punjab and others 2015 CLD 983 distinguished.

(c) Punjab Environmental Protection Act (XXXIV of 1997) [as amended by Punjab Environmental Protection (Amendment) Act (XXXV of 2012)---

----Ss. 16, 22 & 23---Constitution of Pakistan, Art. 10A---Fundamental right to fair trial and due process of law---Nature and scope of such right--- Environmental justice--- Strict Liability--- Precautionary principle---Precautionary actions in cases of environmental harm---While due process and the right to a fair trial were embedded in Art. 10A of the Constitution, the objective of such Constitutional protection was to achieve justice and in cases of strict liability, where damage to the environment was irreversible and permanent, immediate action was fortified in order to prevent irreparable damage---In such cases it was necessary to take precautionary measures, which did not immolate or infringe the right to fair trial or due process, but simply ensured that a harm or hazard did not continue during the time spent in due process.

Warid Telecom (Pvt.) Limited v. Pakistan Telecommunication Authority 2015 SCMR 338 and Karnataka Public Service Commission v. B.M. Vijaya Shankar AIR 1992 SC 952 rel.

(d) Punjab Environmental Protection Act (XXXIV of 1997) [as amended by Punjab Environmental Protection (Amendment) Act (XXXV of 2012)---

----Ss. 16, 21, 20 & 17---Constitution of Pakistan, Art. 10A---Environment Protection Order ("EPO") issued under S. 16 of the Punjab Environmental Protection Act, 1997---Right to fair trial and due process of law---Jurisdiction and powers of Environmental Tribunals---Precautionary actions in cases of environmental harm---Scope---Petitioner impugned sealing of petitioner's premises for non-compliance of Environment Protection Order issued under S. 16 of Punjab Environmental Protection Act, 1997 on the ground that the same violated his right to fair trial under Art. 10A of the Constitution---Validity---Said contention was not sustainable because public safety, public health and the environment must be protected from irreparable harm and in the present case, the issue of noise pollution and vibrations were exceeding the National Environmental Quality Standards (NEQs), hence the same required immediate action to secure public health and safety especially since the petitioner had failed to rectify the cause of the harm in any manner whatsoever---Contention that power of sealing lay only with the Tribunal and that the Environmental Protection Agency was required to file a complaint under S. 21 of the Punjab Environmental Protection Act, 1997 was misconceived since the same provided that an application could be filed by any officer authorized by the Director General of the EPA if there was reasonable suspicion of his having been involved in contravention punishable under S. 17(1) of the Punjab Environmental Protection Act, 1997 which was available to the EPA in addition to the power it had to execute the measures provided in S. 16(2) of the Punjab Environmental Protection Act, 1997---In the event that there was non-compliance of S. 16(2) of the Punjab Environmental Protection S.16(3) of the same enabled the Environmental Protection Agency to itself take the measures that were prescribed in the Environmental Protection Order---Use of the words "itself take or cause to be taken" in S. 16(3) of the Punjab Environmental Protection Act, 1997 were for the benefit of the environment and empowered the Environmental Protection Agency to enforce its orders in order to stop pollution which caused imminent danger to the people and the locality---High Court held that there was no violation of Art. 10A of the Constitution.

Sharjeel Haider and Muhammad Yasin Hatif for Petitioner.
Mrs. Samia Khalid, AAG along with Asghar Ali Tahir, Deputy Director and Mian Ijaz Ahmad, Deputy Director (L&E), Environment Protection Agency for Respondents.
Date of hearing: 1st February, 2017.

JUDGMENT

AYESHA A. MALIK, J.---Through this Petition, the Petitioner has impugned order dated 11.1.2017 issued by Respondent No.5 whereby the Deputy Director, Environmental Protection Agency, Punjab, Gujranwala ordered for the sealing of

the plant of the Petitioner in order to implement the Environmental Protection Order issued on 6.11.2015.

2. The facts of the case are that the Petitioner runs a business in the name of Ali Steel Works in Allama Iqbal Colony, Street No.2, Gujranwala. The residents of the area filed a complaint against the business of the Petitioner on the ground that it causes air pollution as well as noise pollution and vibration which is hazardous to the environment and to the health of the residents of the area. The District Officer (Environment), Gujranwala inspected the unit of the Petitioner on 14.5.2015 and found that it had been established without obtaining the environment approval from the Environment Protection Agency, Punjab ("EPA") and that the noise pollution exceeded the National Environment Quality Standards ("NEQS") limits. The Petitioner was issued Environmental Protection Order ("EPO") on 6.11.2015 under section 16 of the Punjab Environmental Protection Act, 1997 ("Act") after being given two opportunities, one on 11.6.2015 and the other on 22.6.2015 to controvert the allegations raised against him. Since the Petitioner was unable to do so, EPO was issued on 6.11.2015. The EPO stated that the Petitioner should,
"Immediately stop operation of your unit till its regularization from competent forum to ensure compliance of section 12 of Punjab Environmental Protection Act, 1997 (amended 2012).

No appeal was filed against the EPO and the Petitioner continued its business without compliance of the EPO. Thereafter the complainant filed W.P. No.31185/2016 in which a direction was issued on 5.10.2016 that he should avail remedy under section 17 of the Act for compliance of the EPO. In the meanwhile a follow up inspection was carried out and it was found that the Petitioner had not complied with the EPO, hence the Deputy Director, Environmental Protection Agency, Punjab, Gujranwala while invoking the powers under section 6(1)(a) of the Act sealed the unit of the Petitioner on 11.1.2017. Hence this Petition.

3. The basic issue before the Court, as raised by the Petitioner is the power of the Deputy Director, Environmental Protection Agency, Punjab, Gujranwala/Respondent No.5 to pass a sealing order. Learned counsel for the Petitioner argued that Respondent No.5 did not have any power to seal the unit of the Petitioner. The power of sealing lies exclusively with the Environmental Protection Tribunal ("Tribunal") under section 17(5)(c) of the Act. Learned counsel further argued that the order of sealing was done without following due process and without notice to the Petitioner. Learned counsel further submitted that the complainant filed W.P. No.31185/2016 before the Court wherein a direction was issued on 5.10.2016 that he should approach the Tribunal, therefore the act of sealing was in derogation to the said orders of this Court. Learned counsel places reliance on the case titled Messrs Mega Steel Mills Private Limited v. Government of Punjab through Secretary, Environmental Protection Department, Punjab, Lahore and 6 others (2016 CLC 1095) in support of his contentions.

4. Learned Law Officer argued that sufficient notice was given to the Petitioner before issuance of the EPO and the Petitioner was unable to refute the allegations that the noise level exceeded the NEQS limits. Furthermore despite the EPO, the Petitioner made no effort to control the noise and vibration level and continued with his business. Learned Law Officer further argued that the EPO dated 6.11.2015 issued under section 16 of the Act was not complied with and on 11.1.2017 an order was passed in terms of the powers vested with the EPA to seal the unit of the Petitioner. Learned Law Officer argued that the EPA has power to implement its orders under section 16(3) read with section 16(2) of the Act. She argued that when a person does not comply with the order of the EPA, the EPA can initiate action under the Act and can also take necessary measures to ensure that the direction given in the EPO is implemented. In this case an immediate stop order was passed on 6.11.2015, subsequent inspections were carried out and it was seen that the Petitioner was not compliant with the EPO. Sufficient warnings were given to him, opportunity of hearing was provided and ultimately in order to prevent the continuation of the environmental hazardous, sealing order was issued on 11.1.2017. Learned Law Officer has placed reliance on the case titled Ms. Imrana Tiwana and others v. Province of Punjab and others (2015 CLD 983) to urge the point that right of appeal is provided for under the Act and remedy of a second appeal is also available before a Division Bench of this Court. However, the Petitioner has failed to avail the said remedy provided for under the Act, hence the instant Petition is not maintainable.

5. Arguments heard and record perused.

6. On the issue of maintainability the question before the Court is with reference to the power exercised by the EPA under section 16 of the Act. Learned Law Officer further argued that since the remedy of appeal is available to the Petitioner, the instant Petition is not maintainable. However given that the question involved relates to interpretation of section 16 and the powers of the EPA versus power of the tribunal to enforce the EPO, the remedy of appeal is not efficacious. Hence the instant Petition is maintainable.

7. The basic question raised in this Petition is whether the EPA has the power to seal a unit which is not compliant with the EPO. Section 5 of the Act authorizes the Director General to carry out all powers and functions of the EPA and section 5(5) of the Act allows the Director General to delegate any of his powers. By way of Notification No. 176/F-02/LS dated 21.08.2007 and 503/F-02(VII)/LS/EPA dated 27.02.2008, the powers and functions under the EPA were delegated by the Director General with respect to the different provisions of the Act. The Notification mentioned above delegates powers to the Deputy Directors in matters pertaining to section 16 of the Act. Section 16 of the Act being the relevant provision is reproduced hereunder:-

Environmental protection order. (1) Where the Provincial Agency is satisfied that the discharge or emission of any effluent, waste, air pollutant or noise, or the

disposal of waste, or the handling of hazardous substance, or any other act or omission is likely to occur, or is occurring, or has occurred, in violation of any provisions of this Act, rules or regulations or of the conditions of a licence, or is likely to cause, or is causing, or has caused an adverse environmental effect, the Provincial Agency may, after giving the person responsible for such discharge, emission, disposal, handling, act or omission an opportunity of being heard, by order direct such person to take such measures as the Provincial Agency may consider necessary within such period as may be specified in the order.

(2) In particular and without prejudice to the generality of the foregoing power, such measures may include-

(a) immediate stoppage, preventing, lessening or controlling the discharge, emission, disposal, handling, act or omission, or to minimize or remedy the adverse environmental effect;
(b) installation, replacement or alteration of any equipment or thing to eliminate or control or abate on a permanent or temporary basis, such discharge, emission, disposal, handling, act or omission;
(c) action to remove or otherwise dispose of the effluent, waste, air pollutant, noise, or hazardous substances; and
(d) action to restore the environment to the condition existing prior to such discharge, disposal, handling, act or omission, or as close to such conditions may be reasonable in the circumstances, to the satisfaction of the Provincial Agency.

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

8. Section 16 of the Act governs the procedure and powers related to an EPO. An EPO is a written order that is designed to protect the environment. It is issued to secure compliance by a person who is causing harm to the environment in order to protect human health and the environment. It specifies the sensation of the harm and provides for the methods to cure or stop/prevent the harm within a given time frame. Essentially the EPO provides the action that needs to be taken and the timeframe during which it must be taken, to rectify the wrong. In terms of section 16(1) of the Act, the EPA has to satisfy itself that there is discharge or emission of any waste or pollutant or noise in violation of the Act. Once satisfied it must give an opportunity of hearing to the person causing the pollution and can then pass an order directing the person to take necessary measures to cure the problem. However, the EPO can also direct measures requiring immediate action. The measures under section 16(2) of the Act require instant or emergent action, such as immediate stoppage or immediate control of the equipment or thing causing the pollution or removal or disposal of the hazardous or pollutant substance or action

that helps to restore the environment to the condition it was in before the pollutant. While the EPO under section 16(1) of the Act provides for remedial or corrective measures to cure pollution or stop further pollution; Section 16(2) of the Act lays down preventative measures that require immediate action for an immediate effect. Therefore the distinction between section 16(1) and (2) is essentially that the latter acknowledges the need for immediate action as a necessary response mechanism to imminent threat or irreparable damage to the environment.

9. The vital question is whether the EPA can enforce its orders under the EPO where a person fails to comply with the measures prescribed by the EPA. In terms of section 16(3) of the Act, the EPA can either proceed against the person under the Act which could mean proceeding under section 17 of the Act to impose penalties or proceeding under section 21 of the Act where it can file a complaint against the person disobeying the EPO or it can itself take or cause to be taken such measures necessary in the order to implement its EPO. Therefore section 16(3) of the Act itself provides for an enforcement mechanism which is in addition to remedy under the Act. The mandate of the law under Section 16(3) of the Act is very clear. An EPO can be passed to prevent any form of pollution be it air, water, noise or waste or handling of hazardous substance. Section 16(3) of the Act is an enabling provision to ensure compliance with orders under section 16(1) and (2) of the Act, enabling immediate action by the EPA to enforce orders where necessary. The need to provide for enforcement powers in the EPA is essential given that immediate measures may be required to prevent environment degradation. The purpose and overarching objective of the Act to protect the environment and promote sustainable development would be rendered redundant if such powers did not exist.

10. The spirit of section 16 of the Act is based on the Precautionary Principle. The Precautionary Principle requires the relevant agency to anticipate the danger and take immediate steps to prevent harm or danger to the environment. The Rio Declaration and Agenda 21 in 1992 adopted the Precautionary Principle as a necessary mechanism in the following terms:
to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environment degradation. (Article 15, Rio Declaration)

Essentially, the Precautionary Principle is a tool for ensuring sustainable development. The court in M.C. Mehta v. Union of India Court (1997 (2) SCC 353: AIR 1997 SC 734) affirmed that, "The Precautionary Principle" and "The Polluter Pays Principle" are necessary tools for sustainable development. The court elaborated on this, holding that:

If an activity is allowed to go ahead, there may be irreparable damage to the environment and if it is stopped, there may be irreparable damage to economic interest. In case of doubt, however, protection of environment would have

precedence over the economic interest. Precautionary principle requires anticipatory action to be taken to prevent harm. The harm can be prevented even on a reasonable suspicion. It is not always necessary that there should be direct evidence of harm to the environment.
The Precautionary Principle was further recognized by the G8 Ministers in 2002 as a means to safeguard the protection of the environment. Therefore the Precautionary Principle focuses on empowering regulators to act in anticipation of environmental harm and ensure it does not occur. Pakistan's commitment to uphold sustainable development and the Precautionary Principle was affirmed through ratification of the Rio Declaration (ratified 01-06-1994) and several other international instruments (United Nations Framework Convention on Climate Change (ratified 01-06-1994), The Biodiversity Convention (ratified 01-06-1994), etc). The Bhurban Declaration 2002 further emphasized the need to take immediate action and employ the Precautionary Principle to protect life and nature for present and future generations.

11. Since the Ms. Shehla Zia and others v. WAPDA case (PLD 1994 SC 693), superior courts have taken an active approach in accepting environmental justice and recognized the Precautionary Principle as an integral issue. In the cited case the court held that:

The rule of precautionary policy is to first consider the welfare and safety of the human beings and the environment and then to pick up a policy and execute the plan which is more suited to obviate the possible dangers or make such alternate precautionary measures which may ensure safety. To stick to a particular plan on the basis of old studies or inconclusive research cannot be said to be a policy of prudence and precaution.

Following this, several cases have acknowledged the Precautionary Principle and its importance as an enforcement mechanism for protection of the environment and sustainable development. The Supreme Court in Adeel-ur-Rehman v Federation of Pakistan held that:

It is the duty of the State to see that the life of a person is protected as to enable him to enjoy it within the prescribed limits of law. Pollution, environmental degradation and impure food items also fall in the category of deprivation of life. [2005 PTD 172]

In Imrana Tiwana v. Province of Punjab (2015 CLD 983), the court took this further and established environmental justice as a concept that fell within the scheme of the Constitution,

To us environmental justice is an amalgam of the constitutional principles of democracy, equality, social, economic and political justice guaranteed under our Objectives Resolution, the fundamental right to life, liberty and human dignity (Article 14) which include the international environmental principles of sustainable

development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine. Right to environment that is not harmful to the health or well-being of the people and an environment that protects the present and future generations is an essential part of political and social justice and even more integral to the right to life and dignity under our Constitution.
In Ali Steel Industry v. Government of Khyber Pakhtunkhwa and another (2016 CLD 569) the need to use precautionary and preventative measures to ensure the protection of rights under Articles 9 and 14 of the Constitution of Islamic Republic of Pakistan, 1973 was reaffirmed. The court found no illegality with respect to the sealing of the premises or the direction of stoppage to the petitioner even though the Khyber Pakhtunkhwa Environmental Protection Act, 2014 did not extend to PATA. The court stressed on the duty to combat environmental degradation, again pointing towards the need for immediate enforcement mechanisms.

12. Therefore it is clear that the state and its officers must employ measures to achieve environmental justice and preserve the environment. With the growth of jurisprudence on the establishment of environmental justice in Pakistan, it is necessary to now shift the focus on enforcement mechanism especially where certain kinds of harm or pollution which require immediate stoppage, must be stopped. The Act emphasizes on immediate measures empowering the EPA to protect the environment where there is imminent threat to the public or cause to believe environmental degradation/pollution will be irreversible. In such cases, the enforcement mechanism must act immediately to effectively control the harm and prevent any further degradation without this power of enforcement the issuance of an EPO under section 16(2) of the Act specifically would become redundant. If the EPO requires immediate stoppage or immediate removal of the pollutant then allowing the harm and pollution to continue would defeat the purpose of section 16(2) of the Act.

13. Another aspect of the case is the argument that due process was not followed. In this case notices were issued but since he did not appear, no hearing was given prior to the sealing of the unit. While due process and the right to a fair trial are embedded in Article 10A of the Constitution of Islamic Republic of Pakistan, 1973, the objective of the constitutional protection is to achieve justice. In cases of strict liability, where damage to the environment is irreversible and permanent, immediate action is fortified in order to prevent irreparable damage. In such cases it is necessary to take precautionary measures, which do not immolate or infringe the right to fair trial or due process, but simply ensure that a harm or hazard does not continue during the time spent in due process. The august Supreme Court of Pakistan held in the case titled Warid Telecom (Pvt.) Limited v. Pakistan Telecommunication Authority (2015 SCMR 338) that where actions are taken to stop more injustice from happening then such actions should not be seen as a violation of the right to fair trial or due process. In this case the august Supreme Court of Pakistan quotes Karnataka Public Service Commission v. B.M. Vijaya Shankar (AIR 1992 SC 952):

When meeting the requirement of notice and providing an opportunity of hearing will cause "more injustice than justice" or it is not in the "public interest" the same may be withheld.

Was natural justice violated? Natural justice is a concept which has succeeded in keeping the arbitrary action within limits and preserving the rule of law. But with all the religious rigidity with which it should be observed; since it is ultimately weighed in balance of fairness, the courts have been circumspect in extending it to situations where it would cause more injustice than justice. Even though the procedure of affording hearing is as important as decisions on merits yet urgency of the matter, or public interest at times require, flexibility in application of the rule as the circumstances of the case and the nature of the matter required to be dealt may serve interest of justice better by denying opportunity of hearing and permitting the person concerned to challenge the order itself on merits not for lack of hearing to establish bona fide or innocence but for being otherwise arbitrary or against rules.
The Petitioner's contention that the right to due process and Article 10A of the Constitution of Islamic Republic of Pakistan, 1973 was violated is not sustainable because public safety, public health and the environment must be protected from irreparable harm. In this case, the issue of noise pollution and vibrations were exceeding the NEQS, hence it required immediate action to secure public health and safety especially since the Petitioner had totally failed to rectify the cause of the harm in any manner whatsoever. Thus, there is no violation of Article 10A of the Constitution of Islamic Republic of Pakistan, 1973.

14. In this case the EPA acted strictly in accordance with law. In fact it complied with the requirement of due process and gave the Petitioner sufficient time to comply with the EPO dated 6.11.2015. However, not only was the Petitioner unable to provide any mechanism to control the noise pollution but he blatantly and flagrantly disobeyed the EPO and once action was taken against him, he challenged the legality of the order. More than one year lapsed after the issuance of the EPO yet on successive inspections of the unit it was noted that no effort was made by the Petitioner to rectify the noise pollution or the vibration, nor did Petitioner attempt to comply with the EPO. The argument of the learned counsel that the power of sealing lies only with the Tribunal and that the EPA was required to file a complaint under section 21 of the Act is totally misconceived. Section 21(7) of the Act provides that an application can be filed by any officer authorized by the Director General of the EPA if there is reasonable suspicion of his having been involved in contravention punishable under section 17(1) of the Act which was available to the EPA in addition to the power it has to execute the measures provided in section 16(2) of the Act. In the event that there is non-compliance of section 16(2) of the Act, section 16(3) enables the EPA to, itself take the measures that are prescribed in the EPO. The use of the words itself take or cause to be taken in section 16(3) of the Act are for the benefit of the environment and empowers the EPA to enforce its orders in order to stop pollution which causes imminent danger to the people and the locality.

15. Learned counsel for the Petitioner has also placed reliance on the case cited at 2016 CLC 1095 (supra) wherein it was held that the department did not have the power to seal the property. The said case is distinguishable on the facts. In this case an order was passed by the Tribunal with regard to the pollution caused by the factory of the appellant. The appellant filed an appeal before the EPA which was first dismissed and then subsequently restored. However, during the process of restoration the officials of EPA sealed the factory of the appellant for non-compliance of the EIA. The issue in that case was with reference to the sealing carried out under Regulation 20 of the Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations, 2000 whereas in the instant case the unit was sealed for non-compliance of the EPO. Therefore the case is distinguishable and not applicable to the facts of this case.

16. Under the circumstances, no case for interference is made out. Petition is dismissed.

KMZ/M-29/L Petition dismissed.

2017 C L C 767
[Lahore]
Before Ayesha A. Malik and Jawad Hassan, JJ
MUHAMMAD ASIF----Appellant
Versus
FEDERATION OF PAKISTAN and others----Respondents
I.C.A. No.1137 of 2016, decided on 2nd February, 2017.

Federal Ombudsman Institutional Reforms Act (XIV of 2013)---

----S. 18 & Preamble---Vires of S.18, Federal Ombudsman Institutional Reforms Act, 2013---Petitioner contented that legislature was not competent to make any amendment to the Constitution in defiance of the nine commands mentioned therein---Validity---Federal Ombudsman Institutional Reforms Act, 2013 had been made to make institutional reforms for standardizing and harmonizing the laws related to Federal Ombudsmen institution and the matters ancillary or akin thereto---Purpose was to provide speedy and expeditious relief to citizens by redressing their grievances to promote good governance---Contention of petitioner therefore, was not instructive---Parliament had, under the Constitution, power to set-up administrative Tribunals and quasi-judicial forums for the adjudication of disputes---Section 18 of the Act did not mean any amendment in the Constitution rather it only barred the jurisdiction of other forums in the matters exclusively fell within its domain---Constitutional petition was dismissed accordingly.

SNGPL v. Wafaqi Mohtasib 2015 MLD 1029 ref.
Appellant in person.

ORDER

Through the instant Intra Court Appeal filed under Section 3 of Law Reforms Ordinance, 1972 the Appellant has called in question the legality of impugned order dated 09.06.2016 passed by the learned Single Judge in W.P. No.20196 of 2016 whereby writ petition filed by the Appellant challenging the vires of Section 18 of the Federal Ombudsman Institutional Reforms Act, 2013 (the "Act") has been dismissed.

2. The Appellant argued that the findings of the learned Single Judge in the impugned judgment are not in consonance with the provisions contained in Section 18 of the Act; that refusing the prayer of the Appellant in the petition tantamount to violation of Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973 (the "Constitution"); that the impugned order suffers from legal infirmity as the fact that the legislature was not competent to make any amendment to the Constitution that was in defiance of the nine commands mentioned therein, has not been taken into consideration; that the reasoning given by the learned Single Judge are not convincing, as such the same is liable to be set aside.

3. We have heard the arguments of the Appellant and examined the record available with this Appeal.

4. The Appellant in the writ petition had challenged the vires of Section 18 of the Act. The Act has been made to make institutional reforms for standardizing and harmonizing the laws relating to Federal Ombudsmen institution and the matters ancillary or akin thereto. The purpose of which is to provide speedy and expeditious relief to citizens by redressing their grievances to promote good governance. The contention of the Appellant that the legislature was not competent to make any amendment to the Constitution that was in defiance of the nine commands mentioned therein, is not instructive.

5. We fully agree with the findings of the learned Single Judge that the Parliament has, under the Constitution, power to set up administrative tribunals and other quasi-judicial forums for the adjudication of disputes and Section 18 of the Act does not mean any amendment in the Constitution rather it only bars the jurisdiction of other forums in the matters exclusively fall within its domain. For the sake of brevity said Section is reproduced herein below:
"Bar of jurisdiction.--- No Court or authority shall have jurisdiction to entertain a matter which falls within the Jurisdiction of an Ombudsman nor any Court or authority shall assume jurisdiction in respect of any matter pending with or decided by an Ombudsman."

6. Reliance in this regard can be placed on the case titled in SNGPL v. Wafaqi Mohtasib, (2015 MLD 1029) in which this Court held as under:
"The intention and purpose of setting up these special bodies was very clear and admitted of no ambiguity. These were to deal with all matters relating to special laws, including adjudication of complaints and disputes within their remit. There was no scope for bifurcation of those powers and the sharing of some of those with the Wafaqi Mohtasib. The entire concept would be eroded if parallel proceedings were allowed to be held or continued at the two different forums. There are a myriad of scenarios which could arise leading to extremely awkward and mutually contradictory situations. Courts and agencies would be confronted with the unsavory situation of which order to follow and of which forum.

7. We do not see any illegality in the impugned order which has been passed strictly in accordance with law, as such does not warrant any interference by us. Consequently, the Appeal in hand, being devoid of any merit is hereby dismissed in limine.

MQ/M-14/L Petition dismissed.

2017 P T D 844
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
C.I.T. CO., ZONE-I, LAHORE
Versus
Messrs GULISTAN POWER GENERATION LTD., LAHORE
C.T.R. No.12 of 2005, decided on 6th February, 2017.

Income Tax Ordinance (XXXI of 1979)---

----Ss.30, 136 & Second Sched.---Reference to High Court---Income from other sources---Interest income---Applicability of S.30 of the Income Tax Ordinance, 1979 to "interest income on business activities"---Scope---Question before the High Court was whether "interest income earned by taxpayer on security deposit which was held with a Bank for purpose of obtaining Bank guarantees was part of the business income and exempt from tax and accordingly not taxable under S.30 of Income Tax Ordinance, 1979"---Held, that S.30(2)(b) of the Income Tax Ordinance, 1979 dealt with "income from the sources" and was only applicable where investment of money by a company had not been made as part of its business activity but where such money had been invested by a company in its business, as in the present case, profit generated on such investment, for all intents and purposes, would be considered to be profit earned from business and not from any other source---Reference was answered, accordingly.
Luck Cement Ltd. v. Commissioner Income Tax 2015 SCMR 1494 rel.
Ms. Foziya Baksh for Applicant.
Suhail Raza for Respondent.

ORDER

This is a Reference under section 136(1) of the Income Tax Ordinance, 1979 ("the Ordinance").

2. Following questions of law are pressed for our opinion, which are asserted to have arisen out of order dated 20.11.2003 passed by the Income Tax Appellate Tribunal, Lahore Bench, Lahore ("Appellate Tribunal"):

QUESTIONS OF LAW

1. "Whether on the facts and circumstances of the case, the learned ITAT was justified to hold the interest income earned by Appellant in question on security deposit held with bank for obtaining guarantee is part of assessee's business income and exempt from tax whereas interest income is the income under the head income from other source assessable under section 30 of the Income Tax Ordinance, 1979?"

2. Whether on the facts and circumstances of the case, the learned ITAT was justified to delete the charge of Worker Welfare Fund on interest income as well as

presumptive whereas the same is chargeable on the total income as per section 2(f) of WWF Act, 1971?"

3. Notice was issued to the Respondents and in pursuance of which they are being represented through their counsel.

4. We have heard the learned counsel for the parties at length and have gone through the order dated 20.11.2003 passed by the learned Appellate Tribunal and find that no questions of law arose in the instant Reference. The questions of law that have been framed in the Reference do not raise any substantive questions of law arising out of the order of the Appellate Tribunal. The Applicant disputes the order of the learned Appellate Tribunal which allowed the appeal of the Respondent on the ground that the assessee's income from interest is exempted from tax and the levy of the WWF imposed by the assessing Officer is not sustainable.

5. We agree with the findings of the learned Appellate Tribunal regarding question No.1 which in the impugned order, in detail, has held that the interest income earned by the Respondent in question on security deposits held with Askari Bank for obtaining bank guarantee as part of assessee's business income and is exempt from tax under Clause (176) of the Second Schedule to the Ordinance as it is not an income from other source under section 30 of the Ordinance. So far as the question No.2 is concerned, the Appellate Tribunal has rightly held that as since the assessee's income from the interest has been exempted from tax, levy of WWF cannot be sustained. The Hon'ble apex Court has held that the income exempt from tax under any clause of the Second Schedule to the Ordinance does not attract the levy of WWF. Furthermore, recently the Honourable Supreme Court of Pakistan in Luck Cement Limited v. Commissioner Income Tax, (2015 SCMR 1494) held that the section 30(2)(b) of the Income Tax Ordinance, 1979 [since repealed] which dealt with 'income from other sources' was only applicable where the investment of money by a company had not been made as part of its business activities. But where money had been invested by a company in its business, as in the present case, and profit was generated on such an investment, that profit shall, for all intents and purposes, be considered to be the profit earned from business and not from other sources.

6. In view of above, the impugned order does not suffer from any factual or legal infirmity as the same has been passed after scrutinizing the relevant record as well as on the basis of valid reasons.

7. Therefore, Reference application is decided against the Applicant.

KMZ/C-5/L Order accordingl

2017 P T D 999
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
COMMISSIONER OF INCOME TAX
Versus
Messrs SAJJAD TEXTILE MILLS LTD.
W.T.A. No.214 of 2002, decided on 13th February, 2017.

Wealth Tax Act (XV of 1963)---

----Ss. 27, 24 & 3---Appeal to High Court---Exercise of jurisdiction of High Court under S. 27 of the Wealth Tax Act, 1963---Determination as to whether a question of law was made out---Charge of wealth tax---Scope---Question before the High Court was whether Appellate Tribunal was justified in holding that charge of penalty could not be imposed on taxpayer for reason of uncertainty---Validity---Held, that perusal of order of Appellate Tribunal revealed that no question of law had arisen, and the question of law framed in the present appeal under S. 27 of the Wealth Tax Act, 1963 by the Department was not substantive---Impugned order had been passed after scrutinizing relevant record and on the basis of valid reasons and did not suffer from legal or factual infirmity---Appeal was decided against the Department, accordingly.
I.C.C. Textile's Case 2001 PTD 1557 ref.
Qamar Farooq for Appellant.

ORDER

C.Ms. Nos.562 and 563 of 2016

The applicant has filed both these applications, one for restoration of the main Appeal which was dismissed due to non-prosecution vide order dated 21.05.2015 and the second for condonation of delay on the ground that the delay was not deliberate rather the previous counsel never notified the Department regarding dismissal of Appeal on account of non-prosecution. The applications are supported by affidavits. In the interest of justice, the same are allowed for the reasons mentioned therein as the matter should be decided on merits not on technicalities.

2. The main Appeal is to its original number.

Main Appeal

3. This is an Appeal under section 27 of the Wealth Tax Act, 1963 (the "Act").

4. Following question of law is pressed for our opinion, which is asserted to have arisen out of order dated 13.05.2002 passed by the Income Tax Appellate Tribunal, Lahore Bench, Lahore ("Appellate Tribunal"):

QUESTION OF LAW

Whether on the facts and in the circumstances of the case, the ITAT was justified to hold the charge of penalty as unjustified for the reason of uncertainty, whereas, the august Court of the country in its authoritative judgment, in I.C.C. Textile Case (2001 PTD 1557) has declared the penalty or additional tax as justified?

5. We have heard the learned counsel for the Appellate at length and have gone through the order dated 13.05.2002 passed by the Appellate Tribunal and find that no question of law arose in the instant Appeal. The question of law that has been framed in the Appeal does not raise any substantive question of law arising out of the order of the Appellate Tribunal. The Appellant disputes the order of the Appellate Tribunal which partially allowed the appeal of the Respondent. We agree with the findings of the Appellate Tribunal which declared the penalty of Rs.12,13,000/- unjustified and restricted the additional tax charged under section 12(8) on two grounds viz: firstly that in the earlier order the assessing officer has not charged the same perhaps for the reason that he was satisfied that assessee has not defaulted and secondly that even otherwise, the Appellate Tribunal has considered the charge to be as unjustified in other cases. We see no reason to disbelieve the impugned order which does not suffer from any factual or legal infirmity as the same has been passed after scrutinizing the relevant record as well as on the basis of valid reasons.

6. Therefore, the Appeal is decided against the Appellant.

7. Office shall send a copy of this order under seal of the Court to the Appellate Tribunal Inland Revenue as per section 27(5) of the Act.

KMZ/C-8/L Order accordingly.

2017 P T D 1024
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
COMMISSIONER INLAND REVENUE
Versus
HUNZA GHEE INDUSTRIES (PVT.) LTD.
P.T.R. No.276 of 2010, decided on 14th February, 2017.

Income Tax Ordinance (XLIX of 2001)---

----S. 133---Reference to High Court---Jurisdiction of High Court under S. 133 of the Income Tax Ordinance, 2001---Determination as to whether a question of law was made out ---Scope---Taxpayer had asserted a question of law and contended that the same arose out of the order of the Appellate Tribunal---Validity---Perusal of record revealed that no question of law had arisen in the present reference and the decision of the Appellate Tribunal did not call for any interference---Reference was decided against the taxpayer accordingly.
Sarfraz Ahmad Cheema for Petitioner.

ORDER

C.M. No.278 of 2016.
This is an application for restoration of the titled Reference dismissed for non-prosecution on 26.01.2015.

C.M. No.279 of 2016
2. This is an application for condonation of delay in filing the application for restoration of the titled Reference.
3. For the reasons stated in the CMs duly supported with an affidavit, both the applications are allowed, the delay is condoned and the titled Reference is restored to its original number and is fixed for hearing today with the consent of the learned counsel for the parties. Let office fix this Reference for hearing today.

Main Case.

4. This is a Reference under section 133(1) of the Income Tax Ordinance, 2001 ("Ordinance").

5. Following questions of law have been proposed for our opinion, which are asserted to have arisen out of order dated 18.12.2009 passed by the Income Tax Appellate Tribunal, Lahore Bench, Lahore ("Appellate Tribunal"):--
i) "Whether the learned ATIR was justified to extend the scope of powers of rectification to a mistake that is detected from a judgment of a Court in another case announced subsequent in time to the order sought to be rectified?

ii) "Whether the learned ATIR was justified to accept the appeal against refusal of the Taxation Officer to rectify the order for levy of WWF when there was no mistake apparent from record?
iii) "Whether an order by an assessing authority that is at variance with a subsequent appellate order constitutes a mistake in terms of section 221 of the Income Tax Ordinance?

6. The Applicant contests the decision of the Appellate Tribunal on the ground that the decision of the Peshawar High Court came after the Respondent was charged with WWF, even though he paid minimum tax under section 80DD of the Ordinance.

7. We have heard the learned counsel and gone through the record and find that no question of law arises in the instant Reference. The issue involved is whether WWF can be imposed in the case where tax was deducted under section 80DD. The Appellate Tribunal has rightly concluded that the judgment of the court had to be followed, especially where the department had taken a wrong decision by imposing WWF, even though it was not permissible under the circumstances. The decision of the Appellate Tribunal does not call for interference.

8. Under the circumstances, we decline to exercise our jurisdiction. Reference application is answered in negative.

9. Office shall send a copy of this order under seal of the Court to the Appellate Tribunal as per section 133(5) of the Ordinance.

KMZ/C-9/L Order accordingly.

2017 P T D 1050
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
Mian MUSHTAQ AHMAD
Versus
GOVERNMENT OF PUNJAB and others
I.C.A. No.1466 of 2016, decided on 8th February, 2017.

Punjab Sales Tax On Services Act (XLII of 2012)---

----S. 63---Law Reforms Ordinance (XII of 1972) S. 3(2) & Proviso---Constitution of Pakistan, Art. 199---Constitutional jurisdiction of High Court---Intra-court appeal---Appealable orders---Alternate Remedy---Scope---Appellant in intra-court appeal impugned the order passed in Constitutional petition whereby appellant's Constitutional petition against order of Commissioner, Punjab Revenue Authority was dismissed on the ground that the remedy of appeal under S. 63 of the Punjab Sales Tax on Services Act, 2012 was available to the appellant---Validity---Appellants had not challenged the order of the Commissioner, Punjab Revenue Authority in appeal before the competent forum and proviso to S. 3(2) of the Law Reforms Ordinance, 1972 barred remedy of intra-court appeal in cases where the relevant law provided the remedy of appeal, revision or review---Impugned order of the Commissioner, Punjab Revenue Authority, had clearly mentioned that the appellant had the remedy of appeal against said order in the manner prescribed in S.63 of the Punjab Sales Tax on Services Act, 2012---Intra-court appeal being not maintainable, was dismissed, in circumstances.

Muhammad Aslam Sukhera and others v. Collector Land Acquisition, Lahore Improvement Trust, Lahore and another PLD 2005 SC 45 rel.
Shahbaz Siddique for Appellant.
Sultan Mahmood, Assistant Advocate-General.
Nadeem Salah ud Din, DS (Legal) PRA.
Munir Ahmad, DC (Enf) Faisalabad PRA.

ORDER

Through this order we intend to decide the instant Intra Court Appeal as well as I.C.A. No.1467/2016, I.C.A. No.1468/2016, I.C.A. No.1469/2016 and I.C.A. No.1470/2016 as all the same are outcome of impugned order dated 15.10.2016 passed in W.P. No.31144/2016 by the learned Single Judge whereby the Appellants' petitions were dismissed on the ground that alternate remedy in the shape of appeal was available to the Appellants.

2. Learned counsel for the Appellants submitted that the impugned order is liable to be set aside on the grounds that the same is illegal and has been passed against the facts on record; that a discriminatory attitude has been adopted against the Appellants as the Respondent No. 3 has not taken any action against the other

similarly placed persons (Ada Owners), as such mala fide is surface on the record; that although the law provided remedy of appeal against the order aggrieved by the Appellants but in view of violation of Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973 (the "Constitution") the writ petitions were filed; that the order dated 25.07.2016 and notice dated 29.09.2016 passed by the Respondent No.3 directing the Appellants to submit income tax returns were without jurisdiction; that the learned Single Judge while passing the impugned order has totally ignored the facts of violation of Article 25 of the constitution.

3. Learned Law Officer vehemently contested the arguments advanced by the learned counsel for the Appellants and prayed for dismissal of all the appeals on the ground that there is no illegally or perversity in the impugned order; that in presence of alternate remedy the writ petitions were not competent before this Court.

4. Basically the Appellants are aggrieved of order dated 25.07.2016 passed by the Deputy Commissioner Enforcement-II of the Punjab Revenue Authority ("PRA"). The perusal of said order reveals that appeal lies against it to the Commissioner (Appeals) of the PRA within 30 days under section 63 of the Punjab Sales Tax on Service Act, 2012 read with Punjab Sales Tax on Services (Adjudication and Appeals) Rules, 2012. For the sake of brevity said section is reproduced herein below which is as follows:--

63. Appeals.---(1) Any person, other than the Authority or any of its employees, aggrieved by any decision or order passed under section 60 by an officer of the Authority other than Commissioner may, within thirty days of the date of receipt of such decision or order, prefer an appeal to the Commissioner (Appeals).

(2) An appeal under subsection (1) shall--

(a) be in the prescribed form;

(b) be verified in the prescribed manner;

(c) state precisely the grounds upon which the appeal is made;

(d) be accompanied by the fee specified in subsection (3); and

(e) be lodged with the Commissioner (Appeals) within the time set out in subsection (4).

(3) The prescribed fee shall be--

(a) Where the appellant is a company, one thousand rupees: or

(b) Where the appellant is not a company, two hundred rupees.

(4) An appeal shall be preferred to the Commissioner (Appeals) within thirty days of the receipt of the decision or order passed under section 60.

(5) The Commissioner (Appeals) may, upon application in writing by the appellant, admit an appeal after the expiration of the period specified in subsection (4) if the Commissioner (Appeals) is satisfied that the appellant was prevented by sufficient cause from lodging the appeal within that period.

5. From the above it is clear that against the decision of the Respondent No.3 a remedy of appeal is provided, as such the order dated 25.07.2016 was appealable and the Appellants have never challenged the same in appeal before the competent forum. Therefore, we see no illegally or jurisdictional error in the impugned order

which has been passed in accordance with law and hence, does not warrant any interference by us.

6. Furthermore, the instant Intra Court Appeal is filed under section 3 of the Law Reforms Ordinance, 1972 whereas the object of proviso to subsection (2) of section 3 of the Ordinance bars the remedy of Intra Court Appeal in those cases in which the relevant law provides the remedy of appeal, revision or review. It is important to note that on the first page the order dated 25.07.2016 it is clearly mentioned that appeal against this order lies before the Commissioner (Appeals) Punjab Revenue Authority, Lahore, within thirty days of the date of its receipt in the manner prescribed in section 63 of the Punjab Sales Tax on Services Act, 2012 read with the Punjab Sales Tax on Services (Adjudication and Appeals) Rules, 2012. Reliance in this regard is placed on the case titled Muhammad Aslam Sukhera and others v. Collector Land Acquisition, Lahore Improvement Trust, Lahore and another (PLD 2005 Supreme Court 45) wherein the Hon'ble Supreme Court of Pakistan has held as under:--

"7. There is no doubt in our mind that the award by the Tribunal is treated to be an original judgment and decree within the meaning of section 26 of the Act. Being an original decree, the award has been specifically made appealable before the High Court and then before this Court under section 54 of the Act of 1894. In view of express provisions of section 54 of the Act it is not possible for us to hold otherwise. It cannot be said that the award by the Tribunal is not an original order for the purposes of bar contained in proviso of section 3(2) of the Ordinance. Therefore, it is not necessary for us to determine as to whether the award made by the Collector could also be treated to be an original order or not. The object of proviso to subsection (2) of section 3 of the Ordinance, 1972 seems to be to bar the remedy of Intra Court Appeal in those cases in which the relevant law provides the remedies of appeal, revision or review."

7. In view of above, the instant appeal as well as the abovementioned appeals are not maintainable; consequently the same are hereby dismissed.

KMZ/M-15/L Appeal dismissed.

2017 P T D 1064
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
HASEEB RAZA KHAN
Versus
SUB-REGISTRAR and others
I.C.A. No.872 of 2010, decided on 8th February, 2017.

(a) Constitution of Pakistan---

----Art. 199---Constitutional jurisdiction of the High Court---Scope---Constitutional jurisdiction of High Court could not be exercised for the purpose of examining a factual controversy---Constitutional jurisdiction in matters of factual controversy was barred---Law did not permit the High Court for recording evidence in Constitutional jurisdiction.

Amir Jamal and others v. Malik Zahoor-ul-Haq and others 2011 SCMR 1023; Pervez Alam v. Pakistan Dairy Products (Pvt.), Limited, Karachi and 2 others 2005 PLC SC 366 and Abdur Rahman and 5 others v. Rifatullah and 8 others 2016 CLC 35 ref.

(b) Punjab Finance Act (VI of 2010)---

---S. 6(5)---Capital Value Tax (CVT)---Scope---For purposes of execution of sale deed Appellant presented sale deed before the Sub-Registrar for execution, however Registrar refused to register the same on ground of insufficient stamp duty---Appellant re-submitted documents before the Sub-Registrar, however by that time Capital Value Tax (CVT) was applicable on sale of property---Appellant contended that he was not bound to pay Capital Value Tax (CVT) as he had submitted documents before the enforcement of CVT, and it was only because of objection by the Registrar that he had to re-submit the documents---Validity---Section 6(5) of the Punjab Finance Act, 2010 provided that CVT had to be collected by the concerned person at the time of registering or attesting the transfer---Admittedly, the appellant has re-submitted documents for registering on 07-07-2010 after complying with all laws, when the Punjab Finance Act, 2010 was in force, and CVT was imposed through the same---Sub-Registrar was, thus, justified in collecting 2% CVT from the appellant, under the Punjab Finance Act, 2010---Intra-court appeal was dismissed accordingly.

City District Government, Karachi v. Muhammad Irfan and others 2010 SCMR 1186 and Farman Ali and others v. The State PLD 2007 Lah. 495 distinguished.
District Officer (Revenue) Lahore and others v. Raja Muhammad Yousaf and others 2016 SCMR 203 ref.
Muhammad Irfan Khan Ghazanvi for Petitioner.
Sultan Mahmood, Assistant Advocate General.

ORDER

Through this Intra Court Appeal, the Appellant has called in question judgment dated 11.10.2010 which subsequently was announced on 29.11.2010 (the "Impugned Judgment"), passed by learned Single Judge in Chamber, whereby constitutional petition filed by the Appellant was dismissed.

2. Facts briefly for the disposal of this Intra Court Appeal are that the Appellant purchased property measuring 10-marlas, comprising khasra No.774/81, Khatooni No.619, Khewat No.290, situated at Hadbast Mouza, Jogeenpura, Tehsil Cantt, formerly bearing property No.101-A, Bock-D, situated at Campus View Town, Lahore, but presently bearing House No.699-A/F-II Johar Town, Lahore (the "Property"), for total consideration of Rs.17,00,000/-. For the purpose of execution of the sale deed in respect of the Property, the stamp paper valuing Rs.34,000/- @ 2% of the said value was purchased on 03.06.2010 and the same after its completion was presented before the Respondent No.1 on 07.06.2010 on the understanding that the Property falls under Mouza Jogeenpura. After completing the documents from Local Commission, the same were resubmitted on 30.06.2010. Whereupon Respondent No.1 refused to register the same on the ground of insufficient stamp duty by applying the rate of Johar Town and not Mouza Jogeenpura. Therefore, the Appellant paid the stamp duty under protest at the rate of Johar Town, and presented before the Respondent on 07.07.2010. However, the Respondent again refused to register the sale deed with another objection that CVT is applicable on sale of the Property after coming into force of the Punjab Finance Act, 2010 (the "2010 Act"), having effect from 01.07.2010.

3. Learned counsel for the Appellant has argued that the Property is situated in Mouza Jogeenpura, and the Respondents cannot charge the stamp duty at the rate of Johar Town Scheme. Similarly, the Appellant contended that he has submitted documents much prior to enforcement of the 2010 Act, hence, demand of payment of CVT by the Respondents is also unlawful and illegal. He stated that the learned Single Judge in Chamber has dismissed the writ petition without application of his independent mind and law laid down in an authoritative judgment of this Hon'ble Court titled Farman Ali and others v. The State (PLD 2007 Lahore 495), which is fully applicable to the facts and circumstances of the instant case. He further argued that judgments relied upon by learned Single Judge in Chamber i.e. Messrs Mehran Associates Limited v. The Commissioner of Income-Tax, Karachi (1993 SCMR 274), and City District Government, Karachi v. Muhammad Irfan and others (2010 SCMR 1186), were initially relied upon apart from Farman Ali ibid case, which is basic judgment upon the matter in issue.

4. On the other hand, learned Law Officer has supported the impugned judgment and requested for dismissal of the Intra Court Appeal. He stated that after affixing the deficient stamp duty, the Appellant resubmitted the documents for registration on 7.7.2010 after coming into force of Punjab Finance Act, 2010, hence the Appellant was required to pay CVT @ 2%. The counsel of the Respondent

relied on the judgment titled District Officer (Revenue) Lahore and others v. Raja Muhammad Yousaf and others (2016 SCMR 203) to support his contention.

5. Arguments heard and record perused.

6. Before rendering any decision on instant Intra Court Appeal and examining the arguments urged by the parties, following moot points are essential for consideration and determination by this Division Bench, arising out of this Intra Court Appeal:

a) Whether the Property of the Appellant fall under the scheme of Johar Town or Mouza Jogeenpura, upon which the stamp duty would be applicable and determined?

b) Whether CVT is payable by the Appellant in respect of the Property, provided that the Appellant re-submitted documents after enforcement of the Punjab Finance Act, 2010?

7. For determination of the first moot point, it is essential to note from the record that the Appellant has himself mentioned two addresses of the same Property in the Sale Deed, and for the purpose of avoiding the higher rate of stamp duty of Johar Town, the Appellant is pressing that the Property falls in Mouza Jogeenpura. However, to effectively dilate upon this question, it is essential to examine the record and to call for evidence on this specific issue to resolve the present factual controversy. However, it is pertinent to note that the constitutional jurisdiction of High Court could not be exercised for the purpose of examining factual controversy, which has to be adjudicated upon by the competent authority under the law. The scope of Article 199 of the Constitution of Pakistan, 1973 (the "Constitution") is dependent on the questions which are devoid of factual controversy and writ jurisdiction in matters of factual controversy is barred. The reliance can be placed on Amir Jamal and others v. Malik Zahoor-ul-Haq and others (2011 SCMR 1023) and Pervez Alam v. Pakistan Dairy Products (Pvt.), Limited, Karachi and 2 others (2005 PLC SC 366).

8. Further, in the case of Abdur Rahman and 5 others v. Rifatullah and 8 others (2016 CLC 35) [Peshawar]), the Division Bench of the High Court has clearly held in para 6 that:--

"6. It is settled by now up to the august Supreme Court of Pakistan that factual controversy cannot be gone into in a Constitutional jurisdiction of the High Court and it is the prerogative and privilege of the Civil Court to examine the disputed question of fact undertaken in the Constitutional jurisdiction of this Court. The superior Courts should not involve themselves into investigation of disputed questions of facts, which necessitate taking of evidence. This can more appropriately be done in the ordinary civil procedure for litigation by a suit and that can only be determined by Courts having plenary jurisdiction in the matter. In such an eventuality Constitutional petition is incompetent. In this regard, reliance is placed on Khairuddin v. Settlement Commissioner (1988 SCMR 988),

Colonel Shah Sadiq v. Muhammad Ashiq and others (2006 SCMR 276), Muhammad Asghar v. The State (PLD 2006 SC 326), Faiz Bukhsh and others v. Deputy Commissioner/LAC and others (2006 SCMR 219) and Dr. Sher Afgan Khan Niazi v. Ali S. Habib and others (2011 SCMR 1813)."

9. In the instant case, this Court agrees with the decision rendered in the Impugned Judgment on the first moot point, which can only be determined by recording evidence of the parties, and the law does not permit to a High Court for recording evidence in writ jurisdiction. When there is a factual controversy between the parties, the learned High Court abstains to exercise its jurisdiction under Article 199 of the Constitution.

10. For the purpose of rendering decision on second moot point, section 6(5) of the 2010 Act is applicable law, and is reproduced as follows:--

> "The tax shall be collected by the person responsible for registering or attesting the transfer of the immovable property in respect of which the tax is payable, at the time of registering or attesting the transfer."

It is clear from the above mentioned section that tax has to be collected by the concerned person at the time of registering or attesting the transfer. Admittedly, the Appellant has re-submitted documents for registering on 07.07.2010 after complying with all laws, when the 2010 Act was in force, and CVT was imposed through the same. Therefore, the Appellants submitted documents before the concerned person responsible for registering or attesting the said aid transfer of immovable property after coming into force, of the 2010 Act, and the Respondents are justified in collecting 2% CVT from the Appellant, under the Act, 2010.

11. The Appellant has relied on the case titled Messrs Mehran Associates Limited v. The Commissioner of Income-Tax, Karachi (1993 SCMR 274), in which it was held at Para 12 that "the cardinal principles of interpretation of a fiscal statute seem to be that all charges upon the subject are to be imposed by clear and unambiguous words. There is no room for any intendment nor there is any equity or presumption as to a tax. A fiscal provision of a statute is to be construed liberally in favour of the tax-payer and in case of any substantial doubt the same is to be resolved in favour of the citizen." However, it is to be noted in the instant case that section 6(5) of the 2010 Act is clear and not ambiguous, and the same clearly highlights that the tax shall be collected at the time of registering the transfer.

12. Similarly, the Appellant has also relied on the case titled City District Government, Karachi v. Muhammad Irfan and others (2010 SCMR 1186), in which it was held that, rights of parties would be governed/decided as per law prevailing at the time when cause of action had accrued, particularly in the matters pertaining to fiscal disputes) unless manifestly intention of law was otherwise. Instrument dealing with fiscal matters was to be construed strictly because it imposed burden in terms of money upon the person who claimed relief under said law. Therefore, in view of the above referred case law, it is to be noted that cause of action for the second moot point occurred when the Appellant re-submitted his documents again on

7.7.2010 and the Respondent refused to accept the same without payment of CVT @ 2% after enactment of the 2010 Act. Therefore, in stricto senso, the Appellant is liable to pay CVT under the terms.

13. Moreover, it has been held in the case of District Officer (Revenue) Lahore and others v. Raja Muhammad Yousaf and others (2016 SCMR 203) at Para 12 that the registration officer is only concerned with determining the applicable stamp duty on the date when the document is presented for registration.

14. The judgment titled Farman Ali and others v. The State (PLD 2007 Lahore 495) may be distinguished being the murder reference.

15. In view of the above mentioned discussion, law and the case laws, this Court agrees with the decision of the learned Single Judge in Chamber in deciding that no illegality has been pointed out by the learned counsel of the Appellant/Petitioner for payment of CVT @ 2% for transfer of the Property.

16. In view of the above, this Intra Court Appeal being devoid of merits, is hereby dismissed.

MWA/H-2/L Appeal dismissed.

2017 M L D 815
[Lahore]
Before Ayesha A. Malik and Jawad Hassan, JJ
SANA GULNAZ---Appellant
Versus
SECRETARY, HEALTH GOVT. OF PUNJAB and others---Respondents
I.C.A. No.1023 of 2016, decided on 8th February, 2017.

(a) Educational Institution---

----Examination---Re-checking/re-evaluation of answer sheets---Student sought directions of High Court to the university for enhancing marks in answer book---Allegation of student was that university had violated the regulations making her career at stake---University contended that prescribed rules could not be agitated in constitutional petition---Validity---High Court declined interference in matters pertaining to marking of answer sheets by officers of colleges and universities who were expert in their field---High Court could not substitute its findings for that of the persons skilled in their task---Constitutional petition being not maintainable was dismissed accordingly.
Muhammad Farooq Wajid v. FPSC and others PLD 2015 Lah. 457; Muqarab Akbar v. Bahauddin Zakariya University, Multan through Registrar and 2 others 2006 MLD 1776; Abdul Hakim Hashmi v. Federal Public Service Commission through Chairman and 8 others 2002 SCMR 504 and Board of Intermediate and Secondary Education Lahore through its Chairman and another v. Mst. Salma Afroze and 2 others PLD 1992 SC 263 ref.

(b) Constitution of Pakistan---

----Art. 199---Constitutional petition---Maintainability---Educational Institution---Examination---High Court declined interference in matters pertaining to making of answer sheets by officers of the educational institution who were expert in their filed---High Court could not substitute its findings for that of the persons skilled in their task---Constitutional petition was not maintainable.

Mirza Abdul Khaliq for Appellant.
Sultan Mahmood, Assistant Advocate-General for Respondent No.1.
Imran Sarwar, Vice-Counsel for Respondent No.2.
Noshab Ali Khan for Respondents Nos. 3 and 4.

ORDER
Through this appeal the Appellant has challenged the legality of impugned order dated 04.05.2016 passed in W.P. No.27617/2015 by the learned Single Judge whereby the Appellant's petition was dismissed being without any merit.

2. Learned counsel for the Appellant submitted that the impugned order is liable to be set aside on the grounds that the same is illegal and has been passed against the facts on record, that the learned Single Judge has failed to take into consideration the fact that the Respondents have acted in violation of regulations which were binding on them; that the Convener of the Assessment has not conducted any audit of the assessment made by the Paper Assessor, as such he has violated the Rule 4 of Appointment/Duties of Paper Assessors; that the career of the appellant is at stake and if the impugned order is not set aside and the directions are not given to the Respondents for enhancing the marks in Anatomy paper, the Appellant may suffer an irreparable loss.

3. Learned Law Officer vehemently contested the arguments advanced by the learned counsel for the Appellant and prayed for dismissal of the appeal on the ground that there is no illegally or perversity in the impugned order; that the Court cannot substitute its findings over the assessments of experts in the relevant field; that the appellant has now developed his case by raising new points which have not been agitated before the learned Single Judge as such the appeal in hand is liable to be dismissed. Learned counsel for the University of Health Sciences has also contended that the instant appeal is not maintainable in view of the pronouncements of the Hon'ble Supreme Court of Pakistan and has relied upon the case titled Muhammad Farooq Wajid v. FPSC and others (PLD 2015 Lahore 457), Muqarab Akbar v. Bahauddin Zakariya University, Multan through Registrar and 2 others (2006 MLD 1776), Abdul Hakim Hashmi v. Federal Public Service Commission through Chairman and 8 others (2002 SCMR 504) and Board of Inter-mediate and Secondary Education Lahore through its Chairman and another v. Mst. Salma Afroze and 2 others (PLD 1992 Supreme Court 263).

4. We have heard the arguments of both the sides and have perused the record.

5. Learned Single Judge in the impugned order has observed that that superior courts do not interfere in matters pertaining to marking of answer sheets by officers of colleges and universities who are expert in their field and this Court cannot substitute its findings for that of the persons skilled in their task. The Hon'ble Supreme Court of Pakistan in case titled Tahir Saeed Qureshi v. Board of Intermediate and Secondary Education, Sargodha and others (1996 SCMR 1872) held that this Court cannot go beyond the scope of the prescribed Rules in constitutional jurisdiction. Reliance can also be placed on the case titled Abdul Hakim Hashmi v. Federal Public Service Commission through Chairman and 8 others (2002 SCMR 504) and Board of Intermediate and Secondary Education Lahore through its Chairman and another v. Mst. Salma Afroze and 2 others (PLD 1992 Supreme Court 263). In the Abdul Hakim Hashmi' case supra the Hon'ble Supreme Court of Pakistan has held as under:--
"Re-checking/re-evaluation of answer book. The answer books are secret documents, which cannot be seen by the candidates or their representatives nor re-examination thereof can be allowed in any circumstance. The marking of numbers on the answer book was a technical job which High Court was not expected to

undertake in exercise of its powers of judicial review under Art. 199 of the Constitution. The High Court in Constitutional jurisdiction, cannot go beyond the scope of prescribed Rules regarding re-examination/re-evaluation of answer books. The Supreme Court has disapproved the practice of summoning answer books by High Court in its Constitutional jurisdiction.

6. Furthermore, learned counsel for the Appellant has failed to convince us with co-gent reasons to set aside in the impugned order and to show any illegality or perversity in the same which warrants any interference by us. We agree with the impugned order as the same has been passed in accordance with law and the dictum laid down by the Hon'ble Supreme Court of Pakistan.

7. In view of above, the instant appeal, being devoid of any merit, is hereby dismissed.

MQ/S-9/L Appeal dismissed.

2017 M L D 827
[Lahore]
Before Ayesha A. Malik and Jawad Hassan, JJ
Qureshi MUHAMMAD ASLAM---Petitioner
Versus
ADDITIONAL DIRECTOR ACE, SARGODHA and others---Respondents
Review Application No.64 of 2013, decided on 7th February, 2017.

Civil Procedure Code (V of 1908)---

----S. 114---Review---Scope---Review was not competent where neither any new and important matter or evidence had been discovered nor was any mistake or error apparent on the face of record---Such error might be an error of fact or of law but it must be self-evident and floating on surface not requiring any elaborate discussion---Error must not only be apparent but must also have a material bearing on the fate of case and be not of inconsequential import---Where judgment or finding, although suffering from erroneous assumption of facts, was not sustainable on other grounds on record, review was not sustainable.

Shabbir Ahmed Zafar v. MBR and others 2016 CLC 1655 ref.
Abdul Hameed Tahir Qasoori for Petitioner.
Sultan Mahmood, Assistant Advocate-General for the State.

ORDER

This is a review application filed by the Applicant seeking setting aside of the order dated 03.05.2013 passed by the learned Single Judge in C.M. No.340/2012 in W.P. No.11359/2007 whereby his application for restoration of main petition, which was dismissed as withdrawn, was dismissed.

2. Learned counsel for the Applicant submitted that the counsel who had withdrawn his writ petition, infact was not his counsel; that as and when any criminal matter is withdrawn the physical appearance of the Petitioner is necessary but the Applicant was not present at the relevant date when the case was withdrawn; that the matter should be decided on merits and not on technicalities; that if the impugned order is not set aside the Applicant may suffer an irreparable loss, as such the impugned order dated 03.05.2013 is liable to be set aside.

3. On the other hand learned AAG has vehemently contested the arguments of the learned counsel for the Applicant and contended that there is no illegality in the impugned order which has been passed in accordance with law, hence the instant review petition merits dismissal; that the Applicant after withdrawal of the writ petition has the remedy of private complaint, as such now he cannot reopen the matter which has been dismissed as withdrawn.

4. We have heard the arguments of learned counsel for the parties and have perused the record. The bare perusal of impugned order dated 03.05.2013 reveals that the power of attorney of the counsel who had withdrawn the writ petition on behalf of the Applicant, was available on record and he did not withdraw the petition simpliciter rather with the condition that the Applicant intends to file private complaint.

5. The principles upon which a review can be granted are well settled and elaborated i.e. there must be some new point based upon discovery of new evidence which could not with diligence, have been found out on the previous occasion. A review petition is not competent where neither any new and important matter or evidence has been discovered nor is any mistake or error apparent on the face of record. Such error may be an error of fact or of law but it must be self-evident and floating on surface and not requiring any elaborate discussion. Orders based on erroneous assumption of material facts, or without adverting to a provision of law, or a departure from undisputed construction of law and Constitution, may amount to error apparent on face of the record. On the other hand, error must not only be apparent but must also have a material bearing on the fate of the case and be not of inconsequential import. If judgment or finding, although suffering from an erroneous assumption of facts, is sustainable on other grounds available on record, review is not justifiable notwithstanding error being apparent on the face of record, the review petition is not competent. Reliance in this regard can be placed on the judgment of Division Bench of the Court in Shabbir Ahmed Zafar v. MBR and others, (2016 CLC 1655).

6. In view of above situation, the learned counsel for the Applicant has failed to convince us that there is an error of fact or of law on record to interfere in the same which has been passed in accordance with law. Hence, the instant application being devoid of any merit is hereby dismissed.

MQ/M-16/L Application dismissed.

2017 P L C (C.S.) 727
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
JAN MUHAMMAD
Versus
NATIONAL BANK OF PAKISTAN and others
I.C.A. No.695 of 2010, heard on 6th February, 2016.

Civil service---

----Bank employee---Retirement---Pension, calculation of---Contention of employee was that he was discriminated while calculating his pension---Validity---Person against whom employee had claimed discrimination was promoted earlier in time than the petitioner---Petitioner was promoted on 06-09-2005 and thereafter retired the very next day without doing any work after promotion---No case for discrimination had been made out--- Intra court appeal was dismissed in circumstances.

Ch. Aitzaz Ahsan for Appellant
Umer Abdullah along with Mehmood Akhtar, SVP/Wing Head and Ghulam Shabbir, Vice-President for Respondents.
Date of hearing: 6th February, 2017.

JUDGMENT

AYESHA A. MALIK, J.--- The appellant initially filed the instant ICA in the year, 2010 which was dismissed vide order dated 18.9.2012 on the ground that the ICA was not maintainable. However, the august Supreme Court of Pakistan vide order dated 28.2.2013 remanded the matter to this Court holding that the ICA was maintainable and case may be heard on its merit. Therefore, we have proceeded to hear the matter on its merit.

2. The case of the Appellant is that he retired from service as Senior Executive Vice President ("SEVP") on 6.9.2005 from the Respondent National Bank of Pakistan. At the time of his retirement he was given 10% increase in his salary as SEVP. The Appellant is aggrieved by the 10% increase in his salary on the ground that he was discriminated against as others including one Muhammad Sardar Khawaja who retired on the same date was given a 100% increase. And he was given a much higher increase in salary although both the said Muhammad Sardar Khawaja and the Appellant have been retired as SEVP on the same date. Learned counsel for the Appellant argued that the Appellant is entitled to the same benefit as was given to Muhammad Sardar Khawaja since both retired as SEVP at the same time. Learned counsel relied upon letter dated 21.6.2005 issued by EVP/Group Chief (HRM&AG) National Bank of Pakistan to urge the point that basic pay scale of Muhammad Sardar Khawaja was revised to Rs.1,26,348/- whereas the basic Pay Scale of the Appellant is only Rs.88,042/-. He submitted that the case of the

Appellant is at par with that of Muhammad Sardar Khawaja and he is entitled to the same treatment.

3. Learned counsel for the Respondent bank has produced office note dated 27.1.2004 to show that Muhammad Sardar Khawaja was promoted to SEVP with effect from 1.1.2002 and at that time his basic pay was Rs.88,000/-. Further argued that at the time of retirement basic pay of Muhammad Sardar Khawaja was Rs.99,330/- whereas the basic pay of the Appellant was Rs.90,330/-. He also submitted that the Appellant was retired on 7.9.2005 while Muhammad Sardar Khawaja was retired on 6.9.2005, with a difference of one day. Learned counsel submitted that the other persons with whom the Appellant is comparing himself were promoted as SEVPs in the year, 2002 whereas the Appellant was promoted one day before his retirement as a special concession. Learned counsel argued that since those persons have been working as SEVPs for some time, their basic pay had increased over the years whereas the Appellant had done no work as SEVP and is not entitled to any increment. He further clarified that some of the persons mentioned in the list as annexed by Respondent No.1 in the report are still working as SEVP with the bank, hence there can be no comparison with them either.

4. We have heard the learned counsel for the parties and have gone through the record. The basic issue in this appeal is whether the Appellant is entitled to the same pay as Muhammad Sardar Khawaja which grievance as stated was not properly attended to by the learned Single Judge in the impugned order 28.6.2010 passed in W.P. No.14069/2010. The record shows that some of the persons against whom the Appellant claims he is being discriminated against were promoted earlier in time than the Appellant and some continue to serve as SEVPs even today. In terms of paragraph 2 at page 4 of the writ petition the Appellant himself stated that Muhammad Sardar Khawaja was promoted as SEVP in 2004 with effect from 1.12.2002 whereas he was promoted on 6.9.2005 and thereafter retired the very next day. In terms of the record the Appellant requested for promotion as SEVP from 1.12.2002 instead of 6.9.2005. In response to this request the Respondent Bank informed the Appellant vide letter dated 25.5.2010 that he is not entitled to promotion from 2002 as SEVP as he was not qualified for the promotion. With regard to increase in his pay scale, which by 2010 had become Rs.126,642, the record shows that the Appellant was promoted one day before retirement as a special concession whereas all other persons against whom discrimination is alleged were promoted as SEVP in 2002. This is evident from the 'office note' dated 27.1.2004 wherein the name of Muhammad Sardar Khawaja is also listed along with others. The basic pay scale of all SEVPs was Rs.88,000/- and with the passage of time it increased. The Appellant was promoted on 5.9.2005 and he retired on 6.9.2005 having not worked even one day as SEVP. Muhammad Sardar Khawaja with whom the Appellant is primarily aggrieved became SEVP on 1.1.2002 and retired on 6.9.2005 having served as SEVP for at least three years. Therefore, no case of discrimination is made out.

5. Under the circumstance, the instant ICA is dismissed.

ZC/J-3/L Appeal dismissed.

2017 P L C (C.S.) 737
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
S. ZAFAR ALI SHAH
Versus
ADDITIONAL REGISTRAR OF COMPANIES and another
I.C.A. No.1 of 2017, decided on 6th February, 2017

Constitution of Pakistan---

----Art. 199---Constitutional petition---Official Liquidator---Dispensing with service---Scope---Petitioner was relieved of his duties as Official Liquidator on the basis of allegations by the auction purchaser---Validity---Petitioner had filed reply to the application denying all the allegations leveled therein---Intra-Court appeal was pre-mature without waiting for the decision of said application which was still pending adjudication---Petitioner could establish his case before the Company Bench where he would be afforded opportunity of hearing---Petitioner could not be allowed to bypass the said forum---Intra court appeal being not maintainable was dismissed in limine.

Ms. Nudrat Sultana for Appellant.

ORDER

Through the instant Intra Court Appeal filed under Section 3 of Law Reforms Ordinance, 1972 the Appellant has called in question the legality of impugned order dated 09.12.2016 passed by the learned Company Bench of this Court in C.O. No.51/2003 whereby he was relieved of his duties as Official Liquidator on the basis of alleged allegations against him by the Auction Purchaser and he was further directed to be present on each date of hearing.

2. The learned counsel for the Appellant argued that the observations made in the impugned order with regard to allegations are not supported from the record, as such the same are liable to be struck down; that mere on the allegations against the Appellant the order for his appearance on every date is also nullity in the eye of law and liable to be set aside; that although removal of an Official Liquidator is prerogative of the Hon'ble Company Bench but dispensing with the duties mere on the basis of allegations without proof is illegal.

3. Arguments heard and record perused.

4. From the perusal of record it transpired that the Company Bench in the impugned order dated 09.12.2016 has observed that in view of serious allegations against the Official Liquidator in C.M. No.37/2016 filed by the Auction Purchaser on 22.01.2016, the services of the Appellant are dispensed with and he is ordered to be present on each date and the case was adjourned to 13.01.2017 (now fixed on

21.02.2017). The record further reveals that the Appellant has filed reply to the said C.M. No.37/2016 on 20.09.2016 denying all the allegations levelled therein and praying for its dismissal with cost. As the Appellant has taken the same stance in reply to C.M. No.37/2016, therefore, the instant appeal is pre-mature without waiting the decision of the said application which is still pending adjudication and the next date of hearing before the Company Bench is 21.02.2017. The Appellant may establish his case before the Company Bench where he will be afforded full opportunity of hearing and he cannot be allowed to bypass the same through the instant appeal to set aside the directions of the Company Bench. Without touching the merits of the impugned order, it is observed here that the Appellant should better agitate the matter before the learned Company Bench where C.M. No.37/2016, on the basis of which the impunged order was passed, is pending and reply thereto was also filed by the Appellant.

5. In view of above, the instant appeal is not maintainable; consequently the same is hereby dismissed in limine.

ZC/Z-5//L Appeal dismissed.

2017 P L C (C.S.) 743
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
Chaudhry MOHAMMAD TAZEEM
Versus
CHAIRMAN, STATE LIFE INSURANCE and others
I.C.A. No.1168 of 2015, decided on 14th February, 2017.

Civil service---

----Petitioner employee resigned from service on medical ground---Employee sought pensionary benefits on the ground that his resignation was accepted without recommendations of Medical Board---Constitutional petition filed by the employee was dismissed being not maintainable---Validity---Petitioner had already availed an alternate remedy to get the same relief by filing civil suit---Constitutional petition was not competent before the High Court in circumstances---Constitutional petition was hit by laches as petitioner had approached High Court in the year 2012 against his grievance arising in the year 1989---Intra court appeal was dismissed in limine.

Civil Aviation Authority v. Zulfiqar Ali 2016 SCMR 183 rel.
Mian Luqman for Appellant

ORDER
Through the instant Intra Court Appeal filed under Section 3 of Law Reforms Ordinance, 1972 the Appellant has called in question the legality of impugned order dated 23.06.2015 passed in Writ Petition No.13117/2012 whereby the learned Single Judge has dismissed the writ petition filed by the Petitioner being not maintainable.

2. Brief facts revealing from the instant appeal are that the Appellant was appointed as Area Manager on 31.08.1978 but due to his ill health he resigned from services on medical ground on 16.07.1989. Thereafter the Appellant applied for his pensionary benefits which were, declaimed on the ground that his resignation was accepted without recommendations of the Medical Board. Feeling aggrieved thereby he moved complaint before the Federal Ombudsman in the year 2011 which later on was withdrawn by the Appellant and filed the Writ Petition No.13117/2012.

3. Learned counsel for the Appellant submitted that the impugned order is against law and facts and is liable to be set aside on the grounds that the learned Single Judge has failed to appreciate fact that the Appellant applied for retirement on medical ground and was entitled to pensionary benefits but the same has been misinterpreted as resignation; that it was the department who was duty bound to send the matter to Medical Board which it did not, hence the Appellant should not suffer due to the wrong of the department; that the learned Single Judge has also ignored the fact that the Appellant had completed his 10 years of service before retirement on medical ground.

4, Arguments heard and record perused.

5. From the perusal for record it reveals that the after denial of pensionary benefits from the Respondents the Appellant approached the Federal Ombudsman in the year 2011 through a complaint which was subsequently withdrawn on 17.01.2012 through an application (Annexure-J) appended with the writ petition, to avail the remedy before the Civil Court in Civil Suit No.F-1411/2011. We agree with the findings of the learned Single judge who in the impugned order has rightly observed that when the Appellant has already availed an alternate remedy to get the same relief by filing civil suit, the writ petition was not competent before this Court. Learned Single Judge has also rightly observed that the writ petition was hit by laches as the Appellant approached this Court in the year 2012 against his grievance arose in the year 1989. Recently, the Honourable Supreme Court in Civil Aviation Authority v. Zulfiqar Ali, (2016 SCMR 183) set aside the Order of the High Court in allowing the delayed writ of the Respondent, who was an employee of Civil Aviation Authority, was de-hired from service on account of his illness. Ten years after his de-hiring the Respondent filed the constitutional petition before the High Court for regularization of his service which was allowed by the Court. The Hon'ble Supreme Court of Pakistan held that the said petition suffered from laches and ought to have been dismissed for having been filed after a lapse of about 10 years and that too without any justification or explanation for such delay.

6. We do not see any illegality in the impugned order which has been passed strictly in accordance with law, as such does not warrant any interference by us. Consequently, the Appear in hand, being devoid of any merit is hereby dismissed in limine.

ZC/M-33/L Appeal dismissed.

Lahore High Court
Judge(s)
Ayesha A. Malik, Jawad Hassan,
D.S. Pakistan Railways
VS
Mst. S. Yasmeen And Others
Appeal No,1278 of 2016
11/01/2017

Reported As 2017 P L C 73
Result: Appeal dismissed

Practice Area: Civil servants, Labour, Service and Employment Tagged Statutes: Workmen's Compensation Act, 1923 [], Removal From Service (Special Powers) Ordinance, 2000 []

Cited In: 0Cited By: 0

ORDER
' The Appellant is aggrieved by the judgment dated 23.06.2016 wherein the leaned Single Judge accepted the petition of Respondent No,1 and awarded her the pension along with service benefits that her deceased husband was entitled to.

2. Learned counsel for the Appellant argued that Respondent No,1 had remedy before the Compensation Tribunal under the Workman Compensation Act, 1923 ("Act") and therefore, the writ petition was not maintainable.

3. The preamble of the Act provides that the Act has been promulgated to compensate an employee who has been injured during the course of his employment. The case of Respondent No,1 was not of compensation but was for grant of pensionary benefits, which she was denied on account of the fact that disciplinary proceedings have been ordered against her deceased husband on 21.08.2002 by the Appellant Department **after the death of her husband** on 20.08.2002. Therefore the jurisdictional objection not only is without merit but is also misconceived as the basic question addressed in the impugned judgment by the learned Single Judge is whether the disciplinary proceedings could continue after the death of an employee.

4. The facts of the case are that husband of Respondent No,1 while working as Senior Commercial Assistant (Parcel) Railway, Lahore was issued a show

cause notice under the Removal from Service (Special Powers) Ordinance, 2000 ("Ordinance") on 01.02.2002. Ultimately, order dated 21.08.2002 was issued wherein major penalty of dismissal from service was imposed upon him w,e,f, 06.08.2002 however, the husband of Respondent No,1 died on 20.08.2002. Respondent No,1 applied for all service benefits along with pension of her deceased husband, which application was ultimately declined. The learned Single Judge held that disciplinary proceedings can only be initiated against an employee for his non-performance or ill-performance of his duties, who is alive and in the service of the organization/department. The impugned judgment further finds that if an employee dies during the pendency of disciplinary proceeding then such disciplinary proceeding will abate after the death of the employee. In the case before us the husband of Respondent No,1 died on 20.08.2002 and the disciplinary proceedings were ordered on 21.08.2002 after his death. Since the husband of Respondent No,1 died, the disciplinary proceeding abated and as such no order could have been passed against the deceased employee. As such no illegality has been made out against the impugned judgment. We are in agreement with the findings of learned Single Judge. Appeal is dismissed.

P L D 2017 Lahore 470
Before Ayesha A. Malik and Jawad Hassan, JJ
Syed KHURRAM ABBAS BUKHARI and others---Petitioners
Versus
ELECTION COMMISSION OF PAKISTAN and others---Respondents
Writ Petition No.39505 of 2016, heard on 22nd February, 2017.

Punjab Local Government Act (XVIII of 2013)-

----Ss. 37, 38, 39 & 41---Punjab local Government (Conduct of Elections) Rules, 2013, Rr. 36, 62 & 78-Constitution of Pakistan, Arts. 140-A, & 218---Recounting of votes---Election Commission, powers of---Petitioners were returned candidates but Election Commission after recounting of votes declared respondents as returned candidates-Validity-Executive functions of Election Commission, under R.78 of Punjab Local Government (Conduct of Election) Rules, 2013 were prescribed to ensure that elections were carried out justly, fairly and in accordance with law as per mandate of Art.140-A read with Art.218 of the Constitution---Exercise of power under R.78 of the Punjab local Government (Conduct of Election) Rules, 2013 was to be exercised in relation to the conduct of elections and not to adjudicate on election disputes---Once election result was notified under S.37 of Punjab Local Government Act, 2013 any election dispute that had arisen thereafter was to be referred to Election Tribunal which included any dispute with respect to recount of votes---Election Commission could not have interfered in the matter as petitioners were declared winning candidates for Union Council in question and any dispute in relation to such victory had to be raised before Election Tribunal as that was remedy prescribed under law---Such act of Election Commission was without jurisdiction and illegal---High Court set aside order passed by Election Commission and notification declaring respondents to be returned candidates, consequently earlier notification was revived along with oath of office taken by petitioners---Constitutional petition was allowed under circumstances.

Ch. Muhammad Abdullah v. Ch. Abdul Wakil and others PLD 1986 SC 487; Election Commission of Pakistan through its Secretary v. Javaid Hashmi and others PLD 1989 SC 396; Jam Madad Ali v. Asghar Ali Junejo and others 2016 SCMR 251; Muhammad Mamoon Tarar v. Election Commission of Pakistan and others 2016 CLC 1708; Workers' Party Pakistan through Akhtar Hussain, Advocate, General Secretary and 6 others v. Federation of Pakistan and 2 others PLD 2012 SC 681 and Aftab Shahban Mirani and others v. Muhammad Ibrahim and others PLD 2008 SC 779 ref.

Mahmood A. Sheikh for Petitioners.
Nasir Javed Ghumman for Respondent Election Commission of Pakistan.
Mubeen-ud-Din Qazi for Respondents Nos., 5 and 6.

Date of hearing: 22nd February, 2017.

JUDGMENT

AYESHA A. MALIK, J.---Through this Writ Petition, the petitioners have impugned order dated 13.12.2016 issued by Respondent No.1, Election Commission of Pakistan, Islamabad ("ECP") along with notification dated 17.3.2016 declaring Respondents Nos.5 and 6 to be the returned candidates as Chairman and Vice Chairman in Union Council No.74, Jhamra of District Council Faisalabad.

The facts:

2. The basic-facts in this case are that the Petitioners contested the elections for the seat of Chairman and Vice Chairman of Union Council No.74, Jhamra of District Council Faisalabad in the local government elections held on 31.10.2015. On 2.11.2015 Respondents Nos.5 and 6 moved an application for recount of votes. The said application was not accepted and the result was consolidated and notified on 21.12.2015 declaring the Petitioners as returned candidates. The Petitioners took oath of their office on 14.1.2016. In the meanwhile, Respondents Nos.5 and 6 moved another application before the ECP for recalling the election results in Union Council No.74 which petition was accepted by the ECP on 4.1.2016 by calling for a report on the recount of votes and directing the Returning Officer to recount the votes. On receipt of the report, the ECP 'passed its short order dated 14.3.2016 declaring Respondents Nos.5 and 6 as the returned candidates without giving any reasons for this decision. The short order was challenged in W.P. No.9148/2016 and the impugned order of 14.3.2016 was set aside by this Court. The matter was sent back to the ECP to decide upon the issues raised afresh through a speaking order after hearing all necessary parties. The case was heard by the ECP and order dated 13.12.2016 was passed by the ECP which has been impugned in the instant Petition. In terms of the impugned order, Respondents Nos.5 and 6 have been declared as the returned candidate against the seat of Chairman and Vice Chairman, Union Council No.74, Jhamra of District Council Faisalabad and the Petitioners were denotified.

The arguments:

3. The question before the Court is whether the ECP could set aside the notified result of the election held on 31.10.2015 after calling for recount of votes, based on an application moved by the losing candidate. Learned counsel for the Petitioners argued that the ECP was not authorized to set aside the notified result of the election nor does the ECP have jurisdiction in the matter hence it could not recall the notified election results. Learned counsel further argued that the power to recount votes is under Rule 36(5) of the Punjab Local Government (Conduct of Election) Rules, 2013 ("Rules"). This power can be exercised before the consolidation of results and not after the consolidation of results. In this case, Respondents Nos.5 and 6 moved an application for recount of votes which could not be entertained as the result had already been consolidated and notified on 21.12.201'5. Learned counsel argued that in terms of Rule 62 of the Rules read with Sections 38 and 39 of the Punjab Local Government Act, 2013 ("Act") no election can be called into question except by way of an election petition made by a

candidate for that election. He argued that the only remedy available to Respondents Nos.5 and 6 was in the form of an election petition before the Election Tribunal and as such there is no remedy available before the ECP. Learned counsel argued that the ECP is not the Election Tribunal and it has no jurisdiction or authority to denotify an elected candidate. In this regard, he has placed reliance on Ch. Muhammad Abdullah v. Ch. Abdul Wakil and others (PLD 1986 SC 487), Election Commission of Pakistan through its Secretary v. Javaid Hashmi and others (PLD 1989 SC 396), Jam Madad Ali v. Asghar Ali Junejo and others (2016 SCMR 251) and Muhammad Mamoon Tarar v. Election Commission of Pakistan and others (2016 CLC 1708).

4. Learned counsel for Respondents Nos.5 and 6 argued that the ECP has acted in accordance with law on the basis of the powers that have been specifically provided under the Rules. He has relied upon Rule 78(b) of the Rules wherein he argued that the power of review has been given to the ECP to pass any order including rejection of ballot papers. Learned counsel argued that on the basis of this power the ECP is fully authorized to review any order passed by an officer under the Act or under the Rules including an order rejecting a ballot paper. In such cases, the ECP can denotify a candidate and set aside the election results if it deems it appropriate. Learned counsel further argued that these powers have been given to the ECP to ensure that the elections are carried out justly, fairly and in accordance with law. In this case, the count of votes had not been carried out in accordance with law and on account of the illegalities carried out by the Petitioners a wrong notification was issued declaring them to be the winning candidates. It is their case that there was a thin margin between the votes of the Petitioners and that of Respondents Nos.5 and 6 which necessitated recount of the ballot papers to verify the result. Learned counsel argued that the Returning Officer while consolidating the election results did not comply with the mandatory provisions of Rule 36(2) of the Rules which required him to examine the ballot papers excluded from the count by the Presiding Officer. The grievance of Respondents Nos.5 and 6 was that the Returning Officer did not examine the ballot papers of the rejected votes in the presence of the contesting candidates or their agents at the time of consolidation of results, hence they challenged it. This act of the Returning Officer gave rise to the genuine apprehension that the rejected votes contained valid votes on the basis of which they would become the winning candidates. Learned counsel argued that this argument was accepted by the ECP which relied upon the reports submitted by the Returning Officer with respect to ballot papers of four polling stations. In terms of the report, out of 34 rejected votes only 27 votes were actually rejected votes in Polling Station No.72 of Ward No.2. In the same way in Ward No.5 of Polling Station No.74/7 one valid vote was rejected and in polling station No.74/8 of Ward No.5 three more votes were added in favour of Respondents Nos.5 and 6. In this way Respondents Nos.5 and 6 were declared the winning candidates on account of the wrong counting and rejection of valid votes by the Returning Officer. In terms of the impugned order, the ECP has exercised its powers under Rule 78(c) of the Rules which authorizes it to order for a recount where certain illegalities have been committed. Learned counsel argued that similar question was raised before the

august Supreme Court of Pakistan in Civil Appeal No.190 of 2016 titled Mubashir Khalil Ansari and another v. Election Commission of Pakistan, Islamabad and others vide order dated 15.2.2016 which was ultimately decided on 1.6.2016 where the august Supreme Court of Pakistan decided the issue in favour of the ECP with respect to the provisions of Rule 78 of the Rules and in W.P. No.429/2016 titled Syed Khurram Abbas Bukhari and another v. Election Commission of Pakistan and others with reference to the same Petitioners before this Court where this matter was also decided in favour of the ECP vide order dated 11.11.2016.

5. Learned counsel for Respondent ECP argued that the ECP is empowered under the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution") to organize and conduct elections and make all arrangements that are necessary to ensure that the elections are held honestly, justly, fairly and in accordance with law. In this regard, learned counsel argued that the ECP had extensive powers to regulate the process of elections which included the power to denotify a successful candidate if his success was consent to illegalities in the process of election. Learned counsel argued that the ECP was empowered to make all such orders as were necessary to ensure that the elections were carried out fairly and honestly and that these powers allowed the ECP to pass any order even after the notification of the election results. In this regard, he has relied upon the case titled Workers' Party Pakistan through Akhtar Hussain, Advocate, General Secretary and 6 others v. Federation of Pakistan and 2 others (PLD 2012 SC 681). Learned counsel further argued that the bar of Article 225 of the Constitution does not oust the jurisdiction of the ECP which can take notice of any irregularities or illegalities committed during the process of election in appropriate cases. Learned counsel argued that even otherwise the elections to the Local Government are not covered under the bar of Article 225 of the Constitution. Learned counsel argued that Rule 78 of the Rules gives sufficient powers to the ECP to rectify an illegality or irregularity caused during the election process in order to ensure that proper and honest result is announced and that in order to ensure fair elections the ECP can interfere in matters before or after the issuance of a notification of the result of elections. In this regard, he has relied upon the case titled Aftab Shahban Mirani and others v. Muhammad Ibrahim and others (PLD 2008 SC 779).

6. Heard and record perused.

The law:

7. The ECP derives its power to carry out local government elections from Article 140-A of the Constitution which provides as follows:-

> 140A. (1) Each Province shall, by law establish a local government system and devolve political, administrative and financial responsibility and authority to the elected representatives of the local government.
>
> (2) Election to the local government shall be held by the Election Commission of Pakistan

Article 218 of the Constitution is also relevant as it lays down the duty of the ECP as under:

> 218. (1) For the purposes of election to both houses of Majlis-e-Shoora (Parliament), Provincial Assemblies and for election to such other public offices as, may be specified by law, a permanent Election Commission shall be constituted in accordance with this Article.
> (2) The Election Commission shall consist of,-
> (a) the Commissioner who shall be the Chairman of the Commission; and
> (b) four members, each of whom has been a Judge for a High Court from each Province, appointed by the President in the manner provided for appointment of the Commissioner in clauses (2A) and (2B) of Article 213.
> (3) It shall be the duty of the Election Commission to organize and conduct the election and to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against.

Therefore elections for the local government are organized and conducted by the ECP, having the primary responsibility to ensure that the elections are held honestly, justly and fairly as per law.

8. The local government elections are regulated by Chapter V of the Act. Section 19 of the Act provides that the Election Commission shall conduct local government elections and shall by notification in the official gazette declare the election schedule under the Act. The ECP shall also make provisions for the conduct of, local government elections and in terms of Section 21 it shall prepare the election rolls. Section 37 of the Act provides that every election or removal of an elected body shall be notified by the ECP. Section 38 of the Act provides that an election to the office of local government shall not be called in question except by way of an election petition. Section 39 of the Act requires the ECP to appoint an Election Tribunal to hear all election disputes. An appeal against the order of the Election Tribunal lies before the High Court under Section 46 of the Act. In terms of Section 41 of the Act the Election Tribunal is vested with the power to declare the election of a returned candidate to be void and to declare any other contesting candidate as the duly elected candidate. It can also declare the entire election as void and the grounds for declaring election as void are given in Sections 42 to 44 of the Act. Therefore the Act contemplates that all election disputes shall be decided by an Election Tribunal on the basis of the grounds provided for under the Act.

9. In exercise of powers under Section 144 of the Act, the Punjab Local Government (Conduct of Election) Rules, 2013 were made. Rule 3 of the Rules provides for the powers and functions of the ECP to conduct the elections. In terms of Rule 38 of the Rules, the Returning Officer shall consolidate the result and submit it to the District Returning Officer who shall send the result to the ECP. The ECP shall publish the result in the official gazette. In the instant case, the elections were held on 31.10.2015. The result was consolidated on 2.11.2015 and notified on 21.12.2015. After the notification of the result, Respondents Nos.5 and 6 moved an application before the ECP wherein they prayed for recalling of the election in Union Council No.74, Jhumra of District Council, Faisalabad and re-polling in Polling Station Jungle Sarkar (74/5) and Polling Station G.G.P.S Saiky (74/4).

Essentially they required recount of votes on account of the fact that the victory of the Petitioners was on the basis of a very small margin of only three votes. In this regard Rule 38 specifically provides that there shall be no recounting of votes after the consolidation of the results, hence the Returning Officer can recount valid ballot papers before the consolidation of results but not after consolidation. In this case, the Returning Officer rejected the application before consolidation of the result. However, the Respondents moved another application after consolidation of the result before the ECP, who set aside the notification of the Petitioners essentially on the ground that the mandatory provisions of the Act and the Rules were not followed.

10. The question before us is whether the ECP had powers under Rule 78 of the Rules to direct for a recount of votes after the notification of the returned candidate, thereafter, denotify the winning candidate and notify the other candidate as the winning candidates. In this regard, Rule 78 of the Rules is reproduced below for facility of reference:-

> **78. Powers of Election Commission.-** Save as otherwise provided, the Commission may:
>
> (a) stop the polls at any stage of the election if it is convinced that it shall not be able to ensure the conduct of the election justly, fairly and in accordance with law due to large scale malpractices, including coercion, intimidation and pressures, prevailing at the election:
>
> (b) review an order passed by an officer under the Act or the rules, including rejection of a ballot paper; and
>
> (c) issue such instructions and exercise such powers, and make such consequential orders, as may in its opinion, be necessary for ensuring that an election is conducted honestly, justly and fairly, and in accordance with the provisions of the Act and the rules.

Learned counsel for the ECP argued that on the basis of the powers under Rule 78 of the Rules, the ECP has an overarching power to interfere with election results even after the notification is issued under Section 37 of the Act. It was also argued that this power of the ECP is over and above the power and remedy available before the Election Tribunal. We have heard the learned counsel and find that this argument is totally misconceived and against the statute. Rule 78 of the Rules prescribes the executive functions of the ECP to ensure that elections are carried out justly, fairly and in accordance with law as per the mandate of Article 140-A read with Article 218 of the Constitution. The exercise of power under Rule 78 of the Rules is to be exercised in relation to the conduct of the elections and not to adjudicate on election disputes. As per the Act once the election result is notified under Section 37 of the Act, any election dispute that arises thereafter must be referred to the Election Tribunal. This includes any dispute with respect to the recount of votes. This is the specific mandate of the Act creating a specialized tribunal to decide election disputes. There is no provision in the Act which gives the ECP the power to adjudicate on the election disputes. In this regard, Sections 38 and 39 of the Act specifically provide that an election dispute shall only be called into question by an election petition which is to be filed before an Election Tribunal.

Hence the authority to settle election disputes vests with the Election Tribunal and not with the ECP. In this regard, it is clarified that an election dispute is one which requires resolution after the result is declared and the returned candidates are notified. In this way, the ECP completed its function of conducting the election and any dispute related to the manner in which the election was carried out or votes were counted will be referred to the Election Tribunal and not the ECP.

11. Furthermore we find that Section 41 of the Act specifically authorizes the Election Tribunal to declare the election of any returned candidate to be void and to declare any other contesting candidate as duly elected. In the same way the Election Tribunal can declare the election to be void on the grounds given in Sections 42 to 44 of the Act. Section 44 of the Act gives the Election Tribunal the power to declare the election as a whole void if it is satisfied that the provisions of the Act or the Rules have not been complied with. Therefore the power of declaring any election of any returned candidate to be void and the power of declaring any other contesting candidate to have been duly elected vests solely with the Election Tribunal and not with the ECP. We also find that the power relied upon by the Election Tribunal emanates from the Rules which Rules are delegated authority in terms of Section 144 of the Act. The power given to the ECP under the Rules are to ensure that the substantive powers under the Act are given effect meaning that the elections are carried out in the prescribed manner fairly justly and in accordance with law. The Act does not envision any overarching power with the ECP nor does it create a parallel adjudicatory body to adjudicate on election disputes. The spirit of the law is that the entire election process should be concluded before any challenge to the election process begins. This ensures that the election process is completed, before disputes arise contesting the result. The ECP is empowered under Rule 78 of the Rules to issue all necessary instructions and pass necessary orders so that the election is conducted honestly, justly and in accordance with law as per the provisions of the Act. If there is any issue during the process the ECP can look into the matter to ensure that the elections are carried out smoothly. However, once the result of the election is notified, any dispute arising thereafter must be placed before the Election Tribunal who is authorized under the Act to decide upon election disputes. Hence if the name of the returned candidate is published in the official gazette, an election petition has to be filed under Section 38 of the Act read with Rule 62 of the Rules before the Election Tribunal and the ECP cannot denotify any candidate on account of the fact that there is a dispute on the counting of the votes. The grounds for declaring the election of the returned candidate as void are provided for in Sections 41, 42, 43 and 44 of the Act which grounds must be invoked by the Election Tribunal and Section 44 of the Act specifically deals with the issues where the provisions of the Act or Rules have not been followed.

12. In this case the ECP interfered in the matter on account of the procedural flaws urged by Respondents Nos.5 and 6. Furthermore, Respondents Nos.5 and 6 were aggrieved due to the small margin of victory in favour of the Petitioners. The issue squarely falls within the domain of an election dispute which could be heard by the Election Tribunal. The ECP could not have interfered in the matter as the

Petitioners were the declared winning candidate for Union Council No.74, Jhamra of District Council Faisalabad and any dispute in relation to his victory had to be raised before the Election Tribunal as that is the remedy prescribed under the law. Therefore this act of the ECP was totally without jurisdiction, hence illegal.

13. Under the circumstances, this petition is accepted and impugned order dated 13.12.2016 passed by Respondent No.1 as well as notification dated 17.03.2016 declaring Respondents Nos.5 and 6 to be, the returned candidates as Chairman and Vice Chairman are set aside. Consequently the notification dated 21.12.2015 is revived along with the oath of office taken by the Petitioners on 14-1-2016.

MH/K-8/L Petition allowed

P L D 2017 Lahore 545

Before Ayesha A. Malik, J

LUNG FUNG CHINESE RESTAURANT through Atiq Ahmed and 2 others---Petitioners

Versus

PUNJAB FOOD AUTHORITY through Secretary and 6 others---Respondents

Writ Petition No.25124 of 2015, heard on 27th January, 2017.

Punjab Food Authority Act (XVI of 2011)--

----Ss. 13, 16, 40 & 52---Constitution of Pakistan, Arts. 10-A & 199---Constitutional petition---Punjab Food Authority---Powers of the Food Safety Officer---Improvement notice---Nature and exercise of powers under Ss.13 & 16 of the Punjab Food Authority Act, 2011---Distinction between nature of powers of Food Safety Officer under Ss. 13 & 16 of the Punjab Food Authority Act, 2011---Precautionary principle in food safety laws---Scope---Question before High Court was whether Punjab Food Authority and its Food Safety Officer(s) were required to issue notice and provide an opportunity of hearing before exercising powers of sealing premises under S.13(1)(c) of the Punjab Food Authority Act, 2011, and whether the said provision was ultra vires the Constitution---Validity---Contention that in order to invoke powers under S.13(1)(c) of the Punjab Food Authority Act 2011, the Food Safety Officer had to first issue improvement notice under S.16 of the Punjab Food Authority Act, 2011 before sealing premises, was misconceived as powers under said S.13 were independent of powers under S.16 of the Punjab Food Authority Act, 2011---Powers under S.16 of the Punjab Food Authority Act, 2011 were invoked when a food operator had failed to comply with provisions of the Punjab Food Authority Act, 2011, and rules and regulations thereunder, despite notice from a Food Safety Officer---Section 13 of the Punjab Food Authority Act, 2011 on the other hand authorized Food Safety Officer to carry out functions of regulating and monitoring the food business---Fundamental difference existed between Ss.13 & 16 of the Punjab Food Authority Act, 2011, in that the former was an enforcement mechanism while the latter was a regulatory tool allowing the Food Safety Officer to ensure that food provider provided safe food---Food Safety Officer could exercise powers under S.13 as well as under S.16 of the Punjab Food Authority Act, 2011, in different situations as neither section was dependent upon the other---Clear intent of the Legislature was to give the Food Safety Officer the ability to take action not only to stop the harm but also to prevent further harm in cases where imminent danger to public health was involved---Section 13 of the Punjab Food Authority Act, 2011 was based on the precautionary principle and Food Safety Officers must have self-executing powers that allowed them to act immediately which was necessary to protect the overriding objective public health and food safety---High Court observed that the temporary nature of Food Safety Officer's order and ability to review any action taken by the said officer satisfied the due process requirement and there was no violation of Art.10-A of the Constitution---Constitutional petition was dismissed, in circumstances.

Khawaja Ahmad Hassaan v. Government of Punjab and others 2005 SCMR 186; Messrs Pearl Continental Hotel, through Executive Manager, Khyber, Peshawar v. Government of N.W.F.P through Secretary Excise and Taxation of N.-W.F.P, Peshawar and 3 others PLD 2005 Pesh. 25; Mst. Afsana v. District Police Officer (Operation), Khairpur and 5 others 2007 YLR 1618 and Government of KPK and others v. Khalid Mehmood 2012 SCMR 619 ref.

Ms. Shehla Zia and others v. WAPDA PLD 1994 SC 693; Imrana Tiwana v. Province of Punjab and others 2015 CLD 983; Adeel ur Rehman v. Federation of Pakistan and others 2005 PTD 172; Regarding Pensionary Benefits of the Judges of the Superior Courts PLD 2013 SC 829; Justice Khurshid Anwar Binder v. Federation of Pakistan PLD 2010 SC 483 and Warid Telecom (Pvt) Limited v. Pakistan Telecommunication Authority 2015 SCMR 338 rel.

M. Irfan Khan Ghaznavi for Petitioners

Mrs. Samia Khalid, AAG along with Muhammad Khurshid, Assistant Director (Legal), Punjab Food Authority, Lahore for Respondents.

Date of hearing: 27th January, 2017.

JUDGMENT

AYESHA A. MALIK, J.--Through this Petition, the Petitioners have challenged the vires of Clauses (c) and (ca) of Section 13(1), Subsections (3), (4) of Sections 40 and 52 of the Punjab Food Authority Act, 2011 ("Act") being ultra vires of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution").

The Case

2. The basic facts of the case are that Petitioner No.1 is a restaurant by the name of Lung Fung Chinese Restaurant located at 8-B, Kashmir Block, Lahore. On 8.8.2015 the Food Safety Officer ("FSO"), Respondent No.4 along with other officials entered into the premises of the Petitioner Restaurant and sealed it. The Restaurant was de-sealed on 17.8.2015 after the Petitioners removed the objections noted by Respondent No.4 at the time of sealing of the premises. The Petitioners are aggrieved by the act of sealing as carried out by the Respondents on the ground that it was done in contravention of the principles of natural justice and due process and that Section 13 of the Act is unconstitutional being against the principle of natural justice and due process. The Petitioners have also challenged the constitutionality and legality of Sections 40 and 52 of the Act on the ground that Section 40 is against the doctrine of trichotomy of powers under the Constitution as it gives the executive the power to recommend the names of judges who will be working under the Act, which encroaches upon the independence of the judiciary. So far as Section 52 of the Act is concerned, the grievance of the Petitioners is that the stated Section is unconstitutional because it encourages efficiency on the basis of monetary benefits meaning thereby that it will encourage greed and wrong doing under the garb of receiving a reward from Punjab Food Authority ("PFA"). Section 52 of the Act is also challenged on the ground that it is discriminatory because it can be used in a discriminatory manner to oppress people in the business of food services.

The Arguments

3. Learned counsel for the Petitioners argued that the act of sealing was carried out without any notice to the Petitioners; without affording opportunity of hearing; and most importantly without any warning of the inspection or the consequence of sealing. Learned counsel argued that Section 13 of the Act violates Article 10-A of the Constitution whereby it is the fundamental right of every citizen to be heard, to be treated in accordance with law and due process. Learned counsel further submitted that at the time of sealing, the Petitioners should have been informed of the defects, if any, and in terms of Section 16 of the Act be served with an improvement notice. Thereafter they should have been given time to correct the wrong if any, before the oppressive act of sealing could materialize. In this case, he argued that the Respondents acted prematurely, in haste with mala fide intent, infringing upon the fundamental right of due process thereby causing embarrassment and humiliation for the Petitioner Restaurant. Learned counsel argued that as soon as the act of sealing took place, information to this effect is placed on the social media and an entire campaign commenced against the Restaurant and its owners. He further argued that this brings a bad name to the reputation of the Petitioners and the people involved in the industry, without giving them an opportunity to refute any of the allegations raised against them. Learned counsel further argued that regulations for sealing and de-sealing issued in 2016 are in excess of the power authorized under Section 13 of the Act and therefore is a case of excessive delegation of power to the Respondents. He clarified that at the time when the Petitioner Restaurant was sealed, there were no regulations in the field.

4. With respect to the challenge to Section 40 of the Act, learned counsel submitted that similar matters challenging the right of the Executive under the Constitution to nominate and appoint Judges to Tribunals is pending before a learned Full Bench of this Court. Therefore, the Petitioners may, if desire raise this issue before the learned Full Bench through a fresh petition and do not press the issue in the instant Petition. As to the reward offered under Section 52 of the Act, learned counsel argued that the Section propagates greed and foul play because on the basis of the reward offered by the PFA, Food Inspectors are encouraged to seal the restaurants and businesses in order to collect reward money. Learned counsel further argued that the provision will encourage colourful exercise of powers by the Respondents which will render the acts under the Section not only as discriminatory but also as oppressive. In support of his arguments, learned counsel has relied upon the cases titled Khawaja Ahmad Hassaan v. Government of Punjab and others (2005 SCMR 186), Messrs Pearl Continental Hotel, through Executive Manager, Khyber, Peshawar v. Government of N.W.F.P through Secretary Excise and Taxation of N. W.F.P, Peshawar and 3 others (PLD 2005 Peshawar 25), Mst. Afsana v. District Police Officer (Operation), Khairpur and 5 others (2007 YLR 1618) and Government of KPK and others v. Khalid Mehmood (2012 SCMR 619).

The Respondents' Case

5. Report and parawise comments have been filed by the PFA being Respondents Nos.1 to 4 as well as on behalf of Secretary Food Department,

Government of Punjab being Respondent No.7. In terms of the report and parawise comments filed, a visit was made to the Petitioners' premises on 8.8.2015 and during the visit it transpired that the Restaurant's workers were not wearing caps; the washing area was dirty; stagnant water was present on kitchen floor; raw and cooked food was placed together in the freezer; and expired bread was found at the premises. Flies were also seen on the uncooked food. Consequently, Respondent No.4 sealed the premises under the provisions of Section 13 of the Act and issued sealing form (Form 18) wherein all the issues and reasons for sealing the Restaurant were informed to the Petitioners. The Petitioners removed all the objections, corrected the defects and thereby on another visit after checking the premises, the Restaurant was de-sealed on 17.8.2015.

The Arguments

6. Learned Law Officer argued that the PFA was established to protect public health and provide safe and healthy food to the public at large. Section 13(1)(c) of the Act empowers the FSO to enter or seal any premises if he believes that any food which is prepared, preserved or stored, is operating and maintaining itself in contravention to the requirements of the Act. Learned Law Officer further argued that the Petitioners do not deny any of the objections raised against the cleanliness and maintenance of food at the Restaurant but are aggrieved by the manner in which the act of sealing took place. She argued that as an emergent measure, in order to prevent imminent danger or injury to the public, the PFA can seal the premises without any notice at the time. She argued that the power of seizure and the power of imposition of fine falls within the ambit of strict liability for which hearing and mens rea are not required. She further argued that the right to fair trial has not been denied or deprived to the Petitioners. This right is available to the Petitioners, however, the law empowers the FSO to take immediate action which power is not in derogation of Article 10-A of the Constitution.

7. So far as the argument that an improvement notice must be given before taking any action, she argued that the objective of the Act and the powers under Section 13 of the Act are to ensure that certain standards of cleanliness and health are maintained by persons providing services in the food sector to protect public health and safety. Therefore, she argued that there is no requirement of informing the Petitioner of the visit or to give the Petitioners an opportunity to explain why food was not being maintained in a proper and hygienic manner. She argued that there is no bar in the law preventing the FSO from carrying out such visits and in fact it is in furtherance of the mandate of the law that these actions are taken. So far as the grievance of the Petitioners that the matter is placed on Face Book and other social media, she explained that this has stopped and now the matter is totally regulated under the Sealing and De-sealing of Food Business Premises Regulations, 2016 ("Regulations"). So far as the objections to the reward given under Section 52 of the Act, she argued that it was lawful and in accordance with international best practices. Hence requests for dismissal of the Petition.

8. Heard and record perused.

The Law

9. The relevant law on the subject being the sections impugned before this Court are Sections 13, 40 and 52 of the Act. And for ease of reference Section 16 of the Act regarding improvement notice is also relevant. These sections are reproduced below:

13. Powers of Food Safety Officer.- (1) A Food Safety Officer may

(a) take sample of any food or any substance, which appears to him to be intended for sale, or has been sold as food;

(b) seize any food, apparatus or utensil which appears to the Food Safety Officer to be in contravention of this Act, the rules or the regulations;

(c) enter or seal any premises where he believes any food is prepared, preserved, packaged, stored, conveyed, distributed or sold, examine any such food and examine anything that he believes is used, or capable of being used for such preparation, preservation, packaging, storing, conveying, distribution or sale;

[(ca) impose fine on a food operator if the Authority has delegated such power to him;)

(d) open and examine any package which, he believes, to contain any food;

(e) examine any book or documents with respect to any food and make copies of or take extracts from the book or document;

(f) demand the production of the identity card, the business registration certificate, licence or any other relevant document from a food operator;

(g) mark, seal or otherwise secure, weigh, count or measure any food or appliance; and

(h) search and seize any vehicle carrying food.

(2) A Food Safety Officer shall prepare a statement describing the food, apparatus, utensil or vehicle seized and shall deliver a copy of the statement to the person from whom it is seized or if such person is not present, send such copy to him by mail.

(3) A person claiming back anything seized under subsection (1) may, within seven days of the seizure, apply to the Court and the Court may confirm such seizure, wholly or in part, or may order that it be restored to the claimant.

(4) If the Court confirms the seizure of the food, apparatus or utensil, it shall be forfeited to the Food Authority or the Court may direct that such food, apparatus, utensil may be destroyed at the cost of the owner or person in whose possession it was found.

(5) If an application is not made within seven days under subsection (3), the food, apparatus or utensil seized, shall be forfeited to the Food Authority.

(6) Any person may make an application in writing to the Food Safety Officer asking him to purchase a sample of any food from a food operator and get it analyzed from the public analyst.

16. Improvement notice.-(l) If a Food Safety Officer has reasons to believe that any food operator has failed to comply with any provisions of this Act,

the rules or the regulations, he may serve an improvement notice upon the food operator-

(a) stating the grounds for believing that the food operator has failed to comply with any provisions of the Act or the rules or the regulations;

(b) specifying the matters which constitute the food operator's failure so to comply; and

(c) intimating the measures which the food operator should take in order to secure compliance with the relevant provisions of the law.

(2) If the food operator fails to comply with the improvement notice within the prescribed time, the Food Authority may cancel or suspended his licence or take such other action as it deems appropriate.

52. Reward by the Food Authority.--The Food Authority may, in the manner prescribed by the rules, make payment of reward from the Food Authority Fund to any person who has made an exceptional effort towards accomplishing the objective of this Act.

Decision

10. The basic question before the Court is whether the Respondents were required to issue notice to the Petitioners and provide an opportunity of hearing before exercising powers under Section 13(1)(c) of the Act. The PFA was established under Section 3 of the Act to provide for the safety and standards of food under the Act. Its powers and functions include the appointment of food safety officers to regulate and monitor the food business in order to ensure the provision of safe food which is fit for human consumption. Section 2(f) of the Act defines "food" to mean anything used as food or drink for human consumption other than drugs, and includes

(i) any substance which is intended for use in the preparation of food:

(ii) any flavouring agent or condiment;

(iii) any colouring matter intended for use in food:

(iv) chewing gum, confectionary and other products of like nature;

(v) water in any form including ice, intended for human consumption or for use in the composition or preparation of food: and

(vi) any other thing prescribed as food

Section 2(i) of the Act defines food business to mean any undertaking, whether or not for profit, carrying out any of the activities related to any stage of manufacturing, processing, packaging, storage, transportation, distribution of food, import, export and includes food services, catering services, sale of food or food ingredients. Section 2(k) defines food operator to mean a person who manufactures for sale, transports, stores, sells, distributes, imports or exports food. Section 2(w) defines safe food to mean an article of food which is not unsafe. Hence the Act governs food operators in the food business to ensure that the food is safe for human consumption.

11. Section 12 of the Act empowers the PFA to appoint and notify the FSO in such areas as the Authority deems necessary. The function and powers of the FSO are laid out under Section 13 of the Act which enables the FSO to take immediate

action to ensure that the food consumed or used by the public at large is safe and fit for human consumption. The Section authorizes the FSO to enter or seal any premises, collect samples of food or any substance which is intended for sale or has been sold as food, mark or seize any food, apparatus or utensils which is in contravention to the Act or any of the rules and regulations made thereunder. Specifically, the challenged Section 13(1)(c) of the Act empowers the FSO to enter and seal premises which are involved in preparation, preservation, distribution, packaging or sale of food. On 6.12.2016 the Regulations were notified in the official gazette. These Regulations provide for the procedure to be followed for sealing and desealing any premises in the food business and further provide that a sealing order can be challenged before the Director General, PFA. It is relevant to note that these Regulations were not in field when the Petitioner's Restaurant was sealed.

12. Section 16 of the Act provides for an enforcement mechanism to be adopted by the FSO where he believes that a food operator has failed to comply with any of the provisions of the Act, rules or regulations. Therefore Section 16 of the Act requires the FSO to issue an improvement notice to the food operator before taking any action. If the food operator fails to comply with the improvement notice, the PFA can cancel or suspend the license of the food operator. Learned counsel for the Petitioners argument that in order to invoke the powers under Section 13(1)(c) of the Act, the FSO has to issue an improvement notice under Section 16 of the Act before sealing the premises is totally misconceived as the power under Section 13 of the Act is totally independent of the power under Section 16, which is an enforcement power. This power is invoked when the food operator has failed to comply with the provisions of the Act, the rules and the regulations despite notice from the FSO. Section 13 of the Act on the other hand authorizes the FSO to carry out the functions of regulating and monitoring the food business. Therefore the fundamental difference between both the Sections is that one is an enforcement mechanism while the other is a regulatory tool allowing the FSO to ensure that the food provider provides safe food. Hence the FSO can exercise powers under Section 13 as well as under Section 16 of the Act in different situations as neither section is dependent upon the other. The significance of Section 13 of the Act is that it enables the FSO to take necessary and immediate action where he finds that the food operator is providing unsafe food in an unhygienic manner in contravention to the standards, procedures, processes and guidelines provided by the PFA. The FSO can immediately enter, seal, seize or examine the premises or any apparatus or utensils from the premises where it is considered to be harmful and unsafe for human consumption. Clearly the intent of the legislature was to give the FSO the ability to take action not only to stop the harm but also to prevent further harm in cases where imminent danger to public health is involved.

13. The spirit of Section 13 of the Act is based on the precautionary principle which enables public authorities to legitimately impose precautionary measures in response to situations that may lead to imminent harm or damage. The Rio Declaration and Agenda 21 in 1992 adopted the precautionary principle as an

instrument of self-executing powers that allows immediate action where there is some hazard or harm, in the form of a current or proposed activity that could lead to environmental degradation. Jurisprudence developed by our Superior Courts has incorporated the precautionary principle and affirmed its commitment to sustainable development and the protection of the environment. The court in Ms. Shehla Zia and others v. WAPDA (PLD 1994 SC 693) first recognized this principle in the following terms:

> The rule of precautionary policy is to first consider the welfare and safety of the human beings and the environment and then to pick up a policy and execute the plan which is more suited to obviate the possible dangers or make such alternate precautionary measures which may ensure safety. To stick to a particular plan on the basis of old studies or inconclusive research cannot be said to be a policy of prudence and precaution.

Subsequently, this principle has been cited and considered by the august Supreme Court of Pakistan in the cases cited at "Imrana Tiwana v. Province of Punjab, etc (2015 CLD 983) and "Adeel ur Rehman v Federation of Pakistan, etc. (2005 PTD 172). Over the years, jurisprudence from around the world has expanded the use of the precautionary principle to the function and authority of food regulators and matters of public health. The World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures (adopted in 1995) and Regulation (EC) No. 178/ 2002 both employ the precautionary principle as a necessary tool for the application of food safety and protection of the public health. Article 7 of the Regulation (EC) No.178/2002 elaborates on the use of the Precautionary Principle for food safety as follows:

> 1. In specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health protection chosen in the Community may be adopted, pending further scientific information for a more comprehensive risk assessment.
>
> 2. Measures adopted on the basis of paragraph 1 shall be proportionate and no more restrictive of trade than is required to achieve the high level of health protection chosen in the Community, regard being had to technical and economic feasibility and other factors regarded as legitimate in the matter under consideration. The measures shall be reviewed within a reasonable period of time, depending on the nature of the risk to life or health identified and the type of scientific information needed to clarify the scientific uncertainty.

The expansion of the precautionary principle in food safety laws has reaffirmed the public interest and the objectives of the precautionary principle to empower regulators to act in anticipation of any harm that can be detrimental to the health of the people. In this regard the august Supreme Court of Pakistan has considered the right to life in the case cited at 2005 PTD 172 (supra) holding that:

> It is the duty of the State to see that the life of a person is protected to enable him to enjoy it within the prescribed limits of law. Pollution,

> environmental degradation and impure food items also fall in the category of deprivation of life.

Essentially the august Supreme Court of Pakistan has cast a duty on the state to protect the public from unsafe food under the fundamental right to life. This being so the power under Section 13(1)(c) of the Act ensures that the public is protected from unsafe foods by enabling the regulator to keep a check on the food operator and the food business in order to achieve the mandate of the Act and protect the public interest.

14. The issue of protecting the public at large versus the rights of the individual must be addressed as well. The august Supreme Court of Pakistan in the case Regarding Pensionary Benefits of the Judges of the Superior Courts (PLD 2013 Supreme Court 829) held that:

> The interest of the public at large is to be given priority and preference over the interest of individuals, therefore, interest of public at large cannot be sacrificed to extend profane benefits to some individuals.

In light of this, the sealing of a food operator providing harmful, impure or unhygienic food becomes necessary to protect the public from potential harm. While protecting the interest of the public is necessary, a question arises as to whether the use of the precautionary principle or other self-executing powers would violate the individual's right to due process. The right to fair trial and due process are enshrined within Article 10-A of the Constitution. Superior Courts have accepted that certain deviations are necessary even with respect to the rights guaranteed under Article 10-A of the Constitution. In this regard, the august Supreme Court of Pakistan in the case cited at Justice Khurshid Anwar Bhinder v. Federation of Pakistan (PLD 2010 SC 483) affirmed that where a right to prior notice and an opportunity of hearing before an order is passed will obstruct the taking of a prior action such a right of notice and hearing can be excluded. The august Supreme Court of Pakistan also held that the rule of audi alteram partem can be excluded if importing a right to hearing has the effect of paralyzing an administrative process or the need for a prompt or urgent action as the situation demands. Thus, deviation from the right to be heard is necessary in cases where there is an imminent threat or possibility of imminent threat to the public at large. It was held in the case cited at Warid Telecom (Pvt.) Limited v Pakistan Telecommunication Authority (2015 SCMR 338) that it is necessary to take precautionary measures, as such measures ensure that no harm will occur during the time spent in due process so the need for such measures does not violate the right to fair trial and due process. So far as the individuals rights are concerned, being the food operator in this case, the Regulations governing the process of sealing and dealing ensure that the FSO does not act arbitrarily. Hence in terms of the Regulations any grievance of the food operator against the FSO can be raised before the Director General PFA giving an opportunity to appeal against any wrongful act of the FSO.

15. It is pertinent to note that FSO or other officers must have self executing powers that allow them to act immediately. This is necessary to protect the

overriding objective of public health and food safety. The temporary nature of the FSO's action and the ability to review any action taken by the FSO, satisfies the due process requirement. Hence no violation of Article 10-A of the Constitution exists, nor is there a need to hinder the good administration by limiting the powers of the FSO.

16. It was also argued that the FSO visits food operators at night, after closing the premises which is intended to harass the food operator. The counsel argued that there is no reason to visit premises after closing hours. While exercising its power and functions under the Act, the FSO can inspect restaurants at any time deemed necessary especially since they are checking on the cleanliness standards, food safety and hygiene matters. In fact it would defeat the purpose of the Act if the FSO could only perform his duties during a stipulated time of the day. The Act is concerned with the safety and standards of food and to fulfill this objective it does not matter what time the FSO performs his function as the standard of the food should be consistent across the board at all times. Further if there is an apprehension that the food operators will conceal facts during working hours, the FSOs late night inspections may be necessary to ensure that the food operators are in compliance with safety and hygienic requirements. Hence inspections do not offend any right of the Petitioners. At the same time needless to say the FSO must remain mindful of their functions and not overstep by publishing posts or pictures of food operators that have been inspected on the social media. The Law Officer stated that this practice has been abandoned and is no longer used by the FSO. However since people have a right to information, the PFA may develop a monthly reporting process which informs the public of the actions of the food operators and the consequences of such actions. The objective being to establish good practices and not to create unnecessary publicity in such cases.

17. With respect to the vires of Section 52 of the Act, the learned Law Officer explained that the procedure for giving rewards is under consideration and rules in relation there to are being proposed, hence this provision has not been executed to date. A plain reading of the Section makes it clear that it does not cater for reward to only public officers meaning the FSO but includes the food operator as well. The word 'any person' in this section has been used to mean persons other than the FSO and can include the food operator, hence it will not give rise to incentives to unnecessarily seal premises as argued by the counsel. To the contrary it will encourage food operators to apply under the reward scheme for recognition and acknowledgement of the clean and healthy standards maintained by them. Moreover the Petitioners have not placed on record any document to show that any such action has been taken adverse to their interest. Therefore, there is no merit in this objection.

18. In view of the aforesaid, no case for interference is made out. The instant Petition is dismissed.

KMZ/L-4/L Petition dismissed.

P L D 2017 Lahore 563
Before Ayesha A. Malik, J
TRADE SERVE INTERNATIONAL (PRIVATE) LIMITED and others---Petitioners
Versus
PAKISTAN ELECTRONIC MEDIA REGULATORY AUTHORITY and others---Respondents
Writ Petitions Nos.2446, 4366, 4367, 4368, 4369, 4370, 4371, 12908, 12909 of 2013 and 29949 of 2014, decided on 12th May, 2017.

(a) Pakistan Electronic Media Regulatory Authority Ordinance (XIII of 2002)-

----S. 14---Constitution of Pakistan, Arts. 73 & 19---Pakistan Electronic Media Regulatory Authority (Radio Broadcast Station Operations) Regulations, 2012. Reglns. 7 & 9---Pakistan Electronic Media Regulatory Authority Rules, 2009, R. 9---Money Bill---Nature of procedure---"PEMRA Fund"---Grant of licence by Pakistan Electronic Media Regulatory Authority, (PEMRA)---Licence to operate radio broadcasting---Licence fee---Renewal of such licence fee---Nature of licence fee deposited into the PEMRA Fund in terms of S.14 of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002---Scope---Petitioners, impugned vires of S. 14 of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002, in reference to imposition of "licence fee" and renewal for the same, for radio broadcasting licences---Contention of petitioners inter alia was that "renewal fee" was a "tax" and not a fee, as there was no quid pro quo for the said fee, and that the same was not passed as a Money Bill within meaning of Art.73(3)(a) of the Constitution---Validity ----Per Art.73(3)(a) of the Constitution, it was clear that a "licence fee" or "fee" was not a "tax" and that a licence fee was distinct from a fee or a charge for services rendered and it was not necessary that every licence have a quid pro quo or that licence fee or renewal fee be passed through a Money Bill---Article 73(3)(a) of the Constitution distinguished between "licence fee" and a "fee for services rendered" which meant that a licence fee did not require any quid pro quo but there must exist a correlation between fee charged and cost of administration under the relevant law---Licence fee must commensurate with the cost of regulating although exact arithmetical equivalence was not expected and such licence conferred a right on the licence-holder to do something which it otherwise could not do---PEMRA, in the present case, was required to regulate the licence-holder to ensure compliance of the law and terms of the licence---High Court observed that per the terms of the Constitution, a licence fee could be regulatory in nature where the regulator imposed a fee for regulating activities of the licence-holder and hence licence fee and its renewal fee did not need to be passed through a Money Bill nor did it require any quid pro quo.
Secunderabad Hyderabad Hotel v. Hyderabad Municipal AIR 1999 SC 635; A.P. Paper Mills Ltd. v. Government of A.P. and another 2000 8 SCC 167; Sreenivasa General Traders v. State of A.P. (1983) 4 SCC 353; (1983) 3 SCR 843 and Corpn of Calcutta v. Liberty Cinema AIR 1965 SC 1107: (1965) 2 SCR 477 rel.

(b) Pakistan Electronic Media Regulatory Authority Ordinance (XIII of 2002)-

----Ss. 39, 4(3), 20 & Preamble---Pakistan Electronic Media Regulatory Authority Rules, 2009 Rr.5, 8 & 12---Pakistan Electronic Media Regulatory Authority (Radio Broadcast Station Operations) Regulations, 2012, Reglns. 4, 6, 7 & 9---Broadcast licence(s) issued by Pakistan Electronic Media Regulatory Authority (PEMRA)---Radio broadcasting licence(s)---Grant of licence---Renewal of licence on expiry of the licence term---Procedure for renewal---Determination of quantum of renewal fee(s)---Rebidding tantamount to grant of fresh licence---Nature and scope---In terms of Pakistan Electronic Media Regulatory Authority Rules, 2009 and the Pakistan Electronic Media Regulatory Authority (Radio Broadcast Station Operations) Regulations, 2012, a clear process had been set out for renewal of radio broadcasting licence and said prescribed process did not contemplate rebidding for the purpose of determining renewal fee or for renewal of licence, and in such circumstances, rebidding for renewal purposes, tantamount to issuance of fresh licence which was clearly contrary to statutory procedure---Rule 12 of the Pakistan Electronic Media Regulatory Authority Rules, 2009 and Regln.9 of the Pakistan Electronic Media Regulatory Authority (Radio Broadcast Station Operations) Regulations, 2012 when read together created a statutory right for licence-holder to have licence renewed on terms and conditions provided---PEMRA was obligated to follow prescribed Rules and Regulations and could not go beyond its delegated powers and set out a new process for renewal of licence for radio broadcasting---Manner in which renewal fee was to be determined was clearly stipulated in the Pakistan Electronic Media Regulatory Authority (Radio Broadcast Station Operations) Regulations, 2012 and Regln.9 of the same, provided that renewal fee shall be the applicable licence fee plus the rate of inflation calculated by the State Bank of Pakistan---In such cases where the licence fee was regulatory, where no service or privilege was granted by the government authority and where the only purpose of the licence was regulatory for enforcement of statutory requirements, then such a fee could not be excessive.

Pakcom Limited and others v. Federation of Pakistan and others PLD 2011 SC 44 ref.

For Petitioners

Raza Kazim, Muhammad Nawaz Bajwa and Usman Raza Jamil and Ms. Fatima Malik (in W.P.No.2446 of 2013).

Jam Asif Mehmood, M. Saim Hashmi, Behzad Haider, Wasif Riaz, Salman Faisal and Ms. Farah Salman (In W.Ps. Nos. 4366, 4367, 4368, 4369, 4370 and 4371 of 2013).

Ali Sibtain Fazli and Hasham Ahmad (in W.Ps.Nos.12908 and 12909 of 2013).

Raheel Kamran Sheikh, Abuzar Salman Khan and Shahzad Burki (in W.P.No.29949 of 2014).

For Respondents

Muhammad Zikria Sheikh, DAG.

Salman Akram Raja, Muhammad Azam Zia, Tariq Bashir, Bilal Bashir, Yasir Islam Chaudhary and Ms. Unsa Manzoor for Respondent PEMRA along with Tahir Farooq Tarar, Head Legal PEMRA, Punjab.

Date of hearing: 9th February, 2017.

JUDGMENT

AYESHA A. MALIK J.---This common judgment decides upon the issues raised in the Writ Petitions detailed in Schedule "A" appended with the judgment as all the Petitions raise common questions of law and facts.

2. The Petitioners are all aggrieved by the excessive renewal fees charged by the Respondent Pakistan Electronic Media Regulatory Authority, Islamabad ("PEMRA") for renewal of their respective FM Radio licences. The Petitioners have impugned order dated 3.1.2013 issued by the General Manager (Licensing), PEMRA whereby the quantum of the renewal fees was upheld by Respondent No.1, PEMRA and it was decided that the Petitioners are required to pay the renewal fees as demanded by PEMRA in order to renew their FM Radio Station Licences.

3. The facts of these cases are that the Petitioners are private limited companies engaged in the business of broadcast media which includes establishing, running, operating and maintaining FM Radio Channels. Petitioners Nos.1 and 2 participated in the open bidding for grant of FM Radio Broadcast Station Licences and were granted the said Licence for 10 years on 18.10.2002 to establish and operate a radio station in the name of "Mast FM 103" in Karachi, Lahore, Faisalabad and Multan for Petitioner No.1 and FM Radio Station in the name of "Power FM 99" in Islamabad, Abbottabad and Vehari for Petitioner No.2. The Petitioner No.1 paid Rs.3.5 million for Karachi, Rs.2.5 million for Lahore, Rs.2.00 million for Faisalabad and Rs.1.25 million for Multan whereas Petitioner No.2 paid Rs.2.5 million for Islamabad, Rs.100,000/- each for Abbottabad and Vehari as licence fee in the year 2002. In July 2010 the Petitioners Nos.1 and 2 applied for renewal of their licences before the end of the stipulated 10 year period and Respondent No.1 provided them with the renewal fees such that an amount of Rs.45.3378 million for Karachi, Rs.57.178 million for Lahore, Rs.32.969 million for Multan and Rs.6.003 million for Faisalabad to Petitioner No.l. Whereas Rs.44.404 million for Islamabad, Rs.10.462 million for Abbotabad and Rs.1.000 million for Vehari to Petitioner No.2 for renewal of their licences. The Petitioners sought a personal hearing from Respondent No.1 to discuss the quantum of the renewal fees. The hearing was granted and on 3.1.2013, the Petitioners received the decision of Respondent No.1, being the impugned order, whereby they were required to pay the renewal fees as demanded, such that 25% of the renewal fee be paid in two installments within 30 days and 75% to be paid in five equal annual installments each of 15% of the total renewal fee.

4. The same set of facts exist in the other petitions except W.Ps. Nos.12908/2013 and 12909/13. The demand for renewal fee may be seen from the table below:-

WP No.	FM Station	Licence fee	Renewal Fee
2446/13	Mast FM 103 Power FM 99	Rs.3.5 million for Karachi, Rs.2.5 million for Lahore, Rs.2.00 million for Faisalabad and Rs.1.25 million for Multan (Petitioner No.1) Rs.2.5 million for Islamabad, Rs. 1.00 million each for Abbottabad and Vehari (Petitioner No.2)	Rs.45.378 million for Karachi, Rs.57.178 million for Lahore, Rs.32.969 million for Multan and Rs.6.003 million for Faisalabad (For Petitioner No.1). Rs.44.404 million for Islamabad, Rs.10.462 million for Abbottabad and Rs.1.000 million Vehari (For Petitioner No.2).
4366/13	HUM FM 106.2	Rs.3.8 million for Karachi, Rs.3 million for Lahore and Rs.0.575 for Sukkur.	Rs.45.378 million for Karachi, Rs.57.178 million for Lahore and Rs.3.893 million for Sukkur.
4367/13	FM 107	Rs.2.549 million	45.378 million.
4368/13	FM 91	Rs.3.850 million for Karachi, Rs.3.3 million for Lahore and Rs.2.75 million for Islamabad.	Rs.45.378 million for Karachi, Rs.57.178 million for Lahore and Rs.44.404 million for Islamabad and Rs.1.00 million for Gawadar.
4369/13	FM 89	Rs.2.5 million as licence fee for Islamabad, Rs.3.5 million for Karachi, Rs.3 million for Lahore and Rs.1 million for Faisalabad.	Rs.45.378 million for Karachi, Rs.57.178 million for Lahore and Rs.44.404 million for Islamabad and Rs.6.603 million for Faisalabad.

4370/13	FM 105	Rs.0.105 million as base price.	Rs.6.4 million.
4371/13	FM 96	Rs.0.35 million	Rs.45.378 million
29949/14	Not mentioned	Not mentioned	Rs.1.445 million for Sialkot and Rs.65,145 million for Petitioner

5. In W.Ps. Nos.12908/13 and 12909/13, both the Petitioners are aggrieved by orders dated 9.4.2013 issued by PEMRA whereby they cancelled the bid offered by the Petitioner in W.P. No.12908/13 for Islamabad, Lahore and Hassanabdal and PEMRA has forfeited the deposited amounts of the stated Petitioner. Vide the same order PEMRA has cancelled the bid offered by the Petitioner in W.P. No.12909/13 for Karachi, Murree and Sheikhupura and forfeited the deposited amounts of the stated Petitioner.

6. In W.P. No.29949/14 the Petitioner participated in the open bidding for grant of FM Radio Broadcast Station Licence and was granted five FM Radio Broadcasting Licences for 10 years on 18.2.2002 to establish and operate Radio Stations in Sialkot, Peshawar, Mardan, Bannu and Mansehra. On 26.3.2012 the Petitioner requested the Respondents for renewal of its licence for Peshawar. On 23.5.2012 Respondent PEMRA notified that the Petitioner's licence would be considered for renewal. Through letter dated 7.9.2013 PEMRA asked the Petitioner to withdraw one of the five licences on account of the fact that the maximum numbers of licences it can have are four as per rules. On 18.9.2012 the Petitioner explained to PEMRA that the rules came into force in 2009 while the Petitioner was rightfully given five radio broadcasting licences in 2002, therefore, the rules cannot be given retrospective application. On 11.9.2012 the Petitioner received a letter from PEMRA to deposit Rs.1.445 million as renewal fee for licence to establish in Sialkot and also to provide documents showing no foreign funding to be delivered by 18.9.2012. On 3.1.2013 the Respondent conveyed to the Petitioner that the payment amount for Peshawar is Rs.65.145 million. The Petitioner was also directed to intimate which four licences it will have to renew and which one will be withdrawn. Further directed that if the Petitioner failed to comply with the payments the Respondent would hold rebidding. Hence the Petitioners have challenged the vires of Section 14 of the Ordinance.

7. The common grievance of the Petitioners is that they have invested huge amounts of money in their businesses and there is no justifiable reason for demanding such excessive renewal fees as no services are being rendered by PEMRA against the fees imposed. Also there is no connection between the cost of administrating the sector and the renewal fees charged which can justify the excessive renewal fees. Learned counsel for the Petitioners argued that there is no set formula or mathematical calculation on the basis of which the renewal fee is being fixed. It is an arbitrary exercise of power by the regulator without any

justification simply to generate revenue. Hence the renewal fee tantamounts to a tax. Learned counsel argued that the FM Radio Broadcast Stations use the air for transmitting FM frequency and that air is not the property of the Government. The Petitioners generate their own frequency and are required to essentially pay for the spectrum and bandwidth allocation. Learned counsel further argued that there is no criteria in the rules setting the parameters on the basis of which the renewal fee can be charged. Since there is no substantive difference in the market area or the way of doing business, there appears to be no justification for increasing the renewal fees one hundred times for larger cities and multiple time for smaller cities. In furtherance of their arguments, the Petitioners have challenged the vires of Section 14 of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 ("Ordinance") being ultra vires to Article 73(3)(a) read with Item No.54 of the Federal Legislative List of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution") and also for being in violation of Articles 18, 19 and 19A of the Constitution. The Petitioners have also challenged the process of rebidding for renewal of licences for being arbitrary and discriminatory in violation of Article 25 of the Constitution. In this regard, it is their case that once granted licences in the year 2002, there is no justification or reason to call for bidding for the purposes of renewal of the licences.

8. Report and parawise comments have been filed by the Respondents. Learned counsel for Respondent PEMRA argued that the contentions of the Petitioners that Section 14 of the Ordinance is ultra vires to Article 73(3)(a) read with Item No.54 of the Federal Legislative List of the Constitution on the touchstone of Articles 18, 19 and 19A of the Constitution is incorrect as the Respondent PEMRA is demanding enhanced rates for renewal of licences as compared to licence fee charged over 10 years ago. Learned counsel further argued that such an assertion is vindicated from a bare reading of Paras 11-16 and the Grounds of the petition. Learned counsel stated that the law enunciated by the competent legislature cannot be declared ultra vires of the constitutional provisions merely because the renewal fees demanded from the Petitioners does not suit them. Learned counsel further stated that the renewal fee has been calculated in accordance with PEMRA laws that is last bid price plus inflation rate. For facilitation of the licence holders for payment of the renewal fees, installments were allowed. Learned counsel argued that the bidding process for renewal of licences is being called arbitrary exercise of power and allegedly based on consideration of revenue collection. However he argued that firstly, the bidding process for grant of licence for the cities is not alien to PEMRA law and is provided in the Ordinance, Rules and Regulations. Secondly the bidding process shuts the door for undue influence and arbitrariness in issuance of such licences and renewal. Thirdly, the grant of radio licence through bidding cannot be compared with TV licences on the touchstone of Article 25 of the Constitution as the two sets of licences are different and in no way belong to same classification. Lastly bidding is always open, excludes arbitrariness and ensures transparency. Learned counsel argued that PEMRA is working within the legal frame enunciated by the legislature and it cannot conceive of any detrimental step or negative action against any of the licensee including the Petitioners.

9. In terms of what has been argued, the issues before the Court are firstly with respect to the vires of Section 14 of the Ordinance and the vires of Pakistan Electronic Media Regulatory Authority (Radio Broadcast Station Operations) Regulations, 2012 ("Regulations"). Secondly the bidding process under Section 19 of the Ordinance with reference to the renewal process and finally the quantum of fees charged for renewal of radio licences.

10. The first issue before the Court is the vires of Section 14 of the Ordinance which is reproduced below:

> **14 Fund.-** (1) There shall be established a fund to be known as "PEMRA Fund" which shall vest in the Authority and shall be utilized by the Authority to meet charges in connection with its functions including payment of salaries and other remunerations to the Chairman, members, employees, experts and consultants of the Authority.
>
> (2) The Fund shall consist of.-
>
> (i) Seed money by the Federal Government;
>
> (ii) fees for issuance and renewal of licences for establishing and operating broadcast or CTV stations;
>
> (iii) loans obtained with the special or general sanction of the Federal Government;
>
> (iv) foreign aid obtained with sanction of and on such terms and conditions as may be approved by the Federal Government; and
>
> (v) all other sums received by the Authority from any other source.
>
> (3) The Authority may open and operate one or more accounts in local, or foreign currency, in any scheduled bank.
>
> (4) The Authority may invest its funds in such investments as it may, from time to time, determine.

11. The basic argument of the Petitioners is that the impugned renewal fee is a tax and not a fee, therefore is violative of the requirements of Article 73(3)(a) read with Item No.54 of the Constitution. That Section 14 of the Ordinance is ultra vires to Article 73(3)(a) as it was not passed as a Money Bill within the meaning of Article 73 of the Constitution. It is also their case that the impugned renewal fee has no connection with they cost of regulating the Petitioners under the licence or the Ordinance and that all amounts collected under the garb of licence fee, annual fee and renewal fee are maintained in a Fund created under Section 14 of the Ordinance which is not maintained as per the requirements of the Constitution. In this regard the argument is that the amounts in the Fund are not made public nor is it subject to the control of the Auditor General of Pakistan as required under Article 169 of the Constitution. It was also argued that all amounts collected under the garb of fees go into the Fund but instead are required to be deposited in the Federal Consolidated Fund as required under Article 78 of the Constitution. Therefore, the impugned renewal fee is a tax and its quantum cannot be justified against the cost of administrating the Petitioners under the Ordinance. The arguments raised by the Petitioners are premised on the ground that the impugned renewal fee is in the nature of a tax because there is no quid pro quo for the fees charged meaning that

PEMRA does not provide any service to the Petitioners against the renewal fee. It is the case of the Petitioners that PEMRA merely regulates the content and conduct of the Petitioners and does not provide any service for the purposes of radio broadcasting. It is also their case that fees for services rendered may be imposed under Article 73(3)(a) of the Constitution of Islamic Republic of Pakistan, 1973, however where the fee charged has no correlation to the regulatory cost or when there is no quid pro quo then it is in the nature of a tax and not a fee.

12. Article 73(3)(a) of the Constitution reads as follows:

A Bill shall not be deemed to be a Money Bill by reason only that it provides:

> (a) for the imposition or alteration of any fine or other pecuniary penalty, or for the demand or payment of a licence fee or a fee or charge for any service rendered; or

A bare reading of this Article makes it clear that a licence fee or fee is not a tax and that a licence fee is distinct from a fee or a charge for services rendered. Hence it is not necessary that every licence have a quid pro quo. It is also not necessary that the licence fee or renewal fee be passed through a Money Bill. This question was considered by the Indian Supreme Court where similar provisions of the constitution were under discussion. In the case titled Secunderabad Hyderabad Hotel v. Hyderabad Municipal (AIR 1999 SC 635) it was held that:

> It is, by now, well settled that a licence fee may be either regulatory or compensatory. When a fee is charged for rendering specific services a certain element of quid pro quo must be there between the service rendered and the fee charged so that the licence fee is commensurate with the cost of rendering the service although exact arithmetical equivalence is not expected. However, this is not the only kind of fee which can be charged. Licence fees can also be regulatory when the activities for which a licence is given require to be regulated or controlled. The fee which is charged for regulation for such activity would be validly classifiable as a fee and not a tax although no service is rendered. An element of quid pro quo for the levy of such fees is not required although such fees cannot be excessive.

It was also held in the case titled A.P. Paper Mills Ltd. v. Govt. of A.P. and another (2000) 8 Supreme Court Cases 167) that:

> Licence fee can be a regulatory fee and not a fee for any special services rendered. The purpose of the licence is to enable the authorities to supervise, regulate and monitor the activities relating to factories in that case with a view to secure proper enforcement of the provisions of the law. In such cases the element of quid pro quo is not required.

Three Judges of the Indian Supreme Court in the case titled Sreenivasa General Traders v. State of A.P. (1983) 4 SCC 353: (1983) 3 SCR 843) held that:

> The traditional view that there must be actual quid pro quo for a fee has undergone a sea change. The distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is for payment of a specific benefit or privilege although the special advantage is secondary to the primary motive of regulation in public interest. If the element of revenue or general purpose of the State

> predominates, the levy become a tax. In regard to fees there is, and must always be, correlation between the fee collected and the service intended to be rendered.

In the case titled Corpn. of Calcutta v. Liberty Cinema (AIR 1965 SC 1107: (1965) 2 SCR 477) where the matter was again considered by the Indian Supreme Court as under:

> There is a distinction between the licence fee and fee for services rendered. While former is not intended to be a fee for services rendered, the latter will require an element of quid pro quo.

13. Article 73(3)(a) of the Constitution clearly distinguishes between licence fee and a fee for services rendered which means that a licence fee does not require any quid pro quo but there must be correlation between the fee charged and the cost of administration under the relevant law. Essentially the licence fee must commensurate with the cost of regulating although exact arithmetical equivalence is not expected. The licence confers a right on the licence holder to do something which it otherwise could not do and in this case PEMRA is required to regulate the licence holder to ensure compliance of the law and the terms of the licence. Therefore in terms of the Constitution a licence fee can be regulatory in nature where the regulator imposes a fee for regulating the activities of the licence holder. In such cases there is no quid pro quo. In the instant cases the Petitioners have challenged the impugned renewal fee on the ground that it is excessive and that the excessive quantum cannot be justified as there is no quid pro quo and because the cost of regulating the Petitioners cannot be so high. Further that PEMRA provides no service or facility to the licence holders to justify the excessive demand. In this context, with reference to the vires of Section 14 of the Ordinance the arguments made before this Court are totally misconceived as the Constitution itself draws a distinction between tax and licence fee or a fee charged for services rendered. Furthermore the Petitioners have challenged the renewal fee which is an extension of the licence fee for a renewal period. The licence fee is a regulatory fee as is the renewal fee. Hence the licence fee and the renewal fee do not need to be passed through a Money Bill nor does it require any quid pro quo. Hence the challenge to the vires of the Section on these grounds has no merit. Furthermore since it is not a tax the licence fee or the renewal fee does not need to go into the Federal Consolidated Fund. So far as the arguments with respect to the requirements of Article 169 of the Constitution are concerned meaning that the Fund under Section 14 should be subjected to the control and monitoring of the Auditor General of Pakistan, there is merit. Article 169 provides that the Auditor General shall in relation to the accounts of any authority or body established by the Federation or a Province perform such functions and exercise such powers as may be determined by or under an Act of Parliament or by an order of the President. Section 3 of the Ordinance provides for the establishment of the Authority by notification of the Federal Government meaning thereby that it is an Authority established by the Federation. Therefore the accounts and the Fund of PEMRA have to be maintained in terms of the requirements provided for under Articles 169, 170 and 171 of the Constitution.

14. The next issue is the challenge to the rebidding process for renewal of the licences issued to the Petitioners and.the quantum of the renewal fee determined by PEMRA on the basis of the rebidding process. In order to appreciate the arguments raised the basic scheme of the law must be understood.

Scheme of Law

15. The relevant law is the PEMRA Ordinance. The Ordinance was promulgated to regulate broadcast media in Pakistan. In terms of the preamble, it is the duty of PEMRA to enlarge the choice of information, education and entertainment available to the people through the media. The primary role of PEMRA is to improve access to mass media and ensure accountability, transparency and good governance by optimizing the free flow of information. Section 4 of the Ordinance provides that PEMRA shall be responsible for regulating the establishment and operation of all broadcast media and distribution services in Pakistan. Further that PEMRA shall regulate the distribution of radio channels and that PEMRA can make regulations for carrying out the purposes of the Ordinance. Section 19 of the Ordinance authorizes PEMRA to issue licences for broadcast media and distribution services through an open and transparent bidding process. Section 20 of the Ordinance provides for the terms and conditions of the licence and in terms of both Sections 19 and 20 for the purposes of issuance of a licence, PEMRA can charge licence fee and an application process fee. Section 39 of the Ordinance is the rule making section which requires PEMRA to make rules for issuance of licences, its terms and conditions including any fees to be charged in connection with licences and related matters. In terms of Section 39 of the Ordinance, PEMRA issued the Pakistan Electronic Media Regulatory Authority Rules, 2009 ("Rules"). The Rules prescribe the licence criteria and the process for issuance of the licence, its terms and conditions and the terms on which a licence can be renewed. The relevant provisions of the Rules for the purposes of renewal of licences are Rules, 5 and 8 which are reproduced below:

> **5. Duration and renewal of licences**: (1) The licence shall be granted for a period of five, ten or fifteen years subject to payment of fee as set out in Schedule-B.
>
> (2) The licence shall be valid for the term for which it is granted subject to the payment of annual fee or any other charges as set out in the Schedule-B.
>
> (3) The fee relating to the grant of licence, renewal thereof, late payment surcharge and fine, if any, shall be deposited in the account of the Authority.
>
> **8. Fees and security deposits:** (1) Each successful applicant shall, within time prescribed by the Authority and before the issue of the licence, deposit the applicable licence fee and make a security deposit, if applicable, as set out in the Schedule-B. The security deposit shall be refundable after the expiry of one year of operation of the station to the satisfaction of the Authority.
>
> (2) Every licencee shall follow the specified time line relating to the payment of any dues of the Authority.

In terms of these Rules PEMRA charges the applicable licence fee, an annual fee and a renewal fee. The process of renewal is provided under Rule 12 of the Rules which is reproduced below:

> **12. Renewal of licence on expiry of the licence term:** (1) A licencee may, at least six months prior to the expiry of the licence, apply to the Authority for renewal of its licence and the Authority may renew the licence subject to:
>
> (a) satisfactory past performance of the licencee;
>
> (b) the opinion of the concerned Council if the Authority so requires;
>
> (c) payment of the prescribed fee prevalent at the time of renewal and payment of outstanding dues, if any, and
>
> (d) fulfillment of any other terms and conditions as prescribed, or varied in the public interest, by the Authority from time to time.
>
> (2) In case of refusal to renew a licence the Authority shall record reasons in writing.
>
> (3) The Authority may renew a licence for such term as the original term of the licence bringing from the date of expiry of the licence.

16. In terms of Section 4(3) of the Ordinance, PEMRA notified the Regulations on 31.1.2012. The Regulations further detail the processes for grant of licence and its renewal. The relevant provisions of these Regulations are as follows:

> **4. Application for grant of a licence:** (1) The Authority may invite, by advertising through media, the expression of interest (EOI) or applications from the general public, interested in establishing and operating radio broadcasting stations in any particular category or area of coverage in Pakistan, for award of licences through bidding under Section 19 of the Ordinance.
>
> (2) The application for grant of a licence to establish and operate a radio broadcast station shall be made on the application form specified by the Authority for such purpose from time to time.
>
> (3) The applicant shall indicate the desired category of licence, in terms of the area of coverage from amongst the given category and shall also provide the details of equipment intended to be used.
>
> (4) Each application for grant of a radio broadcast station licence shall be accompanied by such application processing fee (not-refundable) as determined by the Authority from time to time.
>
> (5) The Authority may, where applicable, forward the application to the Frequency Allocation Board (FAB) through Pakistan Telecommunication Authority (PTA) for frequency allocation.
>
> (6) The application may be processed simultaneously, however, the licence shall be issued only after scrutiny clearance from the Ministry of Interior, allocation of the frequency by FAB where applicable and on completion of other legal requirements.
>
> (7) Base price for the licence shall be determined by the Authority.
>
> **6. Issuance and refusal of licence**: (1) The Authority shall process each application and on being satisfied that the applicant(s) fulfills the

eligibility criteria and requirements of the Ordinance, rules and regulations may, on receipt of the applicable licence fee and prescribed security deposit, issue licence to the applicant(s).

Provided that security deposit shall be refundable after one year of satisfactory performance by the licencee and may be forfeited where the licence has failed either to commence its operation within given time or show satisfactory performance for one year:

Provided further that if at any time it is found that the licencee had provided false or misleading information/ certificate/ documents for issuance of the licence, the licence shall be withdrawn.

(2) The Authority, if satisfied that the applicant is not eligible for grant of licence or the issuance of licence to a particular person is not in the public interest may refuse grant of licence to such person by recording reasons in writing.

(3) Any change in the particulars of the applicant provided in the application shall be notified to the Authority without any delay.

(4) The Authority shall take decision on the application for a licence within one hundred days from receipt of the application subject to fulfillment of all the legal requirements, security clearance from the Ministry of Interior, and frequency allocation by FAB in relevant cases.

Provided that if more time is consumed in the processing of the application, the same shall not be construed as an expectancy to get a licence merely by reason that the application was not decided within 100 days.

7. Fees and security deposits: (1) The licence fee, annual fee other charges and licence renewal fees payable pursuant to these regulations shall be as determined by the Authority from time to time.

(2) A surcharge at the rate of five percent per month, up to a maximum of fifteen percent, for late payment of annual fee or licence renewal fee as the case may be, shall be payable:

Provided that without prejudice to the power of the Authority to revoke a licence, if a licencee fails to pay the outstanding dues including surcharge after expiry of three months from the due date, the licence shall be suspended and equipment shall be seized. However, the licence may be reinstated and equipment may be returned on payment of outstanding dues and such fine as the Authority may impose:

Provided further that if the licencee shows sufficient and reasonable cause, the Chairman may relax the due date by a maximum of seven days in exceptional cases for the reasons to be recorded in writing.

(3) The annual fee payable pursuant to the Ordinance, Rules and Regulations shall include such percentage of the gross advertisement revenue as determined by the Authority from time to time.

9. Renewal of licence on expiry of the licence term: (1) A licencee desirous of getting its licence renewed may, at least six months prior to the expiry of the licence, apply to the Authority for renewal of its licence and the Authority may renew the licence for such terms as deemed appropriate subject to:

(a) Fulfillment of eligibility criteria and other conditions as provided in the Ordinance, rules, regulations or otherwise prevalent at the time of renewal of the licence;

(b) Satisfactory past performance;

(c) Security clearance of the applicant by the Ministry of Interior:

Provided that if decision of Ministry of Interior regarding security clearance of the applicant is not received within a period of six months or before expiry of the licence, whichever is earlier, subject to fulfillment of other conditions, the licence may be renewed conditionally subject to security clearance by the Ministry of Interior and if the security clearance is refused the licence shall be withdrawn immediately without incurring any liability on part of the Authority.

(d) proof of registration with tax authorities for income tax and sales tax;

(e) the applicant must not be a defaulter of any financial institution, Federal Board of Revenue or any organization/ entity owned or operated by the Government of Pakistan.

(f) payment of renewal fee as applicable at the time of renewal, and

(g) payment of outstanding dues in respect of all licences that are held by the applicant, directly or indirectly.

(2) Licence renewal fee shall be prevailing applicable licence fee for the respective area and category of licence plus rate of inflation calculated as prescribed by the State Bank of Pakistan:

Provided that if bidding has not been held for such licence, the renewal fee shall be determined by the Authority.

(3) The Authority may decide not to renew a licence beyond the expiry date of the ongoing term after recording reasons in writing.

17. In terms of the Ordinance, PEMRA issues licences for broadcast media through a bidding process as per the terms and conditions provided in Section 20 of the Ordinance. A licence is for five, ten or fifteen years and each successful applicant has to pay a licence fee and an annual renewal fee plus a renewal fee if it wants renewal of the licence. In the cases before the Court all licences have been issued for ten years. The Rules define applicable licence fee to mean the licence fee prescribed by the Authority or where determined through a bidding process. The quantum of the licence fee and the annual renewal fee is provided in terms of Rule 5 in Schedule B of the Rules. In terms of Schedule B, licence fee is paid on a base price. The base price for all those cities where TV licenses have been issued is the last applicable fee meaning the last paid licence fee. The quantum of the licence fee is determined on the basis of the type of licence, whether commercial or non-commercial and the area where it operates, whether national, provincial or local. Hence the base price is the minimum licence fee which must be paid and which fee will vary as per the size of the city, town or area. A licence is granted on the basis of a bidding process and the applicable licence fee will be the highest bid which cannot be below the base price. In the instant cases the dispute relates to the renewal fee which was determined on the basis of a bidding process. In terms of Rule 5(3) of the Rules PEMRA has to determine the renewal fee. Regulation 9 of the

Regulations provides that the renewal fee shall be the applicable licence fee for the category and the respective area plus the rate of inflation as calculated by State Bank of Pakistan. In terms of what was argued by learned counsel for PEMRA, Mr. Salman Akram Raja, the renewal fee under dispute was determined through a bidding process held in 2012 and all existing licence holders, being the Petitioners in this case, were given the right of first refusal to match the highest bid. He argued that the bidding process was adopted to set the renewal fee because the value of the licence has increased due to the increased market value for bandwidth. As per his contentions market forces determine the value of the bandwidth, hence when the licence period expired the licensees along with others were offered to participate in the bidding process or match the highest bid. He argued that using market forces to set the renewal fee was fair, transparent and as per industry practice. The Petitioners did not participate in the bidding process, hence they were offered the right to match the highest bid. Instead of accepting or rejecting the offer by PEMRA they challenged the renewal process in this Court through these Petitions. As per his arguments the quantum of the fee is high because the Petitioners use radio spectrum which is a scarce and valuable property of the state. The utilization of spectrum is regulated by the International Telecommunication Union ("ITU") and Pakistan is required to follow ITU protocols and standards for spectrum utilization. Hence the renewal fee is totally justified because if the Petitioners want to use a scarce and valuable state resource they have to pay the market value. He further argued that there is no vested right of renewal and the Petitioners are subject to the process adopted by PEMRA to determine renewal fee.

18. So far as the bidding process is concerned, neither the Ordinance nor the Rules or Regulations prescribe for rebidding for the purposes of renewal of the licence. Section 24(5) of the Ordinance provides that PEMRA may renew a licence on such terms and conditions as may be prescribed and in case of refusal to renew a licence, reasons have to be recorded in writing. The process for renewal is given under Rule 12 of the Rules where a licence holder must apply for renewal at least six months prior to the expiry of the licence. Through its application the licence holder, for the purposes of renewal, has to show its performance over the duration of the licence that it has paid the prescribed fee and all other dues and that it has satisfied all terms and conditions prescribed by PEMRA. Rule 12(3) of the Rules prescribes that PEMRA can renew the licence on the same terms as the original licence and in case PEMRA refuses to renew the licence it shall give reasons in writing. Therefore under the Ordinance and the Rules the licence holder has to show satisfactory performance and fulfillment of all terms and conditions prescribed under the licence or by PEMRA in public interest for the purposes of renewal. Regulation 9 of the Regulations further details this process by requiring PEMRA to ensure that the licence holder still meets the eligibility criteria and other conditions for grant of renewal of licence prescribed under the Rules. In addition security clearance is required from the Ministry of Interior from the Tax Authority and that the licence holder is not a defaulter of any financial institution or any government organization. The Regulations reiterate the requirement that all dues and payments must be made in order for the licence to be renewed. Regulation 9(2) of the

Regulations specifically provides that if bidding has not been held for such licence, the renewal fee shall be determined by PEMRA meaning thereby that where bidding took place for issuance of the licence, it is not required for renewal of the licence. Therefore in terms of the Rules and Regulations a clear process has been set out for renewal of a radio licence. The prescribed process does not contemplate rebidding for the purposes of determining the renewal fee or for the renewal of the licence. In these circumstances rebidding for renewal purposes tantamounts to issuance of a fresh licence which is clearly contrary to the statutory procedure. Rule 12 of the Rules and Regulation 9 of the Regulations when read together creates a statutory right for the licence holder to have the licence renewed on the terms and conditions provided. Correspondingly PEMRA is obligated to follow the prescribed Rules and Regulations and hence PEMRA cannot go beyond its delegated power and set out a new process to renew a licence.

19. During the course of arguments the emphasis of the counsel for PEMRA was that rebidding for renewal purposes is necessary because the licence holder is allowed to use valuable state property in the form of radio spectrum. Utilization of radio spectrum means that a licence holder must pay the market value of the spectrum and in order to ensure that the market value is determined fairly and through a transparent process PEMRA offered all radio licences for rebidding. Hence PEMRA in its wisdom and authority decided to determine the renewal fee through a bidding process. He explained that the electromagnetic spectrum is a unique natural resource, which carries a high value for its utilization and placed reliance on the case titled Pakcom Limited and others v. Federation of Pakistan and others (PLD 2011 SC 44). Hence the justification for the exorbitant renewal fee is spectrum utilization. In this regard, two questions arise. First who regulates spectrum; and second whether PEMRA is authorized to charge radio licence holders renewal fees for spectrum utilization. Radio spectrum has three dimensions which govern its utilization that is time, space and frequency. If two radio signals occupy the same time and space on the same frequency it will create interference and disturbance which will adversely affect the dissemination of information. Radio spectrum uses electromagnetic waves called radio waves which are regulated by the ITU. The ITU determines which parts of the radio spectrum are to be used by different radio transmissions. A band is a small section of the spectrum of radio frequency in which channels are used. ITU has divided radio spectrum into bands extending from Very Low Frequencies (VLF) to Very Ultra, Super and Extremely High Frequencies (EHF) and beyond. The lower frequencies of the radio spectrum are used for "point-to-point" communications and for navigational aids. AM radio is located in the range between 300 and 3,000 kHz, known as the Medium Frequency band (MF). FM radio and VHF television (channels 2-13) are in the Very High Frequency band (VHF) from 30 to 300 MHz. The Ultra High Frequency band (UHF) from 300 to 3,000 MHz, is the location of UHF television (channels 14-51). Still higher frequencies are used for microwave relays and communication satellites. Spectrum allocation of frequency allocation is the division of the electromagnetic spectrum into radio frequencies or bands. Within Pakistan the Frequency Allocation Board ("FAB") allocates frequency to the radio licence. FAB falls under the control

of the Pakistan Telecommunication Authority ("PTA") and is the exclusive authority to allocate and assign portions of radio frequency spectrum to radio broadcasting operators. FAB has set out a table of Frequency Allocations showing the allocation of bands to various services. The Board has a National Frequency Management and Monitoring System ("NFMMS") to monitor the frequency spectrtim through its fixed and mobile monitoring stations. Hence it authorizes the use of the frequency and monitors its utilization as per the standards of the ITU.

20. In the instant cases the record shows that FAB allocated the frequency to the Petitioners for the establishment of FM radio broadcasting. In terms of letter dated 2.11.2005 by FAB the Petitioner in W.P. No.2446/2013 was allocated its frequency and the letter clearly stipulates that the frequency allocated is the property of the state. Regulation 4(5) of the Regulations also clearly provides that PEMRA shall forward an application for FM Radio Broadcasting to FAB through the PTA for frequency allocation. Similar letters have been issued to the other Petitioners in the connected writ petitions by FAB. Therefore the spectrum allocation and spectrum utilization is regulated by PTA through FAB.

21. In terms of the Ordinance the mandate of PEMRA is to issue broadcast licences so as to enlarge the choice of information, education and knowledge to the public through the media. PEMRA is the licensing authority which issues broadcast licence and thereafter regulates content and the conduct of media broadcasters. PEMRA is required to ensure the free flow of information and the access to mass media for the general public. Hence in terms of the Ordinance it is not within PEMRA's mandate to regulate or charge for spectrum utilization and frequency allocation. Its function is to provide the free flow of information and to regulate broadcast media licensed under its regime. Even the terms of the licences issued to the Petitioners clearly show that the licence regulates the content and conduct of the Petitioners. The licence provides for the programming mix, the advertising and sponsorship standards and its requirements as well as the technical specifications. In order to ensure that the standards and requirements and content mix is maintained the licence also provides for the terms on which PEMRA can monitor, regulate and investigate the licensee's performance. Hence as per the terms and conditions of the licence PEMRA's role is as content and conduct regulator. It is also noted that the licences provided for the same terms and conditions for renewal as given under the Rules and Regulations. Therefore there appears to be no justification to condition the renewal on a rebidding process and to charge the renewal fee for spectrum utilization or frequency allocation.

22. The manner in which the renewal fee is to be determined is clearly stipulated in the Regulations. Regulation 9 provides that renewal fee shall be the applicable licence fee plus the rate of inflation calculated by the State Bank of Pakistan. Interestingly the Regulations have been issued by PEMRA yet it has totally ignored the prescribed process. In terms of Regulation 9 of the Regulations, the applicable licence fee is the fee paid by the licensee and in order to meet the increased cost, PEMRA is entitled to the cost of inflation. In these cases, since the licence fee is a

regulatory fee, hence its renewal means a continuation of the licence fee plus cost of inflation. In such cases where the licence fee is regulatory, where no service or privilege is granted by the government authority and where the only purpose of the licence is regulatory meaning for enforcement of statutory requirements, then such a fee cannot be excessive. In the instant cases the chart in para 4 clearly evidences how the renewal fee has exceeded the applicable licence fee and in no way justifies the applicable regulatory cost. In the instant Petition Rs.3.5 million plus Rs.2.5 million was the applicable licence fee for Karachi and Lahore whereas the renewal fee is Rs.45 million and Rs.32 million respectively. In the same way for Islamabad it was increased from Rs.2.5 million to Rs.44 million. The proportion of the increase in the renewal fee is the same in the cases of the other Petitioners as depicted in the chart in para 4 of this judgment. In this way the impugned renewal fees are excessive and contrary to the scheme of law.

23. The other issue raised by the Petitioner in W.P. No.29949/14 is that PEMRA be restrained from acting under the Regulations and allow the stated Petitioners to operate five licences whereas Regulation 5(2) of the Regulations provides that a licensee can only operate four licences. The argument is that placing restrictions on the number of total licences is a restriction on the Petitioner's right to do business which is not justifiable. In this regard, it is noted that it is well within the regulatory function of PEMRA to cap the total number of licences for a licence holder as it falls within the mandate to regulate and ensure the free flow of information, enlarge the choice and increase access to mass media at local and community level. Therefore no illegality is made out on these grounds. So far as the Petitioners in W.Ps. Nos.12908/13 and 12909/13 are concerned, they participated in the bidding process for the purposes of renewal. They have impugned letter dated 12.10.2012 wherein PEMRA rejected their demand for the licence fee and security fee to be paid in installments.

24. Therefore for the same reasons enumerated above, these Petitions that is W.Ps. Nos. 12908/13, 12909/13 and W.P. No.29949/14 are dismissed as the rebidding process has been held to be illegal. It is clarified that if the Petitioners were licence holders then they are entitled to renewal in terms of the Ordinance and Rules read with Regulation 9 of the Regulations.

25. Under the circumstances, W.Ps. Nos.2446/13, 4366/13, 4367/13, 4368/13, 4369/13, 4370/13 and 4371/13 are allowed and the rebidding process held in 2012 as well as renewal fees demanded by PEMRA are declared illegal and against the mandate of the law. The impugned orders dated 3.1.2013 in W.P. Nos.2446/13, 4366/13, 4368/13, 4370/13, 4371/13 and dated 15.1.2013 in W.P. No.4369/13 are set aside to the extent that the renewal fee shall be determined on the basis of the applicable licence fee plus cost of inflation as determined by State Bank of Pakistan.

Schedule-A
Details of Writ Petitions mentioned in 'judgment
dated 12.5.2017 passed in W.P. No.2446/2013

(1) W.P. No. 2446/13 Trade Serve International (Pvt.) Ltd etc. v. Pakistan Electronic Media Regulatory Authority etc., (2) W.P. No.4366/13 Shamal Media Services (Pvt) Limited etc. v. Federation of Pakistan etc. (3) W.P. No.4367/13 Syndicate Entertainment (Pvt.) Limited etc. v. Federation of Pakistan etc. (4) W.P. No.4368/13 Salaar Engineering and Trade Enterprise (Pvt.) Limited, Islamabad etc. v. Federation of Pakistan etc. (5) W.P. No.4369/13 Kohinoor Airwaves (Pvt.) Limited etc. v. Federation of Pakistan etc. (6) W.P. No.4370/13 Future Tech Engineering and Systems (Pvt.) Limited etc. v. Federation of Pakistan etc. (7) W.P. No.4371/13 VectraCom Broadcasting Services (Pvt.) Limited etc. v. Federation of Pakistan etc. (8) W.P. No.29949/14 Radio Buraq (Pvt) Limited v. Federation of Pakistan etc. (9) W.P. No.12908/13 Con Air Waves (Pvt) Ltd. v. Federation of Pakistan etc. (10) W.P. No.12909/13 Auburn Waves (Pvt.) Ltd. v. Federation of Pakistan etc.

KMZ/T-11/L Order accordingly.

2017 C L D 1054
[Lahore]
Before Ayesha A. Malik and Jawad Hassan, JJ
MAZHAR IQBAL POULTRY FARM---Appellant
Versus
ENVIRONMENTAL TRIBUNAL, LAHORE and others---Respondents
Appeal No. 785 of 2011, heard on 2nd February, 2017.

Punjab Environmental Protection Act (XXXIV of 1997)---

----Ss. 21(3)(2) & 23---Order of Tribunal to shift location of poultry farm---"No Objection Certificate" not obtained---No proper waste management system---Poultry farm owner/accused assailed order of Environmental Tribunal and contended that poultry farm was located at an isolated place from dwellings and water channel which had proper waste disposal mechanism of dead birds as per environmental standards---Owner challenged Environmental Protection Order and asserted that he did not require "NOC" as his farm was made prior to the promulgation of Punjab Environmental Protection Act, 1997; that inspection report during complaint proceeding being without notice carried no independent statements of witnesses of locality---Environmental Agency contended that the accused ignored Environmental Protection Order "the order" as there was no proper waste disposal mechanism at poultry farm which was situated near residences and water courses---Validity---Record showed that Tribunal passed the order in presence of accused who admittedly raised no objection at that time nor did he raise any objection against the maintainability of the complaint or the factual report presented by the Committee to the Tribunal---Record also showed that the Punjab Environmental Order was issued against accused long time before requiring him to immediately stop his business because of causing environmental hazardous---Admittedly, "No Objection Certificate" had not been obtained by the accused from the Environmental Protection Agency for carrying out the poultry farm business and despite service of notice on the accused he did not appear in the proceedings leading up to the order---On the basis of statement of accused the Tribunal ordered inspection of the premises and required two witnesses of the locality to verify the version of the accused---In terms of the report there were heaps of burnt poultry waste near the poultry farm and there was no soakage pit available and the workers used the jungle as toilet---Distance of nearby houses was approximately 50 meters from poultry farm and the water channel ran through the farm sheds---Appellant was unable to refute any of the observations made by the inspection team---Presence of the appellant during the time of inspection was not relevant or material to the case as the fundamental objective of the inspection was to determine the condition of poultry farm, its distance from any residential area and to ascertain whether there was a proper waste management system---No illegality had been made out in the order of the Tribunal---Appeal was dismissed accordingly.
Akhtar H. Awan for Appellant.
Ch. Sultan Mehmood, A.A.-G. for Respondents.
Date of hearing: 2nd February, 2017.

JUDGMENT

AYESHA A. MALIK, J.---This is an appeal under section 23 of the Punjab Environmental Protection Act, 1997 ("Act") challenging impugned order dated 23.2.2011 passed by Respondent No.1 in Complaint No.229/10.

2. The case of the Appellant is that he was running a poultry farm since 1976. The land on which the poultry farm was running was obtained on lease for a period of 50 years. The poultry farm is located in an isolated place in the hills about 4/5 kilometers away from village Nandkot. Learned counsel for the Appellant submitted there are no dwellings near the poultry farm nor any population close to the poultry farm. There is a shed which has been made and a furnace and husk/litter is available for the poultry farm. Learned counsel submitted that Environmental Protection Order ("EPO") dated 8.9.2016 was issued without hearing the Appellant and, when the Appellant found out about the EPO he challenged it and .stated in his reply that the poultry farm was not functional from 18.1.2011 to April 2011. Learned counsel further submitted that the Appellant's poultry farm was made prior to the promulgation of the Act, hence the Appellant is not required to obtain No Objection Certificate under the Act. Learned counsel further submitted that a committee was formed to inspect the poultry farm of the Appellant in terms of order dated 18.1.2011 of the Environmental Tribunal ("Tribunal"). The committee visited the poultry farm of the Appellant without any notice to the Appellant and without taking the independent statement of the two witnesses of the locality as required in the order of the Tribunal dated 18.1.2011. Learned counsel submitted that the facts stated in the impugned order are incorrect. He clarified that poultry farm has been closed since then and the Appellant is facing great loss and if his poultry farm cannot be permitted to continue on the given land the investment made by the Appellant will be totally wasted.

3. Learned Law Officer argued that EPO was issued on 8.9.2010. The Appellant was aware of the environment hazardous being caused and the pollution, generated yet he ignored the EPO. He was served notices for hearing but he did not appear. Respondent No.2 then filed a complaint under section 21(3)(a) of the Act wherein it is specifically mentioned that the Appellant was polluting the environment not only in the form of bad smell but also that he did not have any proper waste disposal mechanism of the dead birds. He argued that the Respondent damaging the environment which was hazardous to the health of the people residing in the area. Learned Officer submitted that it is a populated area having residences and industries in the area. The Appellant poultry farm polluting the water in the Korang River and Rawal Lake as the farm is located in the catchment area. Learned Law Officer submitted that the Appellant was present at the time when the order was passed by the Tribunal. He raised no objection nor did he present any defence on his behalf. Therefore he is bound to comply with: the requirement of the impugned order failing which he cannot maintain the poultry farm business at the given location.

4. Heard and record perused. The impugned order dated 23.2.2011 passed by the Tribunal requires the Appellant to shift its poultry farm business from the given location at least 500 meters away from the residential area and 500 meters away from the water channel. The record shows that this order was passed in presence of the Appellant who admittedly raised no objection at that time nor did he raise any objection against the maintainability of the complaint or the factual report presented by the committee to the Tribunal. The record also shows that the EPO was issued on 8.9.2010 requiring immediate stoppage of the business of the Appellant. Admittedly No Objection Certificate has not been obtained from the Environment Protection Agency ("EPA") for carrying out the poultry farm business and despite service of notice on the Appellant he did not appear in the proceedings leading up to the EPO. Although, the learned counsel has denied receipt of any notice to him which is not sufficient to refute the record, and the order of the EPA which states that notices were issued, service was effected but he opted not to appear. The record also shows that even for the purposes of the appeal in order to effectuate and ensure the attendance of the Appellant before the Tribunal warrant for his arrest was issued on the basis of which the Appellant appeared before the Tribunal. Therefore the Appellant's contention that he was not served with the notices or that he had no knowledge of the EPO is without any basis. We also note that the Appellant was present on 18.1.2011 when he received copy of the complaint and he filed his reply wherein he claimed that there was a separate room in the poultry farm for keeping the litter and the dead birds/chicks were being burnt in the furnace. He also stated that the farm is at a reasonable distance from the populated area. On the basis of his statement the Tribunal ordered inspection of the premises and required two witnesses of the locality to verify the reply of the Appellant. The inspection took place on 11.2.2011 by Inam ul Haq, Inspector, EPA, Rawalpindi and District Officer (Environment), Rawalpindi. Workers of the poultry farm were present at the site and in their presence report was prepared. In terms of the report there were heaps of burnt poultry waste near the poultry farm. There was no soakage pit available and the workers used the jungle as toilet. The distance of nearby houses is approximately 50 meters from the poultry farm and the water channel runs through the farm sheds. On the basis of the said report, the Tribunal passed its order on 23.2.2011 in the presence of the Appellant who apparently was unable to refute any of the observations made by the inspection team on 11.2.2011. The presence of the Appellant during the time of the inspection is not relevant or material to the case as the fundamental objective of the inspection was to determine the condition of the poultry farm, its distance from any residential area and to ascertain whether there was a proper waste management system. Under the circumstances, no illegality has been made out in the impugned order dated 23.2.2011 passed by the Tribunal.

5. In view of the aforesaid, the instant appeal is dismissed.

MQ/M-18/L Appeal dismissed.

2017 P L C (C.S.) 943
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
IRAM SHAHADI
Versus
PRINCIPAL SCHOOL OF NURSING MAYO HOSPITAL, LAHORE and others
I.C.A. No.1342 of 2016, decided on 2nd February, 2017.

Constitution of Pakistan---

----Art. 199--- Constitutional petition--- Maintainability--- Show-cause notice, issuance of--- Petitioner employee was heard and recommendations had been forwarded to the competent authority---No adverse findings against the employee were available on record---Employee on the apprehension of coercive action against her filed constitutional petition---High Court in constitutional jurisdiction could not act upon mere apprehension---No substantive right of employee had been infringed and only show cause notice had been issued---Constitutional petition was not maintainable in circumstances---Intra court appeal was dismissed accordingly.

Deputy Commissioner of Income Tax/Wealth Tax, Faisalabad and others v. Messrs Punjab Beverage Company (Pvt.) Ltd. 2007 PTD 1347 rel.
Ch. Muhammad Arshad for Appellant.
Ch. Sultan Mehmood, AAG along with Ejaz Farrukh, Senior Law Officer, Health Department.

ORDER

Through this ICA, the Appellant has impugned order dated 5.9.2016 passed by the learned Single Judge in W.P. No.27414/2016.

2. The facts of the case are that the Appellant after passing the matriculation exam applied for admission into General Nursing Training Course in the School of Nursing Mayo Hospital, Lahore. The Appellant joined the school on 7.1.2013. After completion of three years at the school, the Principal School of Nursing, Mayo Hospital, Lahore issued a provisional certificate with reference to the general nursing course attended. On 27.8.2016 the Appellant was issued a show cause notice alleging therein that she did not meet the merit for admission, hence her admission would be cancelled. She challenged the notice through W.P. No.27414/2016 before the learned Single Judge which was dismissed vide impugned order dated 5.9.2016. Learned counsel argued that after the issuance of show cause notice, a notice for personal hearing was issued on 6.9.2016 to the Appellant. Learned counsel stated that in compliance thereof the Appellant appeared before the Inquiry Committee yet the Principal of School of Nursing, Mayo Hospital, Lahore is threatening to terminate the admission of the Appellant.

3. The learned Law Officer raised the objection that it is just a show cause notice in which the Appellant was asked to submit her reply and relevant documents. Learned Law Officer further argued that the writ petition was not maintainable as a show cause notice was challenged in the said writ petition. He also stated that the Inquiry Committee has forwarded its recommendations to the competent authority who has yet to decide the matter.

4. Heard and record perused.

5. Admittedly the case of the Appellant was heard and recommendations have been forwarded to the competent authority. In the first instance the writ petition was not maintainable and we are in agreement with the findings of the learned Single Judge. At this stage there is no adverse finding against the Appellant. She apprehends that the Respondents will take coercive action against her. This Court in constitutional jurisdiction does not act upon mere apprehension. Furthermore it is just a show-cause notice and no substantive right is being infringed. The Hon'ble Supreme Court of Pakistan has held in the case titled Deputy Commissioner of Income Tax/Wealth Tax, Faisalabad and others v. Messrs Punjab Beverage Company (Pvt.) Ltd. (2007 PTD 1347) that tendency of by-passing the remedy provided under law, and resort to Constitutional jurisdiction of High court was deprecated. In view of the contents of the notice the Department only contemplates to take action against them. The petitioner instead of rushing to the High Court and consuming sufficient time should have submitted reply before invoking the jurisdiction of the High Court. We have held in the judgment that such practice is to be deprecated because if merely on the basis of show-cause notice proceedings are started then in such position department would never be in a position to proceed with the cases particularly the recovery of revenue etc. Thus keeping in view the circumstances of the case we are of the opinion that respondent had wrongly availed remedy under Article 199 of the Constitution.

6. In view of the aforesaid, the instant appeal is dismissed. The impugned order dated 5.9.2016 passed by the learned Single Judge in W.P. No.27414/2016 is maintained.

ZC/I-4/L Appeal dismissed.

2017 M L D 1209
[Lahore]
Before Ayesha A. Malik and Jawad Hassan, JJ
MUHAMMAD ASHRAF---Appellant
Versus
ELECTION COMMISSION and others---Respondents
I.C.A. No.400 of 2016, decided on 21st February, 2017.

Punjab Local Government Act (XVIII of 2013)---

----Ss.37, 38 & 39---Punjab Local Government (Conduct of Elections) Rules, 2013, R.38(4)---Election for local government---Notification for returned candidate---Carrigendum, issuance of---Scope---Name of respondent was published as returned candidate in the Official Gazette whereafter an application for correction of result was moved before Returning Officer which was accepted and corrigendum was issued but same was set aside by the Single Judge of High Court---Validity---Once election result was notified, only recourse that an aggrieved candidate had was before the Election Tribunal---Appellant moved an application before Returning Officer after notification of respondent in the Official Gazette as returned candidate---Election Commission issued a corrigendum and notified fresh result which was against the provisions of law---Returning Officer had become functus officio and could not have entertained the application or recommendation to the Election Commission---Election Commission could not have issued a corrigendum to change the notified election result---Respondent filed constitutional petition before the High Court after the corrigendum was issued by impugning the order of Returning Officer and not the corrigendum---Single Judge of High Court set aside the corrigendum and declared the appellant as the winning candidate---Election Commission had acted without jurisdiction as it had no power or authority to set aside a notified election result and declared a fresh result---Election dispute after issuance of a notification in the Official Gazette could only be resolved by way of an election petition before the Election Tribunal---If appellant was aggrieved by the declared result of respondent, his remedy would lie before the Election Tribunal---
Intra-court appeal was dismissed in circumstances.
Ghulam Farid Sanotra for Appellant.
Mammon Rashid Pirzada for Election Commission.
Ali Raza Ansari for Respondent No.4.
Ch. Anwaar ul Haq Pannun for Respondent No.3.

ORDER
The Appellant, Muhammad Ashraf has impugned order dated 24.02.2016 passed in W.P. No.2423/2016 whereby corrigendum dated 11.01.2016 issued by Respondent No.2 was set aside to the extent of Respondent No.3, thereby changing the election result.
2. The facts as per the Appellant are that the Appellant and Respondents Nos.3 and 4 contested the local government election against the seat of General Councilor from Ward No.5, Union Council No.36 ("UC"), Bola Bajwa, District Narowal on

05.12.2015. After consolidation of result, the name of the Appellant was forwarded as returned candidate for Ward No.5, Union Council No.36. However, the name of Respondent No.3 was published in the Official Gazette on 21.12.2015 as the returned candidate for Ward No.5 UC No.36. The Appellant submitted an application before the Election Commission for rectification of the mistake made in the notification issued on 21.12.2015. The application was accepted and a corrigendum was issued on 11.01.2016 whereafter the Appellant took oath of office as General Councilor. Respondent No.3 filed an election petition before the Election Tribunal on 13.01.2016, which is still pending before the Election Tribunal. In the meanwhile. Respondent No.3 also filed WP No.2423/2016 against application filed by the Appellant apprehending action by the Election Commission.

3. Learned counsel for the Appellant argued that the impugned order dated 24.02.2016 be set aside the corrigendum issued by Respondent No.1 declaring the Appellant to be the returned candidate without due consideration of the fact that the Appellant was the winning candidate and it was on account of some clerical mistake that the name of Respondent No.3 was notified as the returned candidate. Learned counsel further argued that since an election petition had been filed by Respondent No.3, which is still pending before the Election Tribunal, the impugned order could not have interfered in the matter nor could the corrigendum have been set aside. Essentially, the corrigendum was issued to correct a clerical mistake and therefore, it did not merit any interference through a constitutional petition.

4. On behalf of Respondents Nos.3 and 4 it is argued that Respondent No.3 was declared the returned candidate for Ward No.5 UC No.36 after the issuance of notification on 21.12.2015. Subsequent thereto neither the returning officer nor the Election Commission could interfere in the matter, hence the corrigendum dated 11.01.2016 issued was totally illegal and against the statutory requirement of the Punjab Local Government Act, 2013 ("Act") and the Punjab Local Government (Conduct of Elections) Rules, 2013 ("Rules"). Learned counsel argued that against the proceedings of the returning officer no appeal lies before the Election Commission, hence Respondent No.3 filed WP No.2423/2016 alleging that Respondents Nos.1 and 2 acted totally without jurisdiction. The impugned order while considering the matter held that the returning officer had become functus officio after 21.12.2015 and the notification in favour of Respondent No.3 was issued. Any dispute subsequent thereof could only be raised by way of election petition before the Election Tribunal and the returning officer could not have issued the corrigendum. Therefore, the corrigendum was set-aside with the observations that the present Appellant can avail his remedy before the Election Tribunal by filing an election petition.

5. We have heard learned counsel for the parties at length. The record shows that the writ petition was filed by Respondent No.3 in January, 2016 praying for a restraining order against the returning officer from proceeding on the application filed by the Appellant to rectify the error made in notifying Respondent No.3. The case was heard on 27.01.2016 by which time, the corrigendum had already been

issued on 11.01.2016. In fact the order impugned before the Court in the writ petition showed that the returning officer had dismissed the application of the Appellant on the ground that his recommendations have already been forwarded to the Election Commission on this issue. The returning officer in its report before the Court submitted that the name of Respondent No.3 was erroneously notified instead of the Appellant, hence he sought correction of the notified result from the Election Commission. Section 37 of the Act provides that every election result shall be notified and Sections 38 and 39 of the Act provide that an election to office can only be called into question through an election petition before the Election Tribunal. In this case, the notified election result was sought to be corrected by the Election Commission by way of a corrigendum in complete disregard of the law. Once the election result was notified in terms of Rule 38 (4) read with Section 38 of the Act, the only recourse that an aggrieved candidate has is before the Election Tribunal. The Appellant moved an application before the returning officer after the notification of Respondent No.3 in the official gazette as the returned candidate. The Election Commission issued a corrigendum and notified a new result which was against the provisions of the law. In this regard, we agree with the learned Single Judge that the returning officer had become functus officio and could not have entertained the application or recommendation to the Election Commission. In the same way, the Election Commission could not have issued a corrigendum to change the notified election result.

6. We are of the opinion that the Election Commission could not have issued the corrigendum and should have directed the parties to take their dispute before the Election Tribunal where a petition between the same parties was already pending. Furthermore, we note that Respondent No.3 filed writ petition after the corrigendum was issued by impugning the order of the returning officer and not the corrigendum. The learned single Judge set aside the corrigendum which declared the Appellant as the winning candidate by setting aside the declared and notified election result. In this way the Election Commission acted without jurisdiction as it has no power or authority under the law to set aside a notified election result and declare a fresh result. After the issuance of a notification in the Official Gazette under Section 37 of the Act an election dispute can only be resolved by way of an election petition before the Election Tribunal. In this case, Respondent No.3 was declared the winner and notified as the winning candidate on 21.12.2015. Subsequently, by way of the corrigendum the Appellant was declared as the winning candidate. Thereafter, the impugned order set aside the corrigendum and once again put Respondent No.3 in office as the winning candidate. Under the circumstances, since the situation is the same as it was when the result was declared on 21.12.2015, we are not inclined to interfere in the matter as it will not be in the interest of justice. The dispute arose when Respondent No.3 was declared the winning candidate. Therefore, if the Appellant is aggrieved by the declared result of Respondent No.3, his remedy lies before the Election Tribunal.

7. In view of the aforesaid, appeal is dismissed.

ZC/M-61/L Appeal dismissed.

2017 P L C (C.S.) 1070
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
MUHAMMAD ZAHEER HUSSAIN
Versus
The RECRUITMENT COMMITTEE and another
I.C.As. Nos.391, 392 and 393 of 2016, decided on 25th January, 2017.

Civil service---

----Advertisement for appointment---Relaxation in upper age limit---Requirements---Exceptional circumstances---Scope---Petitioners applied for relaxation of upper age limit much later after the cutoff date given in the advertisement---Relaxation in upper age limit could be given upto five years as per policies of the Government---Candidate seeking relaxation of upper age limit must have appended a separate application giving reason for relaxation which they failed---Petitioners were not entitled to seek relaxation of upper age limit in circumstances---No exceptional circumstances had been established nor any illegality had been pointed out in the impugned order passed by the Single Judge of High Court---Intra-court appeal was dismissed in circumstances.

Government of Punjab through Secretary (S&GAD), Lahore and another v. Zafar Maqbool Khan and others 2012 SCMR 686 distinguished.
Deputy Director Social Welfare v. Mohammad Laique 2004 PLC (C.S.) 595 rel.
Manzoor Hussain Dogar for Appellant.
Ch. Sultan Mehmood, A.A.G.

ORDER

Through this single order we intend to decide the instant Intra Court Appeal as well as I.C.A. No.392/2016 and I.C.A. No.393/2016 as the cause of action is similar in all the appeals.

2. Through the instant Intra Court Appeal as well as the above-mentioned appeals, the Appellants have called in question the legality of impugned orders all dated 29.02.2016 passed in Writ Petition No.10090/2015, Writ Petition No.10091/2015 and Writ Petition No.10092/2015 by the learned Single Judge whereby their writ petitions were dismissed.

3. Learned counsel for the Appellants argued that the learned Single Judge in the impugned orders has not appreciated the fact that the District and Sessions Judge could enjoy full powers to relax age limit in respect of their inferior appointments to any extent; that the case of the Appellants for relaxation of upper age limit has never been considered by the Respondent No.2; that the Appellants have been applying for the said posts in past but unfortunately have not been successful and

now have become overage, as such exceptional circumstances duly emerged because stroke of bad luck was beyond their control; that during the pendency of the writ petition similarly placed children of serving/retired employees have been allowed relaxation of upper age limit but the Appellants have been deprived of the same, as such it is a clear case of discrimination. Learned counsel for the Appellants in support of his contentions has placed reliance on the case titled Government of Punjab through Secretary (S&GAD), Lahore and another v. Zafar Maqbool Khan and others (2012 SCMR 686).

4. On the other hand learned Law Officer contested the arguments advanced by the learned counsel for the Appellants and prayed for dismissal of all the appeals on the grounds that there is no illegality in the impugned orders; that the impugned orders have been passed in accordance with law as the Appellants have failed to establish exceptional circumstances.

5. We have heard the arguments of the learned counsel for the Appellant and learned AAG and examined the record.

6. Through these appeals the Appellants have sought a direction to the Respondent No.2 for considering the issue of relaxation of age and further their appointments as Process Server from the 20% quota of the serving /retired employees. From the perusal of record it reveals that the Appellants have filed their applications for relaxation of upper age limit on 18.03.2015 and 19.03.2015 whereas the advertisement for the questioned posts clearly mentions that for the post at Serial No.1 favour can be given in relaxation of upper age limit up-to five years as per the policies of Government of Punjab as well as this Court. It was also mentioned in the advertisement that to seek relaxation of upper age limit the candidates must append a separate application giving reasons for relaxation. The perusal of advertisement also reveals that the cutoff date for submission of applications was 28.04.2014 along with specific condition that the applications submitted after the cutoff date and incomplete applications will not be considered. So, in the attending circumstances, it was essential for the Appellants to submit applications for relaxation of upper age limit along with the application for the post of Process Server whereas the Appellants have filed the applications for relaxation of upper age limit much later to cutoff date i.e. on 19.03.2015. From the record it is clear that the District and Sessions Judge, Lahore on 18.03.2015 and 20.03.2015 referred the applications to the Senior Civil Judge/Chairman Recruitment Committee. However, on 30.03.2015 the Senior Civil Judge/Chairman Recruitment Committee dismissed the applications against which writ petitions were filed. It is further observed that the Appellants were well within their knowledge that they have exceeded the required age limit but even they did not bother to given applications for relaxation of upper age limit mentioning therein reasons for the same before the cutoff date. Therefore, suffice it to say that the Appellants are not entitled to seek relaxation of upper age limit at this stage. As observed above, neither the Appellants have given any reason for relaxation of upper age limit before the learned Single Judge and

before use as well nor any exceptional circumstances have been established at this stage.

7. Furthermore, from the perusal of impugned order it reveals that the learned Single Judge has observed that the Appellants have failed to establish exceptional circumstances i.e. cases involving factors beyond human control for relaxation in upper age limit. The word 'exceptional circumstances' has been used by the Honourable Supreme Court in case titled Deputy Director Social Welfare v. Mohammad Laique (2004 PLC (C.S.) 595) in which it was held as follows:

"we cannot subscribe to this narrow interpretation of the judgment and irrespective of the fact whether this ground was taken in the Memo. of petition or not, would like to observe that exceptional situation must be spelt out from the record rather than recently accepted on erroneous assumptions."

8. We see no illegality or perversity in the impugned order which does not warrant any interference by us. The case law cited by the learned counsel for the Appellants is distinguishable to the case in hand as such has no relevancy.

9. In view of above, the instant appeal as well as abovementioned appeals, being devoid of any merit, are accordingly dismissed.

ZC/M-12/L Appeal dismissed.

PLJ 2017 Lahore 827

***Present*: MRS. AYESHA A. MALIK, J.**

LAHORE ELECTRIC SUPPLY COMPANY LIMITED through Chief Executive and 3 others--Petitioners

versus

M/s. AL-HAMD WOOLEN MILLS (PVT.) LIMITED and 2 others--Respondents

W.P. No. 8620 of 2017, decided on 24.3.2017.

Electricity Act, 1910 (IX of 1910)--

----S. 36--Constitution of Pakistan, 1973, Art. 199--Issuance of estimated bill to customer--Challenge by LESCO--Consumer was charged on estimation based on consumption of corresponding months of previous year on directions of electric inspector to Provincial Government, which decision was upheld by Appellate Board--Challenge to--Electric inspector based on consumption data, it was found that an incorrect bill had been issued to customer--Electric Inspector thereafter directed that impugned bills be withdrawn, revised bills for disputed months be issued based on consumption recorded in corresponding months of previous year, which decision was upheld by appellate board who also found that consumption relied upon by petitioner is not correct as it is not made out from record--Petitioners were aggrieved by these orders even though it is their own case that bill is made on estimation of corresponding months for previous year--Petition was dismissed *in limine*. [P. 828] A

Mian Muhammad Mudassar Bodla, Advocate for Petitioners.

Date of hearing: 24.3.2017.

ORDER

Through this petition, the petitioners have impugned orders dated 21.6.2016 and 10.1.2017 issued by Respondents No. 2 and 3.

2. The basic grievance of the petitioners is that Respondent No. 3 has issued its order without considering the facts of the case, without considering any documents and without recording of evidence. Learned counsel for the petitioners argued that Respondent No. 1 challenged the bill for the months of May and June 2015 before Respondent No. 2, Provincial Office of Inspection/ Electric Inspector to Government of Punjab, Gujranwala. During the pendency of the case, Respondent No. 1 issued an affidavit that he will withdraw his petition before Respondent No. 1 that he will pay the bill as required by the petitioners and in this regard, he also submitted an affidavit. Learned counsel for the petitioners argued that Respondent No. 2 did not rely upon the affidavit and instead proceed with the merits of the case. Even on the merits of the case, a liability has been imposed on the petitioners which liability is contrary to the record. Learned counsel argued that the petitioners have been directed to refund certain amounts to Respondent No. 1 which refund is not made out and is contrary to the record.

3. The record shows that Respondent No. 1 filed a complaint before Respondent No. 2 in relation to its bill for the months of April, May and June 2015. It was the case of Respondent No. 1 that the meter was defective and that the metering equipment was slow. The record also shows that the petitioners do not deny the fact that display of the meter was not functional for the disputed months and that Respondent No. 1 was charged on estimation based on the consumption of corresponding months of the previous year. Respondent No. 2 heard the matter, considered various different documents including the test reports with respect to the meter and while relying on the admission of the petitioners that the display of the impugned meter and electromechanical backup meter was not functional and since April 2015, directed that an estimated bill be issued based on the readings of the corresponding months for the previous year. Respondent No. 2 found that the bill issued was not based on actual consumption but instead 100020 units were estimated as consumption. Furthermore for the disputed period no detection bill was issued and that the impugned meter was removed by Respondents themselves without issuing a detection bill. It was also stated that the impugned meter was not produced before Respondent No. 2, hence based on the consumption data, it was found that an incorrect bill had been issued to Respondent No. 1. Respondent No. 2 thereafter directed that the impugned bills be withdrawn, revised bills for the disputed months be issued based on the consumption recorded in the corresponding months of the previous year. This decision was upheld by Respondent No. 3, Appellate Board & National Electric Power Regulatory Authority who also found that the consumption relied upon by the petitioner is not correct as it is not made out from the record. The petitioners are aggrieved by these orders even though it is their own case that the bill is made on the estimation of the corresponding months for the previous years.

4. Under the circumstances, since this matter has been looked into by Respondent No. 2 and upheld by Respondent No. 3, no illegality has been made out. The matter has been properly looked at great detail by both the Respondents after going through the record before them and decided the matter based on the available record. The petitioners have failed to point out any illegality against the impugned orders especially since it is admitted that the meter was faulty for the disputed months.

5. In view of the aforesaid, the instant petition is **dismissed in limine**.

(Z.I.S.) Petition dismissed *in limine*

2017 P T D 2050
[Lahore High Court]
Before Ayesha A. Malik, J
BLI PAKISTAN (PVT.) LTD. and others
Versus
GOVERNMENT OF PAKISTAN and others
W.P. No.6565 of 2015, decided on 8th May, 2017.

Income Tax Ordinance (XLIX of 2001)---

----Ss. 182 & 165---Constitution of Pakistan, Art. 73---Requirement of filing statement of withholding tax---Penalty for non-filing of withholding tax statement---Determination as to what constitutes a "Money Bill" under Art. 73 of the Constitution---Nature and scope of imposition of "penalty" under the Income Tax Ordinance, 2001---Petitioners impugned vires of S. 182(1) of the Income Tax Ordinance, 2001 which provided for penalty in case of failure to furnish statement of withholding tax as required under S. 165 of the Income Tax Ordinance, 2001---Validity---In terms of Art. 73 of the Constitution, for purpose of a "Money Bill", any provision dealing with imposition, abolition, remission, alteration or regulation of any tax was included meaning thereby that any law relating to regulation of any tax fell within domain of "Money Bill"---Purpose of penalty was to ensure that statutory provisions of the Income Tax Ordinance, 2001 were complied with and failure to do so would render a taxpayer liable under S. 182 of the Income Tax Ordinance, 2001---For purpose of levy of such penalty, an exercise had to be carried out by the Department, wherein it was to be determined whether or not non-filing of withholding statement was deliberate and whether the same was done with a mala fide intent---For purpose of levy of penalty, mens rea was an essential ingredient---High Court observed that challenge to the vires of S. 182(1) of the Income Tax Ordinance, 2001 was not competent---Constitutional petition was disposed of, accordingly.

D.G. Khan Cement Company Ltd. and others v. Federation of Pakistan and others 2004 SCMR 456 rel.

Khurram Saeed for Petitioners.

Muhammad Ajmal Khan for Petitioners (in W.Ps. Nos.27554/2013, 2901/2014 and 40714 of 2016).

Shahid Sarwar Chahil and Sarfraz Ahmad Cheema for Respondents with Dr. Ishtiaq Ahmad Khan, Director Legal FBR.

Tahir Mahmood Ahmad Khokhar, Assistant Attorney General for Pakistan.

ORDER

AYESHA A. MALIK, J.---Through this consolidated order, I intend to decide upon the issues raised in W.Ps. Nos.6565/2015, 27554/2013, 2901/2014 and 40714/2016 as common questions of law arise in all the stated petitions.

2. The Petitioners are all taxpayers and their common grievance is that they did not file the withholding tax statement as required under section 165 of the Income Tax Ordinance, 2001 ("Ordinance"), hence the Respondents issued show-cause notices calling for an explanation and stating that they are liable to the penalty under Section 182 (1) of the Ordinance.

3. The Petitioners have challenged the vires of Section 182(1) of the Ordinance, which provides that a person who fails to furnish the statement as required under Section 165 of the Ordinance within the due date shall pay a penalty of Rs.2500/- for each day of default subject to a minimum penalty of Rs. 50,000/-. In the case of instant petition, show-cause notice was issued on 16.02.2015, which states that the Petitioner failed to file the statement under Section 165 of the Ordinance for the stated period and the Petitioner was asked to justify its failure to e-file the statement within the given time and to produce any document/information in support of its explanation before the Respondents for verification of the information provided. The Petitioners in W.Ps. Nos.27554/2013, 2901/2014 and 40714/2016 were issued show-cause notices on 26.09.2013, 17.01.2014 and 14.12.2016 providing the details of the days of default for not filing the statement, the penalty amount. The Petitioners have been asked to explain their failure to e-file monthly statement as per Section 165 of the Ordinance.

4. Counsel for the Petitioners argued that Section 182(1) of the Ordinance is ultra vires the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") as the Constitution only authorizes Parliament to make laws regarding tax on income and they cannot legislate on penalty for non-filing the statement under Section 165 of the Ordinance. Learned counsel further argued that Section 182(1) does not give the Petitioners any chance to have the delay condoned as the Respondents will operate in a mechanical way. They argued that the quantum of the penalty is excessive and not justified.

5. Report and para wise comments have been filed by the Respondents. Learned counsel for the Respondents argued that the Constitution provides under Article 73(2)(a) for the imposition, abolition, remission, alteration or regulation of any tax and these subject matters fall within the definition of Money Bill. Learned counsel further argued that the definition of tax as given in Section 2(63) of the Ordinance, includes penalty, therefore, the legislature is competent to legislate on any matter for the purposes of regulating any tax. Learned counsel argued that for the purposes of the instant petitions show-cause notices have been impugned. The Petitioners are required to file their replies and explain the cause of the delay or non-filing the statements. In such cases, the Respondents undertake a verification process so as to determine whether or not the Petitioners non-filing was deliberate or technical and they also determine whether there was any loss of revenue and thereafter, determine whether minimum or maximum penalty should be levied. In such cases the competent authority looks into the matter and decides it as per the facts of the case.

6. Report and para wise comments have also been filed by the Federation of Pakistan. Learned Assistant Attorney General for Pakistan adopts the arguments advanced by the learned counsel for the Respondents.

7. The Petitioners are admittedly non-filers or late filers of the Statement required under Section 165 of the Ordinance. Consequently, show-cause notices were issued to them wherein they were asked to explain their failure in filing the statement under Section 165 of the Ordinance. In terms of Article 73 of the Constitution for the purposes of a Money Bill any provision dealing with the imposition, abolition, remission, alteration or regulation of any tax is included meaning thereby that any law relating to the regulation of any tax falls within the domain of Money Bill. The purpose of the penalty section is to ensure that the statutory provisions of the Ordinance are complied with and failure to do so will render a taxpayer liable under section 182 of the Ordinance. For the purposes of levy of penalty an exercise has to be carried out by the Respondents wherein they have to determine whether or not the non-filing was deliberate and whether it was done with mala fide intent. For the purpose of levy of penalty mens rea is an essential ingredient, which has to be established in terms of the judgment of the august Supreme Court of Pakistan rendered in a case cited at "D.G. Khan Cement Company Ltd and others v. Federation of Pakistan and others)" (2004 SCMR 456), therefore, as such any challenge to the vires of section 182(1) of the Ordinance is not made out. Furthermore, the Petitioners have impugned a show-cause notice in terms of which a reply was sought and the matter needs to be looked into by the competent authority. As so far there is no determination on minimum or maximum penalty which is contemplated in section 182(1) of the Ordinance itself. Hence no case for interference is made out.

8. The Petitioners are directed to file replies to the impugned show-cause notices raising all their contentions within seven days of receipt of certified copy of this order and if such replies are filed, the same will be decided strictly in accordance with law through a speaking order by the competent authority before taking any coercive action against the Petitioners. However, if such replies are not filed within the stipulated period, the Respondent FBR will be at liberty to proceed in the matter in accordance with law.

9. Disposed of in the above terms.

KMZ/A-77/L Order accordingly.

2017 P L C (C.S.) 1361
[Lahore High Court]
Before Ayesha A. Malik, J
SIRAJ-UR-REHMAN JASRA
Versus
GOVERNMENT OF PUNJAB and others
W.Ps. Nos.66724 and 69026 of 2017, heard on 25th September, 2017.

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

----R. 18(2)---Constitution of Pakistan, Art.199---Recruitment---Recruitment on basis of written examination---Criteria---Eligibility---Cut-off date for determining age---Scope---Petitioners impugned incorporation of a cut-off date for determining age of candidates in an advertisement for recruitment to certain posts issued by Punjab Public Service Commission ("PPSC")---Contention of petitioners, inter alia, was that the cut-off date of 01.01.2017 was arbitrary and discriminatory and no such date had been prescribed in the past and other advertisements issued by the Commission---Validity---Despite the fact that R.18(2) of Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974 provided for requirement of determining age with cut off date of 1st January, the same was not previously followed by the Commission---Petitioners could not be burdened with discriminatory treatment on account of an established practice of the Commission and the Policy Directive implementing the cut-off date of 1st January, was introduced for the first time and was never made public nor announced before the recruitment process, and therefore petitioners and other applicants were not aware of the same---High Court directed, that as a one-time exemption, in order to ensure that the petitioners were not prejudiced in any manner, that they be allowed to compete for the said posts and the cut-off date of 0.1.01.2017 for determining age would not apply---Constitutional petitions were allowed accordingly.

Saif ur Rehman Jasra for Petitioner.
Anwar Hussain, Addl. A.G. with Imran Sajjad, Law Officer, PPD.
Mian Ghulam Shabbir Thaheem Law Officer, PPSC.
Date of hearing: 25th September, 2017.

JUDGMENT

AYESHA A. MALIK, J.--- This single judgment decides upon the issues raised in the titled Writ Petition as well as W.P. No.69026 of 2017 as common question of law and facts are involved.

2. The Petitioners are candidates for the post of Assistant District Public Prosecutor ("ADPP") for which the closing date for submitting applications was 14.09.2017. Their grievance is that in terms of the impugned advertisement candidates who are between the ages 25 to 35 years can apply for the post but the cut off date for determining the eligibility of age was mentioned as 01.01.2017

whereas for the purposes of experience the cut off date was 14.09.2017. The case of the Petitioners is that the cut off date for determining the eligibility of age is arbitrary and discriminatory. He argued that the Petitioners were underage on 01.01.2017 but become eligible prior to 14.09.2017. Learned counsel further argued that the cut off date as given in the advertisement is contrary to the requirements of law which has no justification. It is also argued that previously in the years 2011, 2012, 2015 and 2016 applications for the same post were advertised without any cut off date and suddenly in the impugned advertisement the cut off date is incorporated. Learned counsel argued that this is a case of blatant discrimination because there is no cut off date for determining age for any posts, including posts advertised in the last one week. In this regard various different advertisement issued by the Punjab Public Service Commission ("PPSC") have been placed on record.

3. Report and parawise comments have been filed by Respondents Nos.2 and 3. On behalf of the stated Respondents, it was argued that the fixation of the age is as per Policy Decision No.8.1 which is in line with the requirements of the Punjab Civil Servants (Appointment and Conditions of Services) Rules, 1974 ("Rules"), which also provides that the age shall be determined as on the first of January of the year in which the examination is proposed to be held.

4. Learned Law Officer on behalf of Respondent No.1 stated that the requirement of the law is given in Rule 18 of the Rules and the policy and practice must be in line with the requirements of the law. Learned Law Officer stated that so far as the allegation of discrimination is concerned, it is for Respondents Nos.2 and 3 to explain why they have acted in contravention to the requirements of the Rules which have been in place since 1976. He further highlighted that the Petitioners before the Court claim to be underage on 01.01.2017, however, there will be other candidates who will be prejudiced if the cut off date is changed to 15.09.2017 as they will become overage on the said date.

5. Heard and record perused.

6. The basic grievance of the Petitioners is with respect to the cut off date for the post of ADPP given in the advertisement dated 24.08.2017. In terms of the age requirement it is noted that this post was also advertised in the years 2011, 2012, 2015 and 2016 and no cut off date was prescribed in any of those years. Policy Decision No.8.1 came in October, 2016 and provides that in the case of Competitive/Combined Competitive Examination, the qualifying age shall be reckoned as on the first of January of the year in which the examination is proposed to be held. This Policy Decision is stated to be in terms of the requirement of Rule 18(2) of the Rules, which provides that where recruitment is to be made on the basis of a written examination, age shall be reckoned as on the first of January of the year at which the examination is proposed to be held and in all other cases it shall be on the last date fixed for submission of application for appointment. Admittedly, the Policy Decision came in October, 2016 and prior to October, 2016 despite the fact that Rule 18(2) of the Rules provided the requirement for determining age, it was

not followed by the PPSC. The effect of this negligent act on behalf of the PPSC is that they have developed a practice of recruiting, for competitive posts and in this case for the post of ADPP, without resort to cut off date of first of January of the year in which the examination is proposed to be held. Consequently, aspiring applicants to this post pursuant to the impugned advertisement 2017 are not aware of the requirement of Rule 18(2) of the Rules or Policy Decision 8.1. The Respondent PPSC in October 2016 incorporated the requirement of the Rules in its Policy Decision and on the basis of the same has issued the impugned advertisement with the cut off date without any notice or information to the public.

7. The PPSC is a statutory authority which is required to conduct test and examination for recruitment to provincial services and posts connected with the affairs of the Province. Recruitment is based on the requisition of the department which stipulates its requirements and number of vacant posts. The PPSC is required to fill the vacant posts in a transparent manner through competitive examination. In doing so the Rules are binding on the PPSC and neglecting to follow the Rules is failure on its part to do its job with care and attention as required under the PPSC Act. As per the record, the PPSC over the years has evolved its own mechanism for recruitment to the post of ADPP which is not in accordance with the specific requirement of Rule 18 of the Rules. Counsel for the PPSC was unable to explain the past practice and why PPSC has neglected to ensure that recruitment to the post of ADPP did not prescribe the cut off date stipulated clearly in Rule 18 of the Rules. Under the circumstances due to the irresponsible acts of the PPSC the present Petitioners along with all applicants for the post of ADPP cannot be burdened with discriminatory treatment on account of an established practice of PPSC. The PPSC brought about a sudden change in its Policy in October, 2016 wherein Policy Decision 8.1 was introduced for the first time, be in line with the requirements of the Rules. Even this Policy Decision was never made public or properly announced well before the recruitment process. Hence the Petitioners and other applicants were not aware of the Policy Decision. Therefore as a one time exemption, in order to ensure that the Petitioners along with all other applicants are not prejudiced in any manner, they be allowed to compete for the post of ADPP wherein the cut off date 01.01.2017 will not be made applicable and instead the cut off date of 14.09.2017 will be relevant for the purposes of determining age. In this regard, it is clarified that the applicants who were underage as on 01.01.2017 and/or who have become overage after 01.01.2017 will be eligible to compete for the post of ADPP so long as they are eligible with reference to age as on the cut off date of 14.09.2017. However, as a future course of action the PPSC will ensure to public its Policy Decision No.8.1 not only on the website but also in leading newspapers so that the public at large is informed that the policy requirement as of October, 2016 for the purposes of recruitment made on the basis of written examination, the age shall be determined as on first January of the year in which the examination is proposed to be held.

8. For what has been discussed above, both these petitions are allowed and it is ordered that the benefit of this judgment shall be extended to all applicants by the

Respondents for the post of ADPP who are not party to this case or before the Court yet fall in the category as explained above, with reference to the cut off date for age determination, in order to avoid multiple litigation.

KMZ/S-69/L Petitions allowed.

P L D 2017 Lahore 882
Before Ayesha A. Malik and Jawad Hassan, JJ
ABU TALIB KHAN BARKI---Appellant
Versus
JUDGE FAMILY COURT and others---Respondents
I.-C.A. No. 1175 of 2015, decided on 19th September, 2017.

Family Courts Act (XXXV of 1964)---

----S. 10 (4) & proviso---Dissolution of marriage on the basis of Khula---Haq Mehr, restoration of---Special condition of Nikkah not related to Haq Mehr---Husband impugned order of Family Court whereby khula was granted to wife---Contention of husband, inter alia, was that the wife was required to return gold given as Haq Mehr in lieu of decree of dissolution of marriage, which was not ordered by Family Court---Validity---Husband relied on cl. 17 of the Nikkahnama which provided for special condition attached to contract of marriage, which condition was not related to Haq Mehr, but was an independent clause, and any item given under the said clause did not have to be returned by wife at time of grant of Khula---No illegality therefore existed in impugned order---Intra-court appeal was dismissed, in circumstances.

Tariq Masood for Appellant.

ORDER

AYESHA A. MALIK, J.--The Appellant is aggrieved by the judgment dated 18.06.2015 passed in W.P. No.3693/2014 wherein his petition challenging the grant of Khula by Judge Family Court, Lahore dated 03.01.2014 was dismissed by learned Single Judge.

2. Learned counsel for the Appellant argued that the impugned judgment has upheld the order of Judge Family Court, Lahore dated 03.01.2014 wherein Khula was granted to Respondent No. 2 without following due process. Specifically Respondent No.2 was required to return the Haq Mehr which included 40 tolas gold ornaments given to her at the time of marriage in lieu of the decree for dissolution of marriage. In support of his contention, learned counsel has placed reliance on the cases cited at Muhammad Zafar v. Judge Family Court and another (2005 CLC 1844) and Mst. Ishrat Bano v. Noor Hussain and 2 others 2010 YLR 2452.

3. We have gone through the record as well as the impugned judgment and find that no case for interference is made out. Respondent No.2 filed a suit for dissolution of marriage on the basis of Khula, which was decreed by Judge Family Court, Lahore on 03.01.2014. In terms of the order dated 03.01.2014 Respondent No.2 was required to return the amount of Rs.1,000/- to the Appellant as Zar-e-Khula. Learned counsel for the Appellant argued that Respondent No.2 was also required to return 40 tolas gold ornaments, which was given to her by the Appellant

at the time of marriage. In this regard, he has relied upon Nikahnama, which provides in clause 17 as a special condition that the Appellant will provide Respondent No.2, 40 tolas gold which will be in the ownership of Respondent No.2. Learned counsel has argued that clause 17 of the Nikahnama is a special condition for Haq Mehr as provided in clauses 13 to 16 of the Nikahnama. Learned counsel further argued that clauses Nos.13,14, 16 and 17 have to be read together as a whole, meaning thereby that at the time of Khula, Respondent No.2 was to return Rs.1,000/- as prescribed in clause 13 along with 40 tolas gold as prescribed in clause 17. We find that the arguments of the learned counsel for the Appellant are misconceived and contrary to the terms and conditions of the Nikahnama. Clause 13 deals with the quantity of Haq Mehr, clause 14 requires the payment to be offered prompt or deferred, clause 15 contemplates whether any part of the payment will be made at the time of marriage and clause 16 provides whether the whole Mehr or in lieu thereof any part of the property has been given. Clause 17 is an independent clause, which provides ( ) which means any special condition attached to the contract of marriage. This special condition is not related to Haq Mehr but is an independent clause, meaning thereby that any item given through this clause to Respondent No.2 does not have to be returned by Respondent No.2 for grant of Khula. The amount of Haq Mehr and its payment is a specific condition of the contract contained in clauses 13, 14,15 and 16 of the Nikahnama. Clause 17 is an independent clause, which is not related to the amount of Haq Mehr. It allows the parties to make any special condition at the time of the Nikah. Therefore, we are of the opinion that no illegality is made out in the impugned judgment of a learned Single Judge in this connection. We note that the cases relied upon are judgments of a learned Single Judge of this Court and are not binding on this Court. Even otherwise they are not relevant to the issue at hand. Appeal is dismissed.

KMZ/A-91/l Appeal dismissed.

2017 P T D 2431
[Lahore High Court]
Before Ayesha A. Malik, J
VORTEX INTERNATIONAL
Versus
FEDERATION OF PAKISTAN and others
W.P. No.55114 of 2017, heard on 25th September, 2017.

Customs Act (IV of 1969)---

----S. 18, 25 & 30---Constitution of Pakistan, Art. 199---SRO No.563(I)/2017 dated 01.07.2017---Constitutional petition---Import of goods---Imposition of customs duty---Expression "goods imported into Pakistan"---Scope and effect---Determination of the date on which goods were deemed as imported into Pakistan---Petitioner impugned the applicability of S.R.O. No.563(I)/2017 dated 01.07.2017, to import of goods by the petitioner on the ground that the said goods were imported by petitioner prior to 01.07.2017, and therefore, the said SRO could not be applied---Validity---Under S.18 of the Customs Act, 1969 liability to pay customs duty shall accrue the moment the goods enter into Pakistan---Taxable event was import of goods which had nothing to do with ascertaining value of the same under S.25 of Customs Act, 1969 or determination of the rate of import duty---In the present case, goods were imported into Pakistan prior to the issuance of the SRO which was evident from date of Import General Manifest---High Court observed that for the purposes of determining applicability of a SRO, relevant date would be the date of import, that was the date when such goods entered into territorial waters of Pakistan and not the date of the Goods Declaration---Constitutional petition was allowed, in circumstances.

East and West Steamship Co. v. The Collector of Customs and others PLD 1976 SC 618 rel.
Mian Abdul Bari Rashid for Petitioner.
Muhammad Anwar Khan for Respondents.
Date of hearing: 25th September, 2017.

JUDGMENT

AYESHA A. MALIK, J.---Through this petition, the Petitioner seeks a declaration that S.R.O. 563(I)/2017 dated 01.07.2017 ("Impugned SRO") whereby the S.R.O. 499(I)/2009 dated 30.06.2009 was amended cannot be made applicable on the goods of the Petitioner, which were imported prior to the issuance of Impugned SRO.

2. The relevant facts of the case are that the Petitioner imported goods of old and used auto parts from Japan for which invoice packing list was prepared on 30.05.2017. The goods were shipped for Pakistan vide bill of lading dated 23.05.2017 and reached Karachi Seaport on 29.06.2017 in terms of the Import

General Manifest ("IGM"). The goods were then transshipped to Lahore Dry Port, Thokar Niaz Baig Lahore on 01.07.2017. The Petitioner requested for examination of the goods, which was done on 05.07.2017 and subsequently the Goods Declaration ("GD") was filed on 08.07.2017 for clearance of the goods. The Petitioner was informed that the entire consignment cannot be released in terms of S.R.O. 499(I)/2009 dated 30.06.2009 on account of amendment made in the Impugned SRO. Hence this Petition.

3. The grievance of the Petitioner is that Impugned SRO is not applicable to the Petitioner as the goods were imported into Pakistan prior to 01.07.2017. Learned counsel argued that the import of goods will be taken from the time when the goods enter the territorial waters of Pakistan. Learned counsel further argued that the IGM clearly shows that the goods were imported into Pakistan on 29.06.2017 whereas the Impugned SRO was issued on 01.07.2017. Learned counsel argued that the GD is made for the purposes of determining the amount of duty payable under the Customs Act, 1969 ("Act") and the rate at which the duty is payable. Therefore, the Impugned SRO cannot be made applicable on the goods imported by the Petitioner.

4. Report and para wise comments have been filed by the Respondents. It is their case that the relevant date for determining the applicability of the Impugned SRO is the date when the GD was filed being 08.07.2017. Learned counsel explained that used goods were imported by the Petitioner. After confiscation of the goods under section 181 of the Act it was found that eight used front/half cut show fitted with engines, dash boards and other accessories could not be redeemed on payment of redemption fine in lieu of confiscation under section 181 of the Act on account of their exclusion from clause (e) of Serial No.2 of the table in SRO 499(I)/2009 dated 13.06.2009, which was amended by the Impugned SRO on 01.07.2017. Learned counsel further argued that since the Federal Government has prohibited the import of chassis of used automotive vehicles cut into minimum of two pieces, eight goods of the Petitioner cannot be released.

5. Heard and record perused.

6. The basic issue before the Court is whether the goods of the Petitioner being eight used front/half cut show fitted with engines, dash boards and other accessories can be released under S.R.O. 499(I)/2009 dated 13.06.2009. Or whether the Impugned SRO is applicable on the stated goods imported by the Petitioner. The record shows that the Petitioner imported old and used auto parts having a total US$ 3,904.00. The goods were imported from Yokohama Japan to Karachi through one container by sea. The goods arrived at Seaport Karachi on 29.06.2017 as per the IGM, which is evident from GD filed by the Petitioner. It is noted that the date of IGM is not disputed by the Respondents. As per the Act an IGM is issued to the carrier when the ship is anchored at an allocated port. The IGM provides details of the goods aboard the vessel containing information relevant for the custom authority such as name of the sender, name of the receiver and the description of the shipped goods. Therefore, once the goods arrive within the territorial waters of Pakistan,

they become chargeable to custom duty and thereafter, the importer has to declare the goods for the purposes of levy of custom duty. Section 18 of the Act provides that custom's duty shall be levied at such rate as prescribed in the First Schedule on goods imported into Pakistan. The dispute between the parties is with respect to the application of SRO 499(I)/2009 dated 13.06.2009 in its original form and not through its amended form vide the Impugned SRO. SRO 499(I)/2009 dated 13.06.2009 provides that in terms of Section 181 of the Act, Federal Board of Revenue ("FBR") can require the importer to pay a fine in lieu of confiscated goods named within the SRO. Accordingly in clause 2(e) of the SRO auto parts imported in used or second hand condition can be released on payment of redemption fine of 20% on custom value. This SRO was amended through Impugned SRO in which the clause 2(e) was amended such that it excluded front cabin/half cut HTV/LTV/Cars, with or without chassis number such that these parts could not be redeemed on payment of redemption fine. Hence the dispute is about the chargeability of the goods imported. The record shows that the Petitioner on the import of the goods, invoked Section 181 of the Act which prescribes for the option to pay fine in lieu of confiscated goods. The imported goods were redeemed by the Petitioner on payment of redemption fine at the rate of 20% of the customs value along with payment of duty and taxes applicable under the law. A penalty of Rs,10,000/- was also imposed on the Petitioner which was duly paid. The dispute before this Court is limited to the import of eight used parts which were not redeemed on payment of redemption fine in lieu of confiscation, on account of their exclusion from SRO 499(I)/2009 dated 13.06.2009 vide the Impugned SRO.

7. The question before the Court is whether the Impugned SRO is applicable to the goods of the Petitioner? The relevant Section of the Act is Section 18 which provides that customs duty shall be levied at the prescribed rates on goods being imported into Pakistan. In terms of this provision the liability to pay customs duty shall accrue the moment the goods enter into the territory of Pakistan. This means that the taxable event is the import of the goods which has nothing to do with ascertaining the value of the imported goods under section 25 of the Act or determination of the rate of import duty under section 30 of the Act. Admittedly, in this case the goods were imported into Pakistan prior to the issuance of the Impugned SRO on 01.07.2017 which is evident from the date of IGM which is not disputed by the Respondents and shows that the goods of the Petitioner entered into the territorial waters of Pakistan at the allocated port in Karachi on 29.06.2017. As per the record the goods were shipped for Karachi in May 2017 from Japan and the packing list and invoice was issued on 30.05.2017. Therefore, when the goods were shipped for Karachi the applicable SRO was SRO 499(I)/2009 dated 13.06.2009. The goods entered into the territorial waters of Pakistan on 29.06.2017 on which date the import was still permissible as per SRO 499(I)/2009 dated 13.06.2009. For the purposes of determining which SRO is applicable, the relevant date will be the date of import that is the date when the goods enter into the territorial waters of Pakistan and not the date of the Goods Declaration. In "East and West Steamship Co. v. The Collector of Customs and others" (PLD 1976 SC 618), the august Supreme Court of Pakistan held that the word "import" carried the meaning of

"bringing in" or "to bear or carry into" and an imported articles was one which was brought or carried into a country form abroad and it did not necessarily entail the entire process of filing bill of entry, discharging the goods from the vessel at a wharf, the assessment of the value of the goods and the duty payable on them. No sooner, therefore, the vessel touches a Pakistan Port, the goods can be stated to have been imported. Section 43 of the Act provides that the Import Manifest is issued to signify that the vessel has arrived at the designated port which signifies entering into the territory of Pakistan. Furthermore, the Bill of Lading was issued on 23.05.2017 being prior to the issuance of the Impugned SRO. Therefore, the Respondents are bound to treat the goods of the Petitioner under S.R.O. 499(I)/2009 dated 13.06.2009.

8. Under the circumstances, this petition is allowed and the Respondents are directed to release the goods of the Petitioner in terms of SRO 499(I)/2009 dated 13.06.2009.

KMZ/V-1/L Petition allowed.

2017 P T D 2461
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
COMMISSIONER INLAND REVENUE
Versus
MUHAMMAD KHALID SETHI
I.T.R. No.244 of 2016, decided on 2nd October, 2017.

Income Tax Ordinance (XLIX of 2001)---

----Ss. 122(5) & 133---Amendment of assessment---Jurisdiction of High Court under S.133 of the Income Tax Ordinance, 2001---Nature---Question of Law---Scope---Question before the High Court was "whether Appellate Tribunal was justified in holding that amendment of taxpayer's assessment was not justified in the circumstances of the case"---Held, wealth statement, Bank statements and other document were filed by taxpayer in his reply to the Department and entries referred to by Department were all duly explained, and therefore there was no occasion for amending assessment of taxpayer under S.122(5) of the Income Tax Ordinance, 2001 and no question of law arose in the present case---High Court declined to exercise jurisdiction under S.133 of the Income Tax Ordinance, 2001, in circumstances.

Liaqat Ali Chaudhry for Appellant.
Ch. Qamar uz Zaman for Respondent.

ORDER

AYESHA A. MALIK, J.---This is a Reference under section 133 of the Income Tax Ordinance, 2001 ("Ordinance").

2. Following question of law is pressed for our opinion, which is asserted to have arisen out of order dated 12.05.2016 passed by the Appellate Tribunal Inland Revenue, Lahore ("Appellate Tribunal"):-

> "Whether the learned ATIR is justified in holding that other provisions of Income Tax Ordinance, 2001 including section 122(5) become inapplicable if statement under section 115(4) read with section 113A of the Income Tax Ordinance, 2001 is filed?

3. The basic case of the Applicant is that an order was passed under Section 122 (5) of the Ordinance for amendment of assessment of the income tax for the year 2007. Proceedings were initiated to probe into the allegations that the Respondent taxpayer, who is not filing his return and has bank accounts in Askari Bank and Al-Faisal Bank, Paris Road, Sialkot but has not disclosed the same. The Respondent taxpayer filed his reply along with relevant documents which included bank statements for the relevant period, wealth statement as on 30.06.2007 and copies of sale deeds of the properties owned in Sialkot. The Applicant concluded

that the taxpayer had concealed the particulars of his income especially with reference to the bank accounts maintained with Askari Bank and Al-Faisal Bank, Paris Road, Sialkot and with reference to the properties owned in Sialkot. Hence an order to award the assessment was issued on 30.06.2012. Feeling aggrieved, the taxpayer filed an appeal before the Commissioner Inland Revenue (Appeals), Multan (Camp at Sialkot), who found that the taxpayer has disclosed all his wealth through wealth statement and has also disclosed bank accounts which show that a loan has been obtained for the purposes of properties which were also duly disclosed. Therefore the appellate authority came to the conclusion that there was no justification to amend the assessment order as there was no information before the department on the basis of which any loss to revenue could be explained. The department filed an appeal before the Appellate Tribunal, which agreed with the decision of the Commissioner and found that the taxpayer had filed its statement for final taxation under Section 113A of the Ordinance and in such circumstances, an amendment order could not be issued under Section 122 of the Ordinance.

4. We have heard learned counsel for the parties at length and find that the basic reasons with the Commissioner for accepting the appeal of the taxpayer was that there is no definite information on the basis of which the department could have concluded that the loss was caused to revenue by concealing income. Admittedly, wealth statement, bank statements and proper documents were filed and the entries referred to by the department were all duly explained. Under the circumstances, we are in agreement with the orders of the Commissioner as well as the appellate authority in that there was no occasion to issue an order for amending the assessment under section 122(5) of the Ordinance. Therefore, the question of law raised by the Applicant is not made out from the orders impugned.

5. Under the circumstances. we decline to exercise our jurisdiction. Reference application is decided against the Applicant Department.

6. Office shall send a copy of this order under seal of the Court to the Appellate Tribunal as per section 133(5) of the Ordinance.

KMZ/C-26/L Order accordingly.

2017 P T D 2469
[Lahore High Court]
Before Ayesha A. Malik, J
Mian MEHMOOD-UR-RASHEED
Versus
FEDERATION OF PAKISTAN through Additional Secretary and Ministry of Finance and 3 others
Writ Petitions Nos.4311, 30920, 36734, 3829 and 3399 of 2016, heard on 22nd September, 2017

Sales Tax Act (VII of 1990) ---

----S.3---Constitution of Pakistan, Arts.77 & 199---Tax to be levied by law only---Nature and effect of Art.77 of the Constitution---Public interest litigation---Petitioners, in public interest, impugned increase in prices of petroleum products, inter alia, on the ground that the Federal Government had encroached upon jurisdiction of Parliament by fixing sales tax on petroleum products under S.3 of the Sales Tax Act, 1990---Validity---Under Art. 77 of the Constitution, no tax could be levied except by or under authority of an Act, which meant that there must exist an Act of Parliament which either levied tax or granted authority to levy tax---Provisions of S.3 of the Sales Tax Act, 1990 authorized Federal Government to impose conditions and restrictions by way of notification on the manner in which sales tax was to be charged, collected and paid and it could specify higher or lower rates of the same in a notification---Impugned S.R.Os. whereby sales tax has been notified on petroleum products had been issued pursuant to S.3 of the Sales Tax Act, 1990 meaning thereby the same were authorized by the Parliament---Levy of tax could not be declared unconstitutional or against public interest if it increased or lowered prices---Constitutional petition was dismissed, in circumstances.

Messrs Mustafa Impex Karachi and others v. The Government of Pakistan through Secretary Finance, Islamabad and others PLD 2016 SC 808 ref.
Sheraz Zaka for Petitioner (in Writ Petitions Nos.4311, 30920 and 36734 of 2016).
Nemo for Petitioner (in Writ Petition No.3829 of 2016).
Mohammad Azhar Siddique, Ali Raza Kabir, M. Rizwan Gujjar, Adeel Hassan, Ms. S.Parveen Mughal, Ms. Mafia Kausar and Mian Shabbir Asmail for Petitioners (in Writ Petition No.3399 of 2016).
Nasar Ahmad, D.A.-G. and Tahir Mehmood Ahmad Khokhar, D.A.-G. along with Atteeq Aslam, Executive Secretary, OGRA for Respondents.
Safraz Ahmad Cheema, Respondent for Federal Board of Revenue.
Date of hearing: 22nd September, 2017.

ORDER

AYESHA A. MALIK, J.---This judgment decides upon the issues raised in W.Ps. Nos.4311/16, 30920/16, 36734/2016, 3829/2016 and 3399/2016 as all the Petitions raise common questions of law and facts. In W.Ps. Nos. 4311/16, 30920/16,

36734/2016, 3829/2016, the Petitioners have impugned SRO 57(I)/2016 dated 29.1.2016 issued by Government of Pakistan, Ministry of Finance, Economic Affairs, Statistics and Revenue (Revenue Division), Islamabad ("SRO"). In W.P. No. 3399/2016, the Petitioners have impugned the S.R.O. and have also called into question increase in petroleum prices in the country and the manner in which petroleum prices are fixed.

2. All the Petitions have been filed in public interest. Writ Petitions Nos. 4311/16, 30920/16, 36734/2016, 3829/2016 only impugn the S.R.O. whereas the Petitioners in W.P. No. 3399/2016 have also impugned through various applications subsequent S.R.Os. dated 29.1.2016, 29.2.2016, 31.3.2016, 29.4.2016, 31.5.2016, 30.6.2016, 31.7.2016, 31.8.2016, 30.9.2016, 31.10.2016, 30.11.2016, 31.12.2016, 15.1.2017, 31.1.2017, 15.2.2017, 28.2.2017, 31.3.2017, 30.4.2017, 31.5.2017, 30.6.2017, 31.7.2017, 5.8.2017 through C.Ms. Nos. 5/2016, 7/2016, 9/16, 11/2016, 13/2016, 15/2016, 2840/2016, 19/2016, 21/2016, 23/2016, 1/2017, 3/2017, 5/2017, 7/2017, 9/2017, 11/2017, 1-3399-16/2017, 3/2017, 5/2017 and 7/2017 issued by the Government of Pakistan, Ministry of Finance, Economic Affairs, Statistics and Revenue (Revenue Division), Islamabad levying the sales tax collected on import and supply of certain petroleum products.

3. With respect to the vires of the S.R.O. and the subsequent S.R.Os., the case of the Petitioners is that the Federal Government has encroached upon the jurisdiction of Parliament by fixing sales tax on petroleum products which is in violation of Section 3 of the Sales Tax Act, 1990 ("Act"). It is their case that the Federal Government does not have jurisdiction to levy or collect sales tax without the approval of Parliament and without the approval of the Cabinet which is in absolute violation of "Messrs Mustafa Impex, Karachi and others v. The Government of Pakistan through Secretary Finance, Islamabad and others" (PLD 2016 SC 808). Counsel for the Petitioners argued that the S.R.Os. were issued without getting the approval of Parliament as required under Articles 77 and 162 of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution"). Furthermore the Federal Government by issuing various subsequent notifications manipulates the price of petroleum products by increasing them regularly, therefore burdening the public at large with high prices. Counsel argued that the aim behind this unlawful fixation is to extort money from the consumers without lawful justification. It was also argued that this is in absolute disregard of the constitutional mandate, hence all the S.R.Os. should be struck down.

4. Report and parawise comments have been filed on behalf of Respondent Secretary, Finance Division, Government of Pakistan Islamabad, Respondent Secretary, Ministry of Petroleum, Oil Gas and Natural Resources, Government of Pakistan, Islamabad and Respondent Federal Board of Revenue. Learned DAG on behalf of the Ministries argued that the Petitioners have totally misconceived the constitutional mandate and the requirements of the Act. He has relied on Article 77 of the Constitution along with section 3 of the Act to urge that the Federal Government has acted in accordance with law and the Constitution and has not

exceeded its jurisdiction in any manner. He further argued that the Petitioners have failed to show how the general public is aggrieved in any manner on the basis of which the instant Petitions have been filed.

5. In W.P. No.3399/2016, the other grounds raised and argued by the Counsel at great length is with reference to petroleum prices and the manner in which they are fixed. Learned counsel for the Petitioners argued that there is no mechanism for the fixation of petroleum products. Further that the Government in an arbitrary manner increases the prices of petroleum products every month under the garb of the impound SROs and illegally levy of the sales tax. He further argued that in doing so the Federal Government has encroached upon the function of the regulator that is Oil and Gas Regulatory Authority ("OGRA") and without following due process, arbitrarily fixes the prices of the petroleum products. Further argued that sales tax is charged up to almost 55% of the value of the taxable supply which is sheer violation of the constitutional mandate as well as Section 3 of the Act. Learned counsel argued that under the garb of sales tax, the price of petroleum products are increased which is unconstitutional as the Federal Government has no authority or jurisdiction to fix the petroleum prices which exclusively lies with OGRA. In this regard, the entire argument of the Petitioners is premised on the levy of sales tax through various SROs which is being presented as fixation of petroleum prices. On the other hand, learned DAG argued that there is nothing arbitrary in the manner in which the price for petroleum products is fixed nor has the Federal Government acted in a manner which is against the mandate of the Constitution or the Act. Learned DAG argued that the Federal Government has acted in accordance with law.

6. Heard and record perused.

7. The basic and common question in all these Petitions is the authority of the Federal Government to issue the impugned SRO as well as SRO No.57(I)/2016 dated 29.1.2016 and SRO No.(I)/2016 29.2.2016 (impugned in CM No.5/2016), SRO No.268(I)/2016 dated 31.3.2016 (impugned in CM No.7/2016), SRO No.369(I)/2016 dated 29.4.2016 (impugned in CM No.9/16), SRO No.(I)/2016 dated 31.5.2016 (impugned in CM No.11/2016), SRO No.490(I)/2016 dated 30.6.2016 (impugned in CM No.13/2016), SRO No.(I)/2016 dated 31.7.2016 (impugned in CM No.15/2016) and SRO No.806(I)/2016 dated 31.8.2016 (impugned in CM No.2840/2016), SRO No.925(I)/2016 dated 30.9.2016 (impugned in CM No.19/2016) and SRO No.1011(I)/2016 dated 31.10.2016 (impugned in CM No.21/2016), SRO No.1127(I)/2016 dated 30.11.2016 (impugned in CM No.23/2016), SRO No. (I)/2016 dated 31.12.2016 (impugned in CM No.1/2017), SRO No.21(I)/2017 dated 15.1.2017 (impugned in CM No.1/2017), SRO No. (I)/2017 dated 31.1.2017 (impugned in CM No.3/2017), SRO No. (I)/2017 dated 15.2.2017 (impugned in CM No.5/2017), SRO No. (I)/2017 dated 28.2.2017 (impugned in CM No.7/2017), SRO No. (I)/2017 dated 31.3.2017 (impugned in CM No.9/2017), SRO No.292(I)/2017 dated 30.4.2017 (impugned in CM No.11/2017), SRO No. (I)/2017 dated 31.5.2017 (impugned in CM No.1-3399-16/2017), SRO No. (I)/2017 dated 30.6.2017 (impugned in CM No.3/2017), SRO No. (I)/2017

dated 31.7.2017 (impugned in CM No.5 /2017) and SRO No. (I)/2017 dated 5.8.2017 (impugned in CM No.7/2017). Article 77 of the Constitution reads as follows:-

> "No tax shall be levied for the purposes of the Federation except by or under the authority of Act of Parliament."

In terms of this Article, no tax can be levied except by the authority of the Act of Parliament or under the authority of an Act of Parliament. This means that there must be an Act of Parliament which either levies the tax or grants the authority to levy the tax.

Section 3(1) of the Act provides as under:--

> Subject to the provisions of this Act, there shall be charged, levied and paid a tax known as sales tax at the rate of (seventeen) percent of the value of
>
> (a) taxable supplies made by a registered person in the course or furtherance of any (taxable activity) carried on by him; and
>
> (b) goods imported into Pakistan.

Section 3(2)(b) of the Act reads as follows:

> the Federal Government may, subject to such conditions and restrictions as it may impose, by notification in the official Gazette, declare that in respect of any taxable goods, the tax shall be charged, collected and paid in such manner and at such higher or lower rate or rates as may be specified in the said notification.

Section 3(6) of the Act reads as follows:

> The Federal Government or the (Board) may, in lieu of the tax under subsection (1), by notification in the official Gazette, levy and collect such amount of tax as it may deem fit on any supplies or class of supplies or on any goods or class of goods and may also specify, the mode, manner or time of payment of such amount of lax.

The said provisions authorize the Federal Government to impose conditions and restrictions by way of notification in the official gazette on the manner in which the tax is to be charged, collected and paid and it can also specify higher and lower rates in the notification. The Federal Government is also authorized that in lieu of the tax levied under sub-section (1) of section 3, it may levy and collect such amounts as it may deem fit on any taxable supplies or goods in the manner prescribed by it. The impugned SROs have all been issued pursuant to Section 3(2)(b) read with subsection (6) of the Act wherein the Federal Government has been authorized by the Act means authorized by Parliament to impose conditions and restrictions on the levy and collection of sales tax and to set rates in lieu of sales tax. Hence the argument that the Federal Government has encroached upon the jurisdiction of Parliament is without basis as Parliament, through its Act has authorized the Federal Government and the Federal Board of Revenue to levy such amounts and collect in lieu of sales tax as it may deem fit and to specify the mode and manner and time to collect the amount. It is also noted that the Federal Government issues such notifications periodically, hence SRO No.57(I)/2016 dated 29.1.2016 impugned in W.P. No.4311/2016 was replaced by the subsequent SROs which have been impugned through numerous C.Ms. in W.P. No.3399/2016.

Therefore to the extent of the SRO it has become infructuous and even otherwise with respect to the other SROs, there is no merit in the petitions.

8. With reference to the argument that there is no prescribed method for fixing petroleum prices and that they are being increased arbitrarily, there is nothing on the record to establish this point. The Petitioners have relied upon the SROs to show that prices are being increased whereas the SROs show the levy of sales tax or amounts in lieu of sales tax as prescribed under Section 3 of the Act. The power has been delegated through an act of Parliament and the Federal Government can raise or lower the rates. The levy of the tax cannot be declared unconstitutional or against public interest if it increases or lowers the price. Even otherwise it is the Federal Government stance that prices have not been increased and that the Petitioners have attempted to mislead the Court by relating it to the levy of sales tax under the Act.

9. In view of the aforesaid, no case for interference is made out.
All the petitions are dismissed.

KMZ/M-167/L Petition dismissed.

2017 P T D 2488
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
LAHORE ELECTRIC SUPPLY COMPANY LTD.
Versus
COMMISSIONER INLAND REVENUE, REGIONAL TAX OFFICER, LAHORE and others
S.T.R. No.68374 of 2017, decided on 25th September, 2017.

Sales Tax Act (VII of 1990)---
----Ss. 47, 3 & 7---Determination of sales tax liability---Jurisdiction of High Court under S.47 of the Sales Tax Act, 1990---Nature---Question before the High Court was whether the Appellate Tribunal and forums below were justified in holding that the taxpayer, an Electricity Supply Company, was liable to pay full amount of sales tax collected, which was charged through consumer bills, and not just the tax according to the amount of units declared in its return, which was substantially less---Held, no substance existed in the Reference and High Court declined to exercise its jurisdiction under S.47 of the Sales Tax Act, 1990.
Khurram Shahbaz Butt for Petitioner.

ORDER

AYESHA A. MALIK, J.---This is a Reference under Section 47 of the Sales Tax Act, 1990 ("Act").

2. Following question of law is pressed for our opinion, which is asserted to have arisen out of order dated 8.6.2017 passed by the Appellate Tribunal Inland Revenue, Lahore ("Appellate Tribunal"):--

(a) "Whether on the facts and in the circumstances of the case, the impugned order having been passed by the Appellate Tribunal after the laps of three months and fourteen days from the date of hearing, could stand the test of judicial efficacy and can hold field as a lawful order, in view of the law laid down by the Hon'ble Apex Court, in the case reported as 2015 SCMR 1550 in re: M/s. MFMY Industries Ltd. and others v. Federation of Pakistan?"

(b) "Whether on the facts and in the circumstances of the case, the learned Appellate Tribunal has failed to pass a speaking and a reasoned order in consonance with the requirements of section 24A of the General Clauses Act, 1897?"

3. We have heard the learned counsel and have gone through the record and find that show cause notice was issued to the Applicant on 19.1.2015 wherein the main allegation was that the Applicant has collected sales tax through the electricity bills along with electricity charges from steel melters and re-rollers for the tax period July 2014 against 72,672,922/- kwh whereas it has deposited amounts against 4,169,138 kwh. Therefore the short fall amount of Rs.479,526,978/- is liable

to be recovered from the Applicant. The Applicant filed its reply and the matter was heard at length and was decided against the Applicant by the Deputy Commissioner Inland Revenue vide his order dated 14.9.2015. The Applicant appealed the said order and the matter was heard by the Commissioner Inland Revenue who also dismissed the case vide his order dated 25.11.2015. Both the orders of the Deputy Commissioner Inland Revenue and the Commissioner Inland Revenue have explained in great detail that the tax paid by the steel melters and re-rollers has to be deposited with the government exchequer on the basis of tax collected and not on the basis of billed amounts. After going through the record both the Deputy Commissioner Inland Revenue and the Commissioner Inland Revenue found that the Applicant has short paid sales tax amounting to Rs.479,526,978/- for the tax period of July 2014 which stands recoverable from the Applicant along with the surcharge. The Applicant filed an appeal before the Appellate Tribunal. The Appellate Tribunal heard the matter and vide order dated 8.6.2017 upheld both the orders passed by the Deputy Commissioner Inland Revenue and the Commissioner Inland Revenue stating therein that sales tax has to be deposited on the basis of the collected amount and that the Applicant had declared less units in its sales tax return as compared to the number of units declared in its bill which were actually supplied to the consumer. Hence the Applicant was required to pay the full amount of sales tax which was charged through the electricity bills.

4. Under the circumstances, we find no substance in this Reference, hence decline to exercise our jurisdiction. Reference application is decided against the Applicant.

5. Office shall send a copy of this order under seal of the Court to the Appellate Tribunal as per section 47(5) of the Act.

KMZ/L-8/L Application dismissed.

PLJ 2017 Lahore 1008
***Present*: MRS. AYESHA A. MALIK, J.**
NASREEN ADREES, etc.--Petitioners
versus
DEPUTY DISTRICT OFFICER, etc.--Respondents
W.P. No. 34209 of 2016, decided on 1.11.2016.

Constitution of Pakistan, 1973--

----Art. 199--Co-operative Societies Act, 1925--S. 54--Private Housing Society, Registration of rent-deed--Issuance of gate pass--Interference in the peaceful possession--Maintainability--Petitioner is against Respondent No. 3, who admittedly is a private Housing Society against whom a writ cannot be issued--Matter is subjudice before Banking Court, with is proper forum in this case--Petition was dismissed. [P.] A & B
Mr. Yousaf Naeem Chandio, Advocate for Petitioners.
Date of hearing: 1.11.2016.

ORDER

Through this petition, the Petitioners have impugned orders dated 02.01.2015 and 04.04.2016 passed by Respondents No. 1 and 2 respectively and seek a declaration against Respondent No. 3 not to interfere with the peaceful possession of the Petitioners.

2. The facts of the case are that the Petitioners filed an application on 01.11.2014 before Respondent No. 3 for registration of rent agreement/deed and then issuance of gate pass. On account of the failure of Respondent No. 3 to perform its legal obligation, the Petitioners filed a petition under Section 54 of the Co-operative Societies Act, 1925 before Respondent No. 1, which was dismissed *vide* order dated 02.01.2015. Feeling aggrieved against the said order, the Petitioners filed an appeal before Respondent No. 2, which was also dismissed *vide* order dated 04.04.2016. Hence this petition.

3. The basic grievance of the Petitioner is against Respondent No. 3, who admittedly is a private housing-society against whom a writ cannot be issued. Reliance is placed upon the case titled *Messrs Millat Tractors Ltd. through Deputy General Manager v. Muhammad Munir Ahmad and 3 others* (PLD 2015 Lahore 507). Furthermore, as per the impugned orders, the matter is subjudice before the Banking Court, which is the proper forum in this case.

4. Under the circumstances, this petition is *dismissed in limine* being not maintainable.

(Y.A.) Petition dismissed

P L D 2018 Lahore 9
Before Ayesha A. Malik, J
AHSIN ARSHAD and others---Petitioners
Versus
ADVOCATE GENERAL, PUNJAB and others---Respondents
Writ Petition No. 30737 of 2012, heard on 3rd November, 2017.

(a) Mental Health Ordinance (VIII of 2001)---

----Ss. 29, 31 & 32---Judicial proceedings for appointment of guardian of person and manager of the property of the mentally disordered---Territorial jurisdiction of Court of Protection---Question before the High Court was whether consent of the Advocate-General under S. 29 of the Mental Health Ordinance, 2001 for appointment of guardian of person and manager of property of a mentally disordered person, was a substantive function and whether applicant and the mentally disordered person must reside within jurisdiction of Court of Protection---Held, in order to achieve purpose of Mental Health Ordinance, 2001; presence of mentally disordered person was necessary and Advocate, General's Office, at the time of issuance of consent, ensured that mentally disordered person as well as relatives who had applied for guardianship or managership were available to present themselves before the Court of Protection---Giving of consent under S.29 Mental Health Ordinance, 2001 was therefore a substantive function carried out by the Advocate-General of the Province and if such function was considered to be a ministerial function, mandate of the law, which essentially was to protect mentally disordered persons and their property would be defeated---Consent sought for under S.29 of Mental Health Ordinance, 2001 was limited to three aspects; first to ensure that the mentally disordered person and the relatives who sought guardianship/managership resided within the jurisdiction of the Court of Protection, secondly that there was a mentally disordered person for whose property an application under S.32 or 33 of Mental Health Ordinance, 2001 had been made and finally that relatives of such person had moved the application---Advocate-General's office therefore in the first instance had to ensure that the mentally disordered person and applicant resided within the jurisdiction of Court of Protection---Constitutional petition was dismissed, in circumstances.

(b) Interpretation of statutes ---

----Language of a statute must be given meaning, which was consistent with the objectives of such a statute.

Muhammad Iqbal Awan for Petitioners.

Anwaar Hussain, Addl. A.G. for Respondents.

Date of hearing: 3rd November, 2017.

JUDGMENT

AYESHA A. MALIK, J.--Through this petition, the Petitioners have impugned letter dated 1.11.2012 issued by Respondent No.1, Advocate General, Punjab, Lahore whereby permission sought under Section 29 of the Mental Health Ordinance, 2001 ("Ordinance") was declined.

2. The instant petition is filed through special attorney Muhammad Arshad Parwaiz, who is the father of the Petitioners. The mother of the Petitioners Naghmana Akhtar is statedly suffering from mental disorder and she is unable to take care of herself and her property. Consequently the Petitioners seek appointment of a manager of the property of Naghmana Akhtar under the Ordinance. In this regard, the Petitioners filed an application under Section 29 of the Ordinance before Respondent No.1 seeking his consent, which application was rejected on the ground that Naghmana Akhtar did not reside within the territorial jurisdiction of the Court of Protection. Learned counsel for the Petitioners argued that the consent required under Section 29 of the Ordinance is a clerical function and the Respondent No.1 is not allowed to seek the presence of the Petitioners or their mother for the purposes of giving his consent. He argued that in doing so he has usurped the jurisdiction of the Court of Protection. Learned counsel further argued that the Court of Protection as per Section 30 of the Ordinance may decide whether it requires the attendance and examination of any person including the person with mental disorder and this power lies exclusively with the Court of Protection and not the Advocate General's Office. Learned counsel further argued that the mother of the Petitioners cannot travel, therefore cannot come to Pakistan. Moreover the Petitioners are entitled to take care of her property, hence they seek permission to be appointed as manager of her property under Section 33 of the Ordinance so that they can manage the affairs of the property. Learned counsel concluded that while permanent residence of the Petitioners is in Pakistan, currently they live in New York, hence the impugned order is illegal.

3. On behalf of the Respondents, Mr. Anwaar Hussain, Additional AG argued that the "consent" required under Section 29 of the Ordinance is not a clerical or post office function. It is a substantive function, in order to ensure that the objectives of the Ordinance are achieved. He argued that a mentally disordered person who does not reside within the jurisdiction of the Court of Protection cannot be given consent under Section 29 of the Ordinance. He further argued that the "consent" under Section 29 of the Ordinance is meaningful consent whereby the office of Respondent No.1 is to ensure that prima facie there is a mentally disordered person, who resides within the jurisdiction of the Court of Protection. Further that the applicant seeking to be appointed manager under Section 33 of the Ordinance is a relative who also resides within the jurisdiction of the Court of Protection. He explained that since neither of the parties have presented themselves before the Respondent No.1 nor do they reside within the jurisdiction of the Court of Protection, the application of the Petitioners was turned down.

4. Heard and record perused.

5. The issue before the Court is the role of the Advocate General's Office under Section 29 of the Ordinance. The stated Section reads as follows:-
Whenever any person is possessed of property and is alleged to be mentally disordered, the Court of Protection, within whose jurisdiction such person is residing may, upon application by any of his relatives, having obtained consent in writing of the Advocate General of the Province concerned, by order direct an inquiry for the purpose of ascertaining whether such person is mentally disordered and incapable of managing himself, his property and his affairs.
In terms of this Section if a person applies to be appointed as manager under Section 33 of the Ordinance, an application must be made before the Advocate General's Office seeking his consent to file the application before the Court of Protection. If a person is alleged to be mentally disordered, the Advocate General's Office must satisfy itself that there is a mentally disordered person, residing within the jurisdiction of the Court of Protection for whose property, a manager is sought to be appointed under Section 33 of the Ordinance. As per the Section, it is only upon receipt of this "consent" that the application can be placed before the Court of Protection. The question that arises in this case is whether consent under Section 29 of the Ordinance is a substantive function and whether the applicant must reside within the jurisdiction of the Court of Protection.

6. The preamble of the Ordinance provides that it is an Ordinance relating to mentally disordered persons with respect to their care and treatment and the management of their property. Chapter V of the Ordinance deals with judicial proceedings for appointment of guardian of person and manager of the property of the mentally disordered by the Court of Protection. The proceedings are regulated by Sections 30 and 31 of the Ordinance, in terms whereof the Court may require the alleged mentally disordered person to attend the proceedings in order to check the mental capacity and condition of that person. The Court can also call for personal examination of such person and inquire in the matter in order to ascertain whether that person is capable of managing his or her affairs or whether a guardian is required under Section 32 of the Ordinance. In order to achieve this purpose the presence of the mentally disordered person is necessary. The office of the Advocate General's Office, at the time of issuance of his consent, ensures that the mentally disordered person as well as the relatives who have applied for guardianship or managership are available to present themselves before the Court of Protection. The legislature in its wisdom created a first level of inquiry through the Advocate General's Office to ensure on the genuineness of the application as well as the fact that prima facie there is a case to be placed before the Court of Protection. This heightened protection is given to protect a person who cannot coherently protect his or her rights or property. It is, therefore, a substantive function carried out by the Advocate General of the Province to protect the person alleged to be mentally disordered and to protect his or her property. If this function is considered to be a ministerial function, the mandate of the law, which essentially is to protect mentally disordered persons and their property would be defeated.

7. Furthermore the consent sought under Section 29 of the Ordinance means that the Advocate General's Office has to agree that the pre-requisites of Section 29 are satisfied. The word "consent" means to agree to do something, hence the Advocate General's Office has to agree that the application under Section 29 of the Ordinance may be filed. The requirement of giving his consent therefore cannot be considered mechanical as it requires some degree of probe and reasoning before acceptance of the request for filing the application. In this regard, the consent sought for under Section 29 of the Ordinance is limited to three aspects, first to ensure that the mentally disordered person and the relatives who seek guardianship/ managership reside within the jurisdiction of the Court of Protection, secondly that there is a mentally disordered person for whose property an application under Section 32 or 33 has been made and finally that the relatives of such person have moved the application. The Advocate General's Office has to satisfy himself on all elements before he can agree to the filing of such an application. This means that he has to in the first instance ensure that the mentally disordered person and the applicant reside within the jurisdiction of the court of Protection.

8. It is a settled law that the language of statute must be given meaning which is consistent with the objectives of the Ordinance. The Ordinance under review was promulgated to protect mentally disordered persons and their property. The purpose of the consent given by the Advocate General's Office therefore is a meaningful function which is clear from a bare reading of Section 29 of the Ordinance and which is in furtherance of the protection given under the Ordinance. The Court of Protection has to administer the property of a mentally disordered person which requires constant monitoring and supervision. Section 36 of the Ordinance requires the manager to seek permission of the Court with reference to the property of the mentally disordered person. Section 37 of the Ordinance requires the manager to furnish an inventory of all immovable property, all assets and other moveable property to the Court of Protection. It also provides that all transactions with reference to the property of the mentally disordered person shall be through an authorized bank approved by the Court. The Court of Protection fixes all fees and expenses to be paid, releases payment for treatment of the mentally disordered person and supervises the investment of his or her assets. Under the circumstances the Court of Protection is required to constantly manage the affairs of the property and to supervise the care of the mentally disordered person. This can only be done if the mentally disordered person and the guardian or manager reside within the jurisdiction of the Court of Protection. Therefore the consent required by the Advocate General's Office ensures that the guardian or manager and the mentally disordered person are residing within the jurisdiction of the Court of Protection so that both can be regularly supervised and monitored. In this case, since neither the mentally disordered person nor the proposed manager reside within the jurisdiction of the Court of Protection, the application was rightly dismissed.

9. In view of the aforesaid, no case for interference is made out. The instant petition is dismissed.
KMZ/A-102/L Petition dismissed.

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Before Ayesha A. Malik and Jawad Hassan, JJ
MUHAMMAD FAHAD MALIK---Appellant
Versus
PAKISTAN MEDICAL AND DENTAL COUNCIL and others---Respondents
I.C.A. No.98703 of 2017, heard on 7th December, 2017.

(a) Medical and Dental Council Ordinance (XXXII of 1962)---

----S. 3, [as amended by Pakistan Medical and Dental Council (Amendment) Ordinance (XI of 2015)] & Ss. 7, 10 & 33---Constitution of Pakistan, Arts. 89 & 73---Power of President to promulgate Ordinance---Nature of Ordinance when promulgated---Expiry of Ordinance with the efflux of time---Constitution and composition of the Pakistan Medical and Dental Council ("PMDC")---Effect of repeal of Pakistan Medical and Dental Council (Amendment) Ordinance, 2015 after expiry of 120 days and lapse of the same---Applicability of de facto doctrine---Scope ----Question before the High Court was "whether after lapse of Pakistan Medical and Dental Council (Amendment) Ordinance,2015; actions taken by the Council constituted under the amended provision, which had lapsed on 25.06.2016, were of no legal effect and whether such Council could continue to function"---Held, Ordinance, being temporary in nature, expired with efflux of time and earlier permanent statute (as it was) automatically stood revived---Under the Constitution, an Ordinance was only a stop-gap arrangement and temporary measure, which must be placed before the National Assembly if it pertained to matters specified in Art. 73(2) of the Constitution and in all other cases before both Houses within four months of the date of its promulgation unless earlier withdrawn by the President or disapproved by the National Assembly or Parliament---In the present case, since the Amending Ordinance ceased to exist on 25.04.2016, new Council elected thereunder also ceased to exist on the same date and said Council could not function thereafter or exercise powers under the Medical and Dental Council Ordinance, 1962---High Court observed that during the period following expiration/lapse of the Pakistan Medical and Dental Council (Amendment) Ordinance, 2015,the new Council acted under bona fide belief that they were duly constituted and took a number of decisions, and based on the same, De facto doctrine was invoked by the High Court out of necessity to protect decisions of the Council from 25.04.2016 to prevent chaos and inconvenience---Intra-court appeal was allowed, accordingly.
Mustafa Impex, Karachi and others v. The Government of Pakistan through Secretary Finance, Islamabad and others PLD 2016 SC 808; Mst. Attiyya Bibi Khan and others v. Federation of Pakistan (Ministry of Education), Civil Secretariat, Islamabad and others 2001 SCMR 1161; Mian Muhammad Afzal v. Province of Punjab and others 2004 SCMR 1570; Junaid Intzar v. UHS and others 2009 MLD 684; Muhammad Zubair and 5 others v. Government of Pakistan through Secretary Health, Islamabad and 22 others 2012 CLC 1071;Syed Fayyaz Hussain Qadri Advocate v. The Administrator, Lahore Municipal Corporation, Lahore and 4 others PLD 1972 Lah. 316; Government of Punjab through Secretary, Home Department v. Ziaullah Khan and 2 others 1992 SCMR 602; Muhammad Naeem alias Naeema

v. The State 1992 SCMR 1617; Peer Sabir Shah v. Federation of Pakistan and others PLD 1994 SC 738; Federation of Pakistan and others v. M. Nawaz Khokhar and others PLD 2000 SC 26 and Air League of PIAC Employees through President v. Federation of Pakistan M/O Labour and Manpower Division, Islamabad and others 2011 SCMR 1254 ref.
Muhammad Arif and another v. The State and another 1993 SCMR 1589; Sabir Shah v. Shad Muhammad Khan PLD 1995 SC 66; Federation of Pakistan through Secretary, Ministry of Law, Justice and Parliamentary Affairs, Islamabad v. Dr. Mubashir Hassan and others PLD 2012 SC 106; Malik Asad Ali and others v. Federation of Pakistan through Secretary, Law, Justice and Parliamentary Affairs, Islamabad and others PLD 1998 SC 161; Mehram Ali and others v. Federation of Pakistan and others PLD 1998 SC 1445; Chairman, Pakistan Broadcasting Corporation, Islamabad v. Nasir Ahmad and 3 others 1995 SCMR 1593 and Managing Director, Sui Southern Gas Company Ltd., Karachi v. Ghulam Abbas and others PLD 2003 SC 724 rel.

(b) De facto, doctrine of---

---De facto doctrine---Nature, scope and applicability---De facto doctrine was an established principle invoked by the superior courts to bring regularity and prevent confusion in the conduct of public business which may be created by persons not legally entitled to perform such duties yet when such persons had continued to do so without any objection.
Malik Asad Ali and others v. Federation of Pakistan through Secretary, Law, Justice and Parliamentary Affairs, Islamabad and others PLD 1998 SC 161; Mehram Ali and others v. Federation of Pakistan and others PLD 1998 SC 1445; Chairman, Pakistan Broadcasting Corporation, Islamabad v. Nasir Ahmad and 3 others 1995 SCMR 1593 and Managing Director, Sui Southern Gas Company Ltd., Karachi v. Ghulam Abbas and others PLD 2003 SC 724 rel.

(c) Constitution of Pakistan---

----Arts. 154 & Fourth Sched. Part II, Item 11---Medical and Dental Council Ordinance (XXXII of 1962) Ss. 3, 10 & 33---Council of Common Interests---Mandatory nature of the provisions of Art. 154 of the Constitution---Regulation of the medical profession by the Council of Common Interests ("CCI")---Mandate of the Pakistan Medical and Dental Council ("PMDC")---Standards, guidelines and regulation of the medical profession by the PMDC subject to approval by CCI via Constitutional mandate---Scope---PMDC regulated the medical profession by ensuring that all medical and dental education in Pakistan was imparted by recognized medical or dental institutions that issued recognized degrees and thereafter registered the medical or dental practitioners---PMDC set standards for education and admission in medical and dental colleges in order to ensure that minimum threshold was maintained---Laws relating to medical profession were covered under Part II of the Federal Legislative List, and thus anything done in relation thereto must be placed before the CCI as it was the Constitutional Forum

which exercised and supervised control over the PMDC and regulated all policies with respect to the medical profession---Language of Art.154 of the Constitution requiring the CCI to formulate and regulate polices in relation to matters in Part II of the Federal Legislative List meant that there must be a deliberative process before the CCI wherein objectives of relevant policy were discussed along with manner in which it was to be effectuated; which would include the framework of any regulation---Article 154 of the Constitution required the CCI to exercise supervision and control over medical institutions and any regulation with reference to the medical profession could fall within the control and supervision of the CCI---High Court held that all standards, guidelines and recommendations issued by PMDC in furtherance of its mandate, which is to regulate the medical profession, must be approved by the Council of Common Interests.
Messrs Gadon Textile Mills and 814 others v. WAPDA and others 1997 SCMR 641 rel.

(d) MBBS and BDS (Admissions, House Job and Internship) Regulations, 2016---

----Regln. 9(6)(7)(8)(11)---Medical and Dental Council Ordinance (XXXII of 1962), Ss. 33, 10 & 3---University of Health Sciences, Lahore Ordinance (LVIII of 2002), Ss. 37 & 4---Constitution of Pakistan, Art. 18---Regulatory function of the Pakistan Medical and Dental Council (PMDC)---Eligibility criteria for admission in MBBS and BDS Courses in Pakistan and abroad---Academic requirements enforced by PMDC via regulations framed under S. 33 of the Medical and Dental Council Ordinance, 1962---Matters in respect of which PMDC could exercise its powers to make Regulations---Regulation of admission into private medical colleges by the PMDC---Scope---Question before the High Court was "whether prescribing conditions for admission, allowed the PMDC to takeover the right of various affiliated medical colleges to choose their students as per eligibility criteria and replace the same with a centralized system managed by the University of Health Sciences"---Held, right of granting admission to students was a matter inter alia between an affiliated medical college and University of Health Sciences ("UHS")---Allowing an affiliated college to admit students on given criteria in terms of permissible intake was a right that such college had whilst being affiliated with UHS and PMDC had nothing to do with said right nor did the right to admission within private medical colleges fell within the regulatory control of PMDC---While PMDC could provide the eligibility criteria and the standard of merit on which admissions should be granted, it could not take away the right to admit students in private colleges as the same was beyond the mandate of the Pakistan Medical and Dental Council Ordinance, 1962 and encroached upon fundamental right of private colleges to carry out their business---Legislature delegated its authority to prescribe conditions for admissions in medical and dental institutions and the same was a facilitative power given to PMDC to retain control over the medical profession and did not allow PMDC to go beyond the intent of the primary Legislation nor did it allow PMDC to deal with any subject matter not specifically enumerated in the enabling statute---High Court held that Reglns. 9(6), 9(7), 9(8), 9(11) of the MBBS

and BDS (Admissions, House Job and Internship) Regulations, 2016, framed by the PMDC, were ultra vires the Pakistan Medical and Dental Council Ordinance, 1962 and were struck down accordingly --- Intra-court appeal was allowed, accordingly.

(e) Delegated Legislation---

----Rules and Regulations---Nature and exercise of the power to frame regulations/rules under a parent statute---Scope---Power to make rules being delegated legislation was simply for advancement of basic objective of the law and no more---Parliament delegated its Legislative function to regulators where it may not have the required expertise on technical matters or it may be unable to respond to change in a timely manner or to a specific need and therefore it gave flexibility in the application of the law by delegating its power to legislate---Statutory Rules and Regulations could enlarge the scope of the section of the statute under which they had been framed and a statutory authority must make Regulations/Rules in order to effectuate intention of the Legislature within the limits of the mandate given to such an authority---Rules framed, if inconsistent with the provisions of the statute and if the same defeated intention of the Legislature, would become invalid.
Independent Newspapers Corporation (Pvt.) Ltd. and others v. Federation of Pakistan and others PLD 2017 Lah. 289; Khawaja Ahmad Hassan v. Government of Punjab and others 2005 SCMR 186 and Pakistan through Secretary Finance, Islamabad and 5 others v. Aryan Petro Chemical Industries (Pvt.) Ltd Peshawar and others 2003 SCMR 370 rel.

Appellants/Petitioners by:
Khalid Ishaq.
Munawar us Salam, Arslan Riaz, Furqan Naveed, Ghulam Mujtaba and Usman Sahi.
Abdul Hameed Chohan, Khawaja Adnan Ahmed, Pervaiz Inayat Malik, Abid Saqi, Tariq Mahmood Mughal, Ijaz Ahmad Awan, Tariq Saeed Rana, Mohammad Azhar Siddique, for Appellant (in C.M. No.3/2017 in W.P. No.104665/17).

Respondents by:
Tahir Mehmood Ahmed Khokhar, DAG, Muhammad Siraj-ul-Islam Khan, Addl. AG, Punjab.
Noshab A. Khan for Respondent PMDC.
Imran Muhammad Sarwar and Alamdar Hussain, for Respondent University of Health Sciences.
Ahsan Maood, for CMH, Lahore Medical College and Institute of Dentistry.
Prof. Dr. Aamir Bandesha, Member, Executive Committee of PMDC.
Dr. Syed Azhar Ali Shah, Acting Registrar PMDC.
Dr. Asad Zaheer, Registrar and Zahid Mahmood, Assistant Registrar (Legal) University of Health Sciences Lahore.
Dr. Salman Shahid, Addl. Secretary (Tech.) Specialized Healthcare and Medical Education Department along with Muhammad Suleman Akash, Law Officer in the Office of Respondent No.5.

Major (R) Israr ul Haq, Executive Director for Sahara for Life Trust.
Dr. Salman Kazim, Secretary Young Doctors Association of Pakistan.
Date of hearing: 7th December, 2017.

JUDGMENT

AYESHA A. MALIK, J.--This common judgment decides upon the issues raised in the instant ICA along with connected ICAs and Writ Petitions detailed in Schedule "A" and "B", appended with the judgment, as all appeals and petitions raise common questions of law and facts.

2. There are two sets of Appellants/Petitioners before the Court. The first are students who are desirous of admission in medical and dental colleges in the 2017-18 session. They completed their A level in June 2017 and obtained their equivalence certificates from the Inter Board Committee of Chairman, Government of Pakistan, Islamabad ("IBCC"). Thereafter they appeared in the SAT II subject test on 3.6.2017 and 1.10.2017 and out of abundant caution also sat for the MDCAT exam in October, 2017 on account of the pending litigation. The case of these Appellants/Petitioners is that on completion of their O level in June 2015 and while opting to study A level, the Appellants/Petitioners planned and took necessary steps over the next two years in preparation for admission in medical and dental colleges. The Appellants/Petitioners at the time were guided by the Admission in MBBS/BDS Courses and Conditions for House Job/Internship/ Foundation Year Regulations, 2013 ("2013 Regulations") in terms of which they were eligible for admission in medical and dental colleges on the basis of their SAT II score in lieu of the MDCAT exam. In October, 2016, the 2013 Regulations were repealed by the MBBS and BDS (Admissions, House Job and Internship Regulations, 2016 ("2016 Regulations") in terms of which the Appellants/Petitioners could no longer rely on the SAT II result for the purposes of admission in medical and dental colleges and were compelled to take the MDCAT exam. The grievance of the Appellants/Petitioners is that when they commenced their A level in June 2015, the 2013 Regulations were in place and all of a sudden the Respondent PMDC brought about major changes in the admission criteria through the 2016 Regulations without any notice, making the MDCAT exam mandatory and doing away with the SAT II score. The 2016 Regulations were challenged by students who had taken their A level in June, 2016 and ultimately they were given a concession such that their admissions were made under the 2013 Regulations. It is the case of the Appellants/Petitioners that they are entitled to the same treatment as they had already completed one year of their A level in October 2016 and had planned the entire year on the understanding that they would be governed by the 2013 Regulations. Therefore, since they had al ready taken the SAT II subject tests for the purposes of admission in medical and dental colleges, before the 2016 Regulations were promulgated they had legitimate expectation to be admitted on the basis of the SAT II score. Being aggrieved the Appellants challenged the 2016 Regulations before the learned Single Judge who dismissed the petitions vide the common order dated 16.10.2017 passed in W.P. No.70036/2017. During the

pendency of these ICAs, other students in similar position to that of the Appellants filed writ petitions, as detailed in Schedule B, which were heard along with the connected ICAs.

3. The other set of Petitioners before the Court are private medical and dental colleges. The Petitions were filed by the Pakistan Association of Private Medical and Dental Institutes ("PAMI") and Shalimar Medical and Dental College, who have also challenged the 2016 Regulations as they are aggrieved by the Centralized Admission Program ("CAP") prescribed thereunder. It is their case that 2016 Regulations require all private and medical dental colleges to submit to CAP on the basis of which Respondent University of Health Sciences ("UHS") will receive all applications for admission in private medical and dental colleges, process the same on the basis of preferences given by the students and thereafter, finalize a merit list for the private medical and dental colleges. The colleges will then admit the students on the merit list. These Petitioners have called into question inter alia the vires and actions of the Respondents under the impugned 2016 Regulations on the touchstone of their fundamental right to do business under the Pakistan Medical and Dental Council Ordinance, 1962 ("1962 Ordinance") and it being contrary to the mandate of Article 18 of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution"). It is also their case that in an earlier round of litigation when the vires of 2016 Regulations were challenged, several opportunities were given to PAMI and PMDC to resolve the issues with respect to CAP and other regulations on the basis whereof the parties entered into an understanding whereby the matter would be deemed pending and in the meantime, for the 2017-18 session, private medical and dental colleges can admit students of their choice in terms of the given criteria by PMDC. It is also their case that PMDC unilaterally disregarded and abandoned all points of negotiations and deliberations, which are documented in the minutes of meeting held on 18.9.2017 at PMDC Office, Islamabad and instead set out to enforce the mechanism prescribed under the 2016 Regulations. Private medical and dental colleges have commenced their admission process, however the UHS has also issued advertisements calling for applications for admission in private and medical dental colleges which has created absolute chaos for students as they are unsure of the manner in which admissions will progress this year.

Submissions of the Appellants/Petitioners Counsel

4. Mr. Munawar us Salam argued on the vires of the 2016 Regulations on behalf of the Petitioners/Appellants. He argued that the 2016 Regulations have been framed by a Council constituted under the Pakistan Medical and Dental Council (Amendment) Ordinance, 2015 ("Amendment Ordinance") which ceased to exist on 25.4.2016 being the date of repeal of the Amendment Ordinance as per Article 89 of the Constitution. Therefore he argued that the 2016 Regulations were framed and notified by a Council on 27.10.2016 which in fact did not exist on that date. He argued that even otherwise neither the Amendment Ordinance nor the purported Council established under the Amendment Ordinance stood approved by the Cabinet in terms of the constitutional requirement pronounced by the august Supreme Court of Pakistan in Mustafa Impex, Karachi and others v. The

Government of Pakistan through Secretary Finance, Islamabad and others (PLD 2016 SC 808). He further argued that the implementation of 2016 Regulations for the year 2017-18 tantamounts to retroactive application of the 2016 Regulations which is violative of the Constitution. He explained that students had already completed one year of their A level and taken decisive steps towards preparing for admission in medical and dental colleges in terms of the 2013 Regulations. Hence a vested right has accrued in their favour and the Respondents cannot unilaterally, without any notice take away this vested right. He further explained that the 2016 Regulations brought about a sea change in the manner of admission and the criteria from the earlier 2013 Regulations, and were made applicable to the Appellants/Petitioners without any regard of the adverse implications it would have on students who had already taken positive steps in furtherance of their desire to participate in the admission process for medical and dental colleges. He argued that it is a case of legitimate expectation when a certain course will be followed for the purposes of admission in medical and dental colleges whereby it would be unfair if the competent authority were allowed to change that course midstream, as it would adversely affect the rights of the students. Learned counsel argued that mere existence of the 2016 Regulations does not take away the vested rights accrued in favour of the students once they had decided and invested their two years towards pursuing the career in medicine and dentistry. It was also argued that in terms of Article 154 of the Constitution read with Entry 2 of Part II of the Federal Legislative List in the Fourth Schedule of the Constitution, all regulations have to be approved by the Council of Common Interests ("CCI"). In this case the 2016 Regulations have not been routed through the CCI hence are ultra vires to the Constitution.

5. Mr. Khalid Ishaq argued that private medical and dental colleges are registered with the PMDC and affiliated with the UHS and as a term of their affiliation, they have the right to make their own admissions. He argued that PM DC without due consideration of the 1962 Ordinance or its authority mandated CAP under the 2016 Regulations whereby al l rights of admission have been taken away from the private medical and dental colleges and placed in the hands of the UHS. He added that the PMDC can only set the conditions for admission under Section 33 of the 1962 Ordinance and cannot make admissions for the private colleges. This he argued was beyond the scope of authority given to PMDC under the 1962 Ordinance. He reiterated that if at all, a change is to be brought about in the admission policy, sufficient notice and time must be given to all stakeholders to ensure full participation in the rule making process and for smooth transition. He argued that after challenging the 2016 Regulations, negotiations took place with PMDC where they conceded to the fact that 2016 Regulations will not apply to the 2017-18 admissions and that private colleges will continue with the admission policy as per practice under the 2013 Regulations until the matter is settled with PMDC over the future course for private medical and dental colleges as well as for students. He also argued that PMDC has gone beyond its mandate and is not competent under the Constitution or the 1962 Ordinance to control admissions of private medical and dental colleges.

Submissions of the Respondents Counsel

6. Mr. Noshab A. Khan on behalf of the PMDC argued that the 2016 Regulations are in accordance with law and that permission from the Federal Government is not required in terms of Section 33 of the 1962 Ordinance. He argued that SAT II score has never been relevant for the purposes of admission on merit seats in medical and dental colleges. Private colleges were admitting students in contravention to the 2013 Regulations which necessitated the promulgation of the 2016 Regulations. He accepted that the waiver was given to the A level students last year on account of the pending litigation and on behalf of the Council offered the same waiver to the students before the Court meaning thereby that they could be given admission against the 15% reserved seats but not on the open merit seats. The learned counsel argued that the PMDC is the regulatory body which is responsible for the quality of education and training imparted in colleges in order to ensure that the quality of the medical profession is maintained and does not fall prey to substandard entry. He further argued that time and again students have challenged the eligibility criteria for entry in medical and dental colleges, however the courts have never accepted such challenges as there is no vested right on the basis of which students can claim admission in medical and dental colleges.

7. Mr. Imran Muhammad Sarwar argued on behalf of Respondent UHS that the 2016 Regulations are binding on them and that in compliance thereof relevant steps were taken to ensure that the changes brought about in 2016 were duly implemented. It was also argued that the Appellant students who have participated in the entry test cannot now attempt to take the benefit of their SAT II result as they were well aware of the admission policy under the 2016 Regulations. Learned counsel explained that even under the 2013 Regulations, the MDCAT entry test was compulsory for all candidates seeking admission in the medical and dental colleges and it was only limited to the 15% seats reserved for foreign that the SAT II result was accepted. Hence the students have no case and they are bound by the decision of PMDC. Reliance was placed on Mst. Attiyya Bibi Khan and others v. Federation of Pakistan (Ministry of Education), Civil Secretariat, Islamabad and others (2001 SCMR 1161), Mian Muhammad Afzal v. Province of Punjab and others (2004 SCMR 1570), Junaid Intzar v. UHS and others (2009 MLD 684) and Muhammad Zubair and 5 others v. Government of Pakistan through Secretary Health, Islamabad and 22 others (2012 CLC 1071). So far as the case of PAMI and private medical and dental colleges is concerned, learned counsel argued that most of the private medical and dental colleges are affiliated with the UHS and since they are regulated by the PMDC they are obligated to comply with the regulations of PMDC. Reliance was placed on the order of the august Supreme Court of Pakistan dated 11.10.2010 passed in Civil Petition No.1720-L of 2010 to urge the point that the regulations issued by PMDC under the 1962 Ordinance are binding on all institutions vis-a-vis the mechanism for determining the merit of the candidates for admission in medical and dental colleges. He further argued that since the students before the Court have taken the MDCAT exam hence are not entitled to any relief from this Court.

8. With respect to the vires of the law, on behalf of the Federation Mr. Tahir Mehmood Ahmad Khokhar, DAG argued that the 1962 Ordinance was amended in 2012 and again in 2015. The amendments were never challenged, hence at this stage the Appellants/Petitioners are barred from challenging the same and the petitions are hit by laches. With respect to the argument that the approval of CCI is required it was argued that it is not obligatory for PMDC to place its regulations before the CCI for approval, as only policy matters are considered by the CCI and not legislation. It was argued that the final and conclusive forum for law making is Parliament which has validated the 1962 Ordinance along with the Amendment Ordinance and has delegated its legislative function to PMDC. It was also argued that the Federal Government has given its approval for the regulations vide its letter No.1-76/2016-SO (PMDC) dated 25.10.2016, hence the 2016 Regulations are fully endorsed by the Federal Government. So far as reliance on Mustafa Impex (supra) is concerned, it was argued that it will have prospective effect and not retrospective effect. He stated that the Federal Government supported the view of PMDC that CAP will improve transparency and ensure fairness in the admission process and that admissions in private medical and dental colleges should be made as per PMDC regulations. In this regard, it was argued that no illegality has been made out and that the impugned order is in accordance with law.

Facts

9. A Standing Committee of the Ministry of Health Services Regulations and Coordination held its meeting in June, 2016 wherein it decided to introduce a central induction system for admission in medical and dental colleges through a uniform admission policy, with a collective merit list for all private medical and dental colleges. Thereafter on 7.9.2016 the Council of the PMDC approved the 2016 Regulations in its 145th session. On 25.10.2016 the Ministry of National Health Services Regulation and Coordination vetted the draft regulations and approved the same stating therein that the Council is competent to make the regulations. On 27.10.2016, the 2016 Regulations were notified in the official gazette. On 28.10.2016 the admission boards as provided for under the 2016 Regulations were duly nominated. In the meantime, several writ petitions were filed challenging the 2016 Regulations and vide order dated 19.12.2016 passed in W.P. No.35526/2016 titled Ms. Mashal Salam v. PM&DC etc. along with other connected matters, the operation of the 2016 Regulations qua the admissions in medical and dental colleges, for the years 2016-17, in terms of the admission criteria contained therein were suspended. At the time students as well as private medical and dental colleges challenged the vires of the 2016 Regulations which brought about a number of changes in the admission process from the 2013 Regulations. Amongst others, the main challenge was that the SAT II score was no longer relevant for local students who have taken the A level exam as they were required to take the MDCAT exam for admission in medical and dental colleges. Private medical and dental colleges were also aggrieved by the 2016 Regulations on account of the CAP introduced which denied them the right to make admissions in their respective institutes and instead required the UHS to compile a merit list on the basis of which private medical and dental colleges could admit students. The

Court directed the parties to attempt to resolve their disputes and ultimately on 4.8.2017 PMDC conceded to the demands of the petitioners and decided to apply the 2016 Regulations prospectively for the 2017-18 session. It was also stated by the Counsel for the medical and dental colleges that a deliberative process was underway with PMDC to iron out other grievances of PAMI with the 2016 Regulations. The Court disposed of the petitions allowing the private colleges to approach the Court in case their grievances were not redressed by PMDC. Therefore, as per the record, the 2016 Regulations were suspended from 19.12.2016 to 4.8.2017 with respect to admission in medical and dental colleges. In September 2017 writ petitions were filed by the Appellants challenging the 2016 Regulations essentially on the same grounds as raised in the earlier round of litigation, seeking the same relief. Ultimately the impugned order was passed on 16.10.2017 in WP No.70036/2017 and connected cases.

10. The record also shows that several meetings were held between PMDC and PAMI to settle the dispute that has arisen consequent to the 2016 Regulations. As per the minutes of the meeting held on 18.9.2017 at the PMDC office at Islamabad a Memorandum of Understanding ("MOU") was prepared on the basis of which several changes were made to the central entry test and the process of admission. In terms thereof all private medical and dental colleges were allowed to advertise for admission after the declaration of the entry test result and grant admission as per the given criteria. It was also agreed that a private medical and dental college has the right to refuse admission to any candidate who does not have the financial ability to pay for the full course over the five years. A procedure to appeal against merit violation was set out and the parties also agreed to increase the tuition fees. The MOU was signed on 18.9.2017 by members of PMDC and PAMI.

Issues

11. We have heard the counsel and find that the issues argued before us can be divided into two broad challenges: the constitutional challenge and the challenge to the regulatory function of the PMDC. The three constitutional grounds are; first that the Amendment Ordinance lapsed on 25.4.2016, hence the 1962 Ordinance as it stood before the amendment was revived and since there was no Council at the time, any actions taken by the purported new Council formed under the Amendment Ordinance are without any legal effect; second that the 2016 Regulations were not approved by the CCI and third that the requirements stipulated in the case Mustafa Impex (supra) have not been followed. The vires of the 2016 Regulations have also been challenged with reference to the regulatory function of PMDC such that PMDC has exceeded its given mandate under the 1962 Ordinance and that the 2016 Regulations to the extent that it denies private medical and dental colleges the right to admit students of their own choice is beyond the competence of PMDC and tantamounts to exercise of power beyond the prescribed authority under the 1962 Ordinance. Also in dispute is the applicability of the 2016 Regulations that is whether it is to be applied retroactively as the Appellants and the Petitioners have taken decisive steps since June 2015 in accordance with the 2013 Regulations and

therefore cannot be made to comply with the changes in the 2016 Regulations, especially due to the MOU between PAMI and PMDC on the basis of which it was agreed that the 2016 Regulations would not be made applicable for the 2017-18 admission process.

Opinion of the Court
Vires of the 2016 Regulations

12. The 1962 Ordinance constituted a Council under Section 3 and an Executive Committee under Section 10 to exercise powers given under the law. In August 2012 through the Amendment Act 2012 certain amendments were made to the 1962 Ordinance including a substitution in Section 3 of the 1962 Ordinance dealing with the constitution and composition of the Council. The existing Council vide Section 36B of the Amendment Act 2012 was dissolved and the Executive Committee of the Council assumed the powers of the Council until a new Council was elected. On 26 August 2015 the Amendment Ordinance was promulgated under which a new Council was elected. In terms of Article 89 of the Constitution on 11.12.2015 an extension of 120 days was granted to the Amendment Ordinance. On 22.4.2016 the Amendment Ordinance was placed before the Senate, which resolved that the matter be placed before the CCI which is the competent forum to approve the regulations. This was never done and the Amendment Ordinance lapsed on 25.4.2016. On 6.10.2016 as per the agenda, a joint session of the National Assembly was required to consider the Amendment Ordinance, however the matter was never taken up. Consequently, it is the case of the Appellants/Petitioners that the new Council, as constituted under the Amendment Ordinance did not exist in October 2016 meaning thereby that the 2016 Regulations could not have been framed and notified on 27.10.2016 by that Council. In support of his contentions, learned counsel placed reliance on the cases "Syed Fayyaz Hussain Qadri Advocate v. The Administrator, Lahore Municipal Corporation, Lahore and 4 others" (PLD 1972 Lah. 316), Government of Punjab through Secretary, Home Department v. Ziaullah Khan and 2 others" (1992 SCMR 602), "Muhammad Naeem alias Naeema v. The State" (1992 SCMR 1617), Muhammad Arif and another v. The State and another" (1993 SCMR 1589), "Peer Sabir Shah v. Federation of Pakistan and others" (PLD 1994 SC 738), Federation of Pakistan and others v. M. Nawaz Khokhar and others (PLD 2000 SC 26) and Air League of PIAC Employees through President v. Federation of Pakistan M/O Labour and Manpower Division, Islamabad and others (2011 SCMR 1254).

13. The applicable provision of the Constitution is reproduced hereunder:-
Article 89
(1) The President may, except when the (Senate or) National Assembly is in session, if satisfied that circumstances exist which render it necessary to take immediate action, make and promulgate an Ordinance as the circumstances may require.
(2) An Ordinance promulgated under this Article shall have the same force and effect as an Act of (Majlis-e-Shoora Parliament) and shall be subject to like

restrictions as the power of (Majlis-e-Shoora Parliament) to make law, but every such Ordinance -
(a) shall be laid-
(i) before the National Assembly if it (contains provisions dealing with all or any of the matters specified in clause (2) of Article 73), and shall stand repealed at the expiration of (one hundred and twenty days) from its promulgation or , if before the expiration of that period a resolution disapproving it is passed by the Assembly, upon the passing of that resolution:
Provided that the National Assembly may by a resolution extend the Ordinance for a further period of one hundred and twenty days and it shall stand repealed at the expiration of the extended period, or if before the expiration of that period a resolution disapproving it is passed by the Assembly, upon the passing of that resolution:
Provided further that extension for further period may be made only once.
(ii) before both Houses if it (does not contain provisions dealing with any of the matters referred to in sub-paragraph (i), and shall stand repealed at the expiration of (one hundred and twenty days) from its promulgation or, if before the expiration of that period a resolution disapproving it is passed by either House, upon the passing of that resolution.
(Provided that either House may by a resolution extend it for a further period of one hundred and twenty days and it shall stand repealed at the expiration of the extended period, or if before the expiration of that period a resolution disapproving it is passed by a House, upon the passing of that resolution.
Provided further that extension for a further period may be made only once; and)
(b) may be withdrawn at any time by the President.
(3) Without prejudice to the provisions of clause (2),-
(a) an Ordinance laid before the National Assembly under sub-paragraph (i) of paragraph (a) of clause (2) shall be deemed to be a Bill introduced in the National Assembly and
(b) an Ordinance laid before both Houses under sub-paragraph (ii) of paragraph (a) of clause (2) shall be deemed to be a Bill introduced in the House where it was first laid.)

14. In terms of Article 89(2) (a) (i) and (ii) of the Constitution, an Ordinance shall stand repealed on the expiration of 120 days from the date of its promulgation or in case of an extension from the date of expiry of the extended period. In 1992 SCMR 602 (supra) the august Supreme Court of Pakistan held that where a law is repealed or deemed to have been repealed by or under or by virtue of the Constitution the repeal shall not affect the operation of the previous law except where otherwise provided. In 1993 SCMR 1589 (supra) the august Supreme Court of Pakistan discussed the distinction between temporary enactments and permanent enactments. The general principle of law that emerges from the cases relied upon is that an Ordinance being temporary legislation expires with the efflux of time and the earlier permanent statute automatically stands revived.

15. In this case the Amendment Ordinance made certain amendments by way of substitution to the 1962 Ordinance essentially with respect to the constitution and composition of the Council and the election process. In this regard, it is noted that the Amendment Ordinance was temporary legislation which amended the 1962 Ordinance by way of substitution. The amendments took effect immediately and remained effective on the statute books until the lapse of the Amendment Ordinance on 25.4.2016. With the lapse of the Amendment Ordinance, the amendments made to the 1962 Ordinance also lapsed and the position prior to the amendments was restored meaning thereby that the 1962 Ordinance was restored as it existed prior to 26 August 2015 when the Amendment Ordinance was promulgated. The question that arises under these circumstances is what is the effect of the lapse of the Amendment Ordinance on the new Council constituted thereunder. In terms of the dicta laid by the august Supreme Court of Pakistan the Amendment Ordinance was temporary legislation which remained in force for a limited period of time and ceased to operate after its expiry period on 25.4.2016. Article 89(2)(a) of the Constitution provides that an Ordinance promulgated under this Article shall have the same force and effect as an Act of Parliament and shall be subject to the same restrictions as the power of Parliament to make law, but every such Ordinance must be laid before the National Assembly before its expiration period of 120 days from the date of its promulgation. The National Assembly may by resolution extend the Ordinance for a further period of 120 days and the Ordinance shall stand repealed at the expiration of the extended period. Since the National Assembly extended the Amendment Ordinance on 11.12.2015 it stood repealed on 25.4.2016 after the expiry of the extended period. Therefore as per the Constitution an Ordinance is only a stop gap arrangement and a temporary measure which must be placed before the National Assembly if it pertains to matters specified in Article 73(2) of the Constitution and in all other cases before both Houses within four months of the date of its promulgation unless earlier withdrawn by the President or disapproved by the National Assembly or Parliament as the case may be. Reference is made to Sabir Shah v. Shad Muhammad Khan (PLD 1995 SC 66) and Federation of Pakistan through Secretary, Ministry of Law, Justice and Parliamentary Affairs, Islamabad v. Dr. Mubashir Hassan and others (PLD 2012 SC 106). Since the Amendment Ordinance ceased to exist on 25.4.2016 the new Council elected thereunder also ceased to exist as of 25.4.2016. Consequently the new Council could not function thereafter and exercise any powers as per the 1962 Ordinance as it was not constituted as per the 1962 Ordinance. We are informed that the present position is that the same Council continues even today and if all decisions and actions of the Council are declared unconstitutional and illegal, it will have a devastating effect on the medical profession and will halt the entire admission process which is underway. It was also stated that the future of students already admitted to medical and dental colleges is at stake including the future of students seeking admission in the 2017-18 session. At this juncture we are mindful of the fact that PMDC operates through its Council which carries out the functions of PMDC with respect to the recognition, registration and monitoring of medical and dental colleges and their qualifications as well as being the registering authority of all medical and dental practitioners. During the period after 25.4.2016 the new

Council acted under the bona fide belief that they were duly constituted and had the legal authority to perform their duties under the 1962 Ordinance and regulations made thereunder. Many decisions were taken including decisions under the 2016 Regulations pertaining to the admission process, holding of the MDCAT exam and the preparation of the final merit list for admission in medical and dental colleges not to mention the process of registration and recognition of colleges and their qualifications. We are therefore compelled to invoke the de facto doctrine, out of necessity, to protect the decisions of the Council from 25.4.2016 in order to prevent chaos and inconvenience to the public as well as the students and medical and dental colleges who fall under the regulatory control of PMDC and are directly effected by their decisions. The de facto doctrine is an established principle invoked by the superior courts to bring regularity and prevent confusion in the conduct of public business which may be created by persons not legally entitled to perform such duties yet have continued to do so without any objection. Reliance is placed on Malik Asad Ali and others v. Federation of Pakistan through Secretary, Law, Justice and Parliamentary Affairs, Islamabad and others (PLD 1998 SC 161), Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445), Chairman, Pakistan Broadcasting Corporation, Islamabad v. Nasir Ahmad and 3 others (1995 SCMR 1593) and Managing Director, Sui Southern Gas Company Ltd., Karachi v. Ghulam Abbas and others (PLD 2003 SC 724). In this regard, we are of the opinion that the 2016 Regulations could not have been framed by the Council elected under the Amendment Ordinance since the Council did not exist in October 2016. However in order to give continuity to the regularity regime overseeing the admission process already under way and in order to protect the interest of the colleges and students, all decisions taken including the decisions of framing the 2016 Regulations shall remain intact and valid until they are not placed before the competent authority in accordance with the law and Constitution for due consideration and approval. It is noted that we have deliberated on this aspect in the later part of the judgment. In saying so we clarify that the given position has to be corrected at the earliest in terms of this judgment.

16. The second argument made was with respect to applicability of the mandatory provisions of Article 154 of the Constitution which is reproduced hereunder:

Article 154 of the Constitution:

[(1) The Council shall formulate and regulate policies in relation to matters in Part II of the Federal Legislative List and shall exercise supervision and control over related institutions].

(2) The Council shall be constituted within thirty days of the Prime Minister taking oath of office.

(3) The Council shall have a permanent Secretariat and shall meet at least once in ninety days:

Provided that the Prime Minister may convene a meeting on the request of a Province on an urgent matter.]

[(4)] The decisions of the Council shall be expressed in terms of the opinion of the majority.

[(5)] Until [Majlis-e-Shoora (Parliament) makes provision by law in this behalf, the Council may make its rules of procedure.
[(6)] [Majlis-e-Shoora (Parliament) in joint sitting may from time to time by resolution issue directions through the Federal Government to the Council generally or in a particular matters to take action as [Majlis-e-Shoora (Parliament) may deem just and proper and such directions shall be binding on the Council.
[(4)] If the Federal Government or a Provincial Government is dissatisfied with a decision of the Council, it may refer the matter to [Majlis-e-Shoora (Parliament) in a joint sitting whose decision in this behalf shall be final .
Fourth Schedule of Federal Legislative List Part II Item 11 is reproduced as under:
Legal, medical and other professions.

17. Part II of the Federal Legislative List provides for all those subject matters the supervision and control of which has been entrusted to the CCI. The CCI is a constitutional forum equally represented from the Provinces as well as from the Federal Government which takes decision on the basis of the opinion of the majority. The CCI is answerable directly to both houses of a Parliament in a joint sitting through the Prime Minister. In the case cited at Messrs Gadon Textile Mills and 814 others v. WAPDA and others (1997 SCMR 641) the role of the CCI was duly considered and the august Supreme Court of Pakistan concluded as follows:--
The Council of Common Interests is an independent Constitutional body, with an important Constitutional role to play, answerable directly to the Parliament "without any interference from the Cabinet or the executive Government of the Federation.
The executive authority of the Federation stands, to the extent defined in Article 154, abridged, and to that extent, it stands vested in the Council; and
The provisions of Article 154 are mandatory in character.
If a matter falls within the powers of the Council of Common Interests under Article 154, it must be placed before it. It is wrong to think that the function of the Council is to resolve disputes and that it is to be activated only when there is a dispute to be resolved. Secondly, the policy decision by the Council of Common Interests must precede any decision by the Federal Government or for that matter any of its instrumentalities such as the Authority.
Thirdly, if the Council has made a policy decision in the performance of its functions under Article 154, it is binding upon the Federal Government and the Authority. That is the necessary result of Article 154 being a constitutional provision and it being of mandatory character.

18. As per the 1962 Ordinance the mandate of PMDC is to establish uniform minimum standard of basic and higher qualifications in medicine and dentistry. In order to carry out its regulatory function PMDC must recognize all medical and dental qualifications granted by medical or dental institutions in Pakistan, which institutions must also be recognized by PMDC and should be included in the First Schedule of the 1962 Ordinance. Similarly PMDC recognizes medical and dental qualifications granted by medical or dental institutions outside of Pakistan which institutions should be included in the Second Schedule of the 1962 Ordinance. Furthermore all medical licenses or diplomas granted by medical institutions are

stipulated in the Fourth and Fifth Schedule of the 1962 Ordinance. PMDC is also required to maintain a register of all medical and dental practitioners possessing qualifications which are recognized under the 1962 Ordinance. In terms of Section 29 of the 1962 Ordinance no one other than a registered medical or dental practitioner can practice medicine or dentistry in Pakistan. Therefore PMDC regulates the medical profession by ensuring that all medical and dental education in Pakistan is imparted by recognized medical or dental institutions which issue recognized degrees and thereafter registers the medical or dental practitioner giving them the right to practice medicine or dentistry in Pakistan. The objective of the law is therefore to ensure that the medical profession maintains the standards prescribed by PMDC and that entry in the medical profession is also as per the prescribed standards. Hence the emphasis of the law on recognizing institutions that impart medical education and training and award MBBS/BDS degrees is to ensure that a given standard is maintained in the profession right from the inception while admitting students to medical and dental colleges. PMDC sets the standards for education and admission in medical and dental colleges in order to ensure that the minimum threshold is maintained which is in furtherance of the ultimate progression and development of the medical profession. Since laws related to the medical profession are covered under Part II of the Federal Legislative List, anything done in relation thereto must be placed before the CCI as it is the constitutional forum which exercises and supervises control over the PMDC and regulates all policies with respect to the medical profession.

19. We were informed by the DAG that the concerned Ministry has never referred any matter to the CCI which includes all regulations made so far including the 2013 Regulations and the 2016 Regulations. The case of the Federation is that it is not obligatory for PMDC to have its regulations approved by the CCI as the CCI only regulates policies and not legislation. So far as regulations are concerned, since Parliament has delegated this function to the PMDC under Section 32 (2) of the 1962 Ordinance, PMDC is competent to make its regulations without CCI approval. It was also argued that the CCI cannot act against the decision of Parliament which is the final authority so far as legislative competence is concerned.

20. We have heard both the parties and find that we are not in agreement with the stance taken by the Federation. The mandatory provisions of the Constitution are clear from a bare reading of Article 154 with Item 11 of Part II of the Federal Legislative List whereby all matters related to the medical profession have to be approved by the CCI. Hence we are of the opinion that all standards, guidelines and recommendations issued by PMDC in furtherance of its mandate, which is to regulate the medical profession, must be approved by the CCI. We are also of the opinion that the language of Article 154 of the Constitution requiring the Council to formulate and regulate policies in relation to matters in Part II of the Federal Legislative List means that there must be a deliberative process before the Council wherein the objectives of the relevant policy are discussed along with manner in which it is to be effectuated. This will include the frame work of any regulation because the regulations are the regulatory tools on the basis of which the objective

of the law is achieved. Furthermore Article 154 requires the Council to exercise supervision and control over related institutions meaning thereby that all decisions are supervised and controlled by the CCI. Consequently the objectives and framework of any regulation with reference to the medical profession will fall within the control and supervision of the CCI. The wisdom behind this constitutional provision is to ensure that all Provinces participate and agree upon the standards set by PMDC to regulate the medical profession. The different standards of education within the country and the different mediums of instruction make it essential that there is a uniform standard for training doctors and dentists. Hence the creation of a federal authority to develop uniform standards ensures on the quality that can be expected from the medical profession. In doing so all Provinces must participate in the process so as to ensure that the standards set can be applied and that they will cater to the requirements of the medical profession as a whole throughout the country. Therefore if in furtherance of its policies regulations are framed they will have to be approved by the CCI. In this context, it is clarified that in the very least there must be a CCI approval of the policy on the basis of which the regulations were framed. Notwithstanding the fact that Section 33 of the 1962 Ordinance authorizes PMDC to make regulations with respect to the subject matter provided in the stated section, the constitutional mandate in Article 154 must be followed. By ignoring the constitutional mandate the right given to the Provinces to participate in the decision making where minimum standards are to be set is denied and matters which in the wisdom of the Constitution are considered to be crucial and vital for the Provinces has not been considered by them. Consequently PMDC has not been able to achieve its objective successfully as it has never worked on the basis of a consensus with all the Provinces. This fact is highlighted by the diverse manner in which PMDC carries out its regulatory function in the Provinces. As per the data provided to us the centralized entry test has been carried out in the Province of Punjab since 2008. It was introduced in the Province of Sindh for the first time this year and was immediately challenged. The matter is now sub judice before the Sindh High Court. So far as KPK and Balochistan are concerned the representative of PMDC Professor Dr. Aamir Bandesha, Member, Executive Committee of PMDC informed us that said Provinces have not started the centralized entry test through an affiliating university as yet. Even with respect to the dispute before us regarding a centralized admission program, he clarified that it is only being implemented in the Punjab and nowhere else. Hence we find that PMDC has not been able to successfully regulate the admission process because the relevant Ministry has never taken the approval of the CCI and has neglected to consider the opinion of the Provinces or the stakeholders nor has it taken account different education systems and standards available on the strength of which students ultimately, through a common pool, all compete for admission in medical and dental colleges. Even otherwise we note that the participation of the Provinces is meant to be without any interference from the cabinet or the executive government of the Federation, therefore we are of the opinion that Mustafa Impex (supra) is not applicable to this case as the said judgment declared that the executive authority of the Federal Government must be exercised through the Cabinet and in this case the matter falls within the domain of the CCI and not that of the Cabinet.

Challenge to the Regulatory Function

21. The Pakistan Medical and Dental Council is a body corporate established under Section 3 of the 1962 Ordinance. It is the regulatory body responsible for establishing uniform minimum standards of basic and higher qualifications in medicine and dentistry. Not only are all medical and dental institutes recognized by PMDC but essentially in terms of the 1962 Ordinance, the medical or dental qualification must also be recognized by PMDC. In doing so any aspirant who wants to provide medical and dental education must apply to the Federal Government through the PMDC for recognition. The Federal Government after consulting the Council may grant recognition to the medical or dental institution, for such period and upon such conditions as may be specified. Section 33 of the 1962 Ordinance gives PMDC the power to make regulations to carry out the purpose of the 1962 Ordinance which includes making regulations for providing uniform minimum standard of the courses for training and for obtaining graduate and postgraduate medical and dental qualification which are included in the First, Third and Fifth Schedule. It also requires the Council to set the minimum requirement for the content and duration of the course to study and to prescribe the conditions for admission to courses of training. The Council is also required to prescribe the minimum qualification and experience required for teachers in the medical and dental institution as well as to set the standards of examination and the matter related thereto including the qualification and experience required for the examiners for professional examination. The Council is therefore, required to make regulations which will set a uniform standard in medical education so as to achieve standardized education in medicine or dentistry throughout the country. In 2012, the 1962 Ordinance was amended by the Medical and Dental Council Amendment Act, 2012 ("2012 Act") in terms of which Section 33 of the 1962 Ordinance was amended to include prescribing regulations which lay down the criteria for university affiliation, conditions and requirements for recognition and continuation of recognition and for the grant of status of a teaching institution.

22. The legislature in its wisdom created the PMDC to ensure that uniform standards were followed throughout the country by institutions imparting training in the field of medicine or dentistry. Section 33 of the 1962 Ordinance authorizes the PMDC to make regulations in furtherance of this objective. A bare review of Section 33 reveals that setting minimum standards for qualification in medicine and dentistry means prescribing the requirements for the course content and the duration of the courses, setting the criteria for examination/professional examination and all related requirements including prescribing the eligibility criteria for examiners and the teaching staff of the institutions. Effectively PMDC is required to structure education in the field of medicine and dentistry by planning, implementing and evaluating medical programs, setting the curriculum and developing programs for continued professional development. It also involves setting procedures related to assessment, examination, appraisement and certifying the completion of the training program. Essentially the standards serve as the regulatory tool for improving the quality of the medical profession. In order to ensure that standards are maintained the 1962 Ordinance requires that the institution as well as its degree be recognized

and registered with the PMDC. This requirement is equally applicable to qualifications granted by institutions outside of Pakistan. It also requires all medical and dental practitioners to be registered with the PMDC. Recognition status is a quality measure which confers the understanding that the quality of medical education is a recognized institution is as per required standards. Adherence to the PMDC standards is therefore the first lens through which quality can be assessed and improved. It also helps to safeguard the medical profession and the workplace by ensuring a minimum standard of entry into profession.

23. The 2016 Regulations have been in dispute by students as they make the MDCAT exam mandatory and does away with the SAT II option for local A level students. It is the case of the students that the 2013 Regulations allowed the SAT II exam in lieu of the MDCAT exam. The Appellants before this Court filed various different writ petitions challenging the 2016 Regulations before the learned Single Judge. The impugned judgment dismissed the petitions on the ground that the Appellants had sufficient knowledge of the 2016 Regulations, which were notified on 27.10.2016. The impugned judgment also finds that under the 2013 Regulations, A level students could not get admission on open merit seats in private medical and dental colleges on the basis of SAT II result. As per the judgment the practice followed by the private medical and dental colleges of admitting A level students on the open merit seats was contrary to Regulations 5(2)(c) of the 2013 Regulations. The judgment finds that SAT II examination was reserved for quota seats only. The judgment also finds that there is no vested right of the students on account of the 2013 Regulations on the basis of which the Appellants before the Court claim admission in private medical and dental colleges on the basis of SAT II result.

24. The relevant provisions of the 2013 Regulations are reproduced hereunder:-
3. Rules of the Central Entry Test (1) An entry test shall be mandatory for admission in MBBS/BDS course in Pakistan and shall be taken of only the eligible candidates. The eligibility criteria of the candidates to sit in the entry is given in these regulations.
(2) The Provincial Government shall make arrangements for holding a central entry test for admission in MBBS/BDS for both private and public institution in their respective provinces in order to determine the order of merit and no admission shall be given to the resident of that Province without it unless specified below. The Provincial Government shall by notification constitute the Central Admission Authority for admission to the Public Colleges of that Province. At least two paper setters from A-level teaching institutions shall be co-opted in the paper setting team by the provincial/NTS authorities. The entry test of one Provincial Authority/NTS shall be acceptable for admission in other provinces in private colleges and public colleges in territories not conducting their own entry tests. The Provincial Central Entry/NTS test shall be held as soon as possible after declaration of F.Sc. result by the Higher Secondary Education/Intermediate Boards. The Provincial Authority/NTS shall complete all formalities, including holding of the entry test and declaration of its result for admission of public medical and dental colleges before 31st October each year or within four weeks of declaration of the result of F.Sc by

the Higher Secondary Education/Intermediate Boards whichever is earlier so that the final merit list of public colleges reaches PM&DC before 31st October. The Provincial Central Admission Authority/NTS shall form the final merit for admission in medical and dental colleges by after giving due weightage to Matric/equivalent, F.Sc. Intermediate/HSSC equivalent and the entry test marks as given in these regulations.

(3) Private medical and dental institutions in all provinces shall advertise for admission of students only after the determination of final order of merit by the respective provincial testing/admission authorities or 31st October whichever is earlier. They will not conduct their own entry test and shall form final merit by utilizing the Provincial/Government/NTS test result in their province/territory, however they may conduct the aptitude test and interview as per these rules.

(4) For admissions in medical and dental institutions located in the Islamabad Capital Territory, a central entry test shall be held by the Federal Government under the arrangements of NTS.

(5) All admissions for both public and private colleges shall be completed by 30th November each year and lists of admitted students shall be submitted to PM&DC for their registration by PM&DC. Students admitted after due date shall not be registered by PM&DC.

(6) ..

(7) ..

(8). .

4

5. Minimum Academic Requirements for Admission in the MBBS/BDS Course:

(1)

(2) Admission on Merit Seats/Pakistani Seats in Private Colleges and Foreign Seats/Self Finance Seats in Public and Private Colleges:

a. Admission in a private college and in a public medical or dental college on reserved seats/self finance/special seats/ quota seats shall given only to a candidate who has passed an examination equivalent to intermediate level of Pakistan from a foreign university or examining body or foreign education system with three subject out of which Biology and Chemistry are essential subjects with 60 % marks in aggregate as certified by IBCC to be equivalent to F.Sc./HSSC/intermediate. The equivalence by IBCC in the above terms shall be accepted in aggregate and the candidate shall be eligible for admission the MBBS/BDS course with any study group whichever the IBCC may write.

The candidate shall have to appear in the provincial entry test or in lieu of the entry test of the admission authority, the candidates is required to have passed SAT II examination score with minimum 550 marks in each of the three subjects of which two have to be Biology and Chemistry or MCAT with minimum aggregate score of 24. The candidate is required to present a valid TOEFL or IELT with a minimum score of 500 or 5.5 only if the medium of instruction of study two years prior to application for admission/entry test is not English. An alternate to TOEFL and IELT is a certification by NUML Islamabad after a one year English language course.

b. No admission shall be given in MBBS/BDS course on the foreign admission/self finance seats or any other such Government or private scheme, without an entry test or the requisite SAT II examination score with minimum 550 marks in each of the three subjects of which two have to be Biology and Chemistry or MCAT with minimum aggregate score of 24 and other conditions laid down in 5(2) a above.
c. Upto 15% of seats in college shall be allowed to be foreign admission/self finance. The foreign admission shall be filled only by person who meet the Council criteria for admission on such seats. If foreign admission/self finance seats are left vacant in any college, a local student can be admitted on such seat subject to fulfillment of eligibility criteria for admission as given in regulation 5(2)a above.

Eligibility Criteria for Admission on Foreign/Overseas Seats:

Background

A. The principle is to encourage foreign students and ex-pats to explore and come for their medical and dental education to Pakistan which offers a wide range of exposure to medical issues and a very cost effective and time effective completion of medical and dental education. Countries like India and Far East are rapidly offering facilitation to students who wish to explore the possibility, a huge Diaspora of Pakistani origin overseas families wish for their children to get this education in Pakistan but are forced to look elsewhere because of various hurdles and restrictions in our system. This deprives the students the opportunity of pursuing their profession of choice and the foreign remittance that is so dearly needed to boost our economy. One classical example is the rigid stance of the IBCC for various subjects and undue underscoring of individuals coming from abroad.

B. There are well reputed and well established international examinations which test the competency of students and are use world over to determine eligibility for admission to university programs, including medicine and dentistry. These examinations are significantly superior to many of our local systems and are much more discriminatory in identifying high performing students.

Based on the above points following eligibility criteria are laid down:

1. All students applying on foreign students quota will be eligible to sit in the entry test for medical and dental seats if they have any of the following prerequisites.

a. A SAT-II score of equal or more than 550 in three subjects two of which should be biology and chemistry, the third may be a science or of a humanities subject

OR

b. A score of greater or equal to 24 in the MCAT exam.

OR

c. IBCC equivalence certificate with a score of equal to or greater then 60%.

2. Such students will sit in an entrance test offered by the institution based on institutional practice and priorities (these might be composed of various science subjects, English language and aptitude).

3. The institutes will utilize the scores in the test and the eligibility exams scores as per their policies to determine the merit order so that the most deserving candidates are selected.

Note:

This option will not be available to students who have completed their education within Pakistani systems within Pakistan or overseas, who will need to present their intermediate scores or IBCC equivalence certificate.

25. In terms of Regulation 3(1) the MDCAT exam is mandatory for admission in MBBS/BDS courses be it public or private colleges. The MDCAT is organized by the Provincial Government through a Central Admission Authority who draws up the final merit list in public colleges as per the regulations. In terms of Regulation 5(1) of the 2013 Regulations, the minimum academic requirement for admission in MBBS/BDS for admission in public colleges is that a candidate has passed the F.Sc/HSSC examination (premedical group) securing 60% marks in aggregate or a candidate who has passed an exam equivalent to F.Sc/HSSC exam from a foreign university or examining body or foreign education system with three subjects out of which biology and chemistry are mandatory with 60% marks in aggregate as certified by the IBCC to be equivalent to the F.Sc. Therefore, a candidate who has passed the F.Sc or A level is eligible for admission, on merit in public colleges. In terms of Regulation 5(2) admission in private and public colleges on merit seats, foreign seats, self finance seats can only be given to candidates who have passed an exam equivalent to F.Sc from a foreign university or examining body or education system with three subjects out of which biology and chemistry are essential with 60% aggregate marks. Candidates have to appear for the MDCAT or in lieu thereof be admitted on the basis of their SAT II exam score with a minimum of 550 marks. Therefore, for the purposes of admission in medical or dental colleges on merit seats the MDCAT exam or in lieu thereof the SAT II option was available. It is noted that under the 2013 Regulations if the 15% reserved seats are left vacant then the remaining seats can be admitted upon as per the criteria given in Regulations under 5(2) meaning thereby on the open merit. We are therefore of the opinion that the SAT II option was available for local A Level students under the 2013 Regulation. The 2013 Regulations also provide for the criteria of candidates applying on the foreign seats. The general principle was to encourage foreign students and expatriates to pursue medical and dental education in Pakistan. The eligibility criteria given was again based on the SAT II score. The Note added provided that this option will not be available to students who have completed their education within Pakistan or overseas who will need to present their intermediate score or IBCC equivalence certificates. It is on the basis of this Note that the learned Single Judge held that the 2013 Regulations do not permit local A level students to get admission on the basis of their SAT II score. We are of the opinion that the Note is applicable with respect to the eligibility criteria for admission on foreign seats meaning thereby that the criteria given will not be applicable to students who have studied within Pakistan an examination equivalent to F.Sc from a foreign university or examining body or foreign education system. Therefore, we find that the interpretation given to the 2013 Regulations in the impugned judgment is not in accordance with the reading of the 2013 Regulations and the learned Single Judge has erred in holding that a local A level student could not opt for the SAT II exam for seeking admission in medical colleges on open merit as this option was available only to the extent of the 15% reserved seats. It is also an admitted fact

between the parties that local A level students were admitted to private medical and dental colleges on the strength of their SAT II score and that PMDC never took any notice of this practice nor did it ever suggest any other understanding of the 2013 Regulations. We believe that this is relevant as PMDC has alleged that medical colleges were admitting local A level students in contravention to the regulations and have further justified and defended the changes made by virtue of the 2016 Regulations due to non-compliance of private medical and dental colleges of the 2013 Regulations. It appears that PMDC deemed it necessary to change the entire process of admission because it was unable to regulate the private medical and dental colleges to ensure compliance of its admission criteria. This is so notwithstanding the fact that the PMDC can take penal action against an institution for not complying with its regulations. In this regard PMDC may call for information from the medical and dental institution regarding the process of admission in order to ensure that the given Regulations are being followed. Furthermore, in terms of Section 22 of the 1962 Ordinance if a recognized institution is violating any provision of the Ordinance or the Regulations made thereunder the PMDC can take steps to withdraw the recognition.

26. The 2016 Regulations changed the eligibility criteria for admissions in medical and dental colleges. The relevant provisions are reproduced hereunder:

7. Eligibility criteria for MBBS and BDS courses in Pakistan and abroad:- (1) Notwithstanding anything contained in any other regulations of the Council no Pakistani student shall be eligible for admission to medical and dental courses in Pakistan or abroad and shall not be registered with the Council as student or practitioner, as the case may be, unless he fulfills the following eligibility criteria namely:-

(a) he must have obtained minimum sixty percent marks in higher secondary school certificate (HSSC) or F.Sc (Pre-medical) or equivalent examination having minimum twelve years of education; or

(b) he must have passed, obtaining minimum sixty percent marks in aggregate in, an examination of a course from a foreign university or examining body or foreign education system in at least three subjects i.e. compulsory subjects of biology, chemistry and either physics or mathematics and such course must have been duly certified by the inter-boards committee of chairman (IBCC) as equivalent to higher secondary school certificate (HSSC) or F.Sc or intermediate level of Pakistan.

(2) Foreign or dual nationality holders or overseas Pakistani students desirous of taking admission in MBBS or BDS courses against open merit or foreign quota seat in any public or private institution of Pakistan must have passed, obtaining minimum 60% marks in aggregate in an examination of a course from a foreign university or its examining body or its education system in at least three compulsory subjects of biology, chemistry and either physics or mathematics and such course must have been duly certified by IBCC as equivalent to HSSC, F.Sc or intermediate level of Pakistan.

(3) Equivalence by IBCC under sub-regulations (1) and (2) shall be accepted in aggregate and the candidate shall be legible to take the admission test for MBBS or BDS course with any study group irrespective of the recommendations of the IBCC.

(4) Without prejudice to any other eligibility criteria under these regulations, a foreign or dual nationality student or overseas Pakistani students desirous of taking admission to MBBS and BDS course against open merits or foreign quota or self finance seats in any public or private institution of Pakistan shall have to meet the following additional eligibility criteria, namely:
(a) English language proficiency test e.g. valid TOEFL or IELTS with a minimum score of 500 or 5.5 or a certification by National University of Modern Languages (NUML) after one year English language course; and
(b) candidates having foreign or dual nationality or overseas Pakistani students and qualified from abroad may also apply if they have passed a foreign SAT II examination with minimum 550 marks in each of the three subjects including compulsory subjects of biology, chemistry and either physics or mathematics or a foreign MCAT with minimum aggregate score of 24 as an alternative to provincial or regional admission test.
8. Self-finance seats and foreign quota seats.---(1) .. (2) .. (3) No candidate shall be eligible for foreign quota seats in public and private medical and dental institutions under sub-regulations (1) and (2) unless he holds a permanent foreign nationality or dual nationality or overseas Pakistani students and who has physically studied and passed secondary school certificate (SSC) and HSSC passing 12th grade examination or equivalent from outside Pakistan during his stay abroad and having a certificate from the institution last attended to this effect.
(4) Where any set of foreign or self-finance quota remains vacant due to unavailability of eligible candidates or otherwise, it shall stand transferred to open merit quota and the student shall be charged fee and charges prescribed for open merit seat. An ineligible candidate shall not be admitted against such seats.
(5) ..
9. Medical and dental institution admission test.--(1) Unless otherwise provided in these regulations, no candidate shall be admitted to any public and private medical and dental institution unless he, in addition to other eligibility criteria under these regulations, passes admission test for this purpose.

27. In terms of the 2016 Regulations the eligibility criteria for MBBS and BDS courses in Pakistan requires F.Sc/HSSC (pre-medical) or students having passed an examination from a foreign university or examining body or foreign education system in three subjects of which biology and chemistry are mandatory and physics and mathematics as the third subject duly certified as equivalent to F.Sc/HSSC by the IBCC. In terms of Regulation 7(4) foreign or dual national students or overseas Pakistani students can rely on their SAT II score with minimum 550 marks in each of the three subjects amongst other things. Regulation 7(3) further provided that no candidate shall be eligible for foreign quota seats in public and private medical dental institutions unless he holds a permanent foreign nationality or a dual nationality or is overseas Pakistani who has physically studied outside of Pakistan having a certificate from the institute last attended to this effect. This provision changed the earlier provision which all owed local A level students to apply on the basis of the SAT II score in lieu of the MDCAT.

28. During the course of arguments the counsel for the students explained that local students who have studied A level should be given the option to get admission on the basis of SAT II score simply because there is a vast difference in the curriculum of F.Sc/HSSC with that of A level. Furthermore since the MDCAT exam is based totally on the F.Sc syllabus it puts the A level students at a disadvantage. In this regard, the impugned judgment finds that the MDCAT exam is designed to cater for both F.Sc students as well as A level students and no prejudice is made out to the A level students. The learned Single Judge called for a list of paper setters and the question answer sheets on the basis of which he concluded that the content of the MDCAT exam covers F.Sc and A level syllabus and that the A level students are not placed at a disadvantage. The same arguments were advanced before us and comparative charts were placed before us along with question papers and the text books of both F.Sc and A level by which the students demonstrated that more than 80% of the MDCAT is based on the F.Sc syllabus and less than 20% is based on the A level syllabus. It was also asserted that the A level students having achieved high merit in their O level and A level lose marks on the basis of the equivalence formula applied by the IBCC which is then compensated by relying on the SAT II score for entry in medical and dental colleges. If the students are compelled to take the MDCAT exam they are placed at a further disadvantage of having to then study for the MDCAT exam independent of their A level in order to compete in the entry test. It is their case that this is unfair and does not allow them to compete on a level playing field with the F.Sc students. It is also their case that the PMDC should consider the various different systems of education offered in the country and place all students on equal footing for the purposes of entry in medical and dental colleges.

29. The Appellants and Petitioners have also relied upon several documents to show that after the issuance of 2016 Regulations when the same were challenged before the Court, PMDC entered into negotiations with students in order to resolve the dispute. Consequently local A level students who appeared for their final exam in June 2016 were given admission on the basis of the SAT II exam on the understanding that since the 2016 Regulations were issued in October 2016 they would not apply to the students who graduated in June 2016. PMDC issued a notification on 28.11.2016 after an emergent session in November 2016 and allowed local A level students admission in medical and dental colleges on the basis of their SAT II result. PMDC does not deny offering the waiver, however it is their case that the SAT II score was only relevant with reference to the foreign quota seats and not for the open merit seats. However, in terms of the 2013 Regulations and on the basis of the data placed before us it is clear that local A level students were given admission on open merit seats on the basis of their SAT II score as it could be done under the 2013 Regulations. The learned Single Judge denied the Appellants admission on the basis of their SAT II score given that these students had sufficient knowledge of the 2016 Regulations and given that the 2013 Regulations did not permit admission on open merit on the basis of SAT II score in lieu of the MDCAT exam. We, however have a slightly different view. Although the Appellants and Petitioners before us had knowledge of the 2016 Regulations in

October 2016 that does not amount to a reason to deny them a benefit that others in similar position were allowed. The A level program is a two year program and the students before the Court completed one year of their A level in October 2016 when the 2016 Regulations were issued. By this time they had taken several steps in progression of their desire to get admission in medical and dental colleges and had planned their two years post their O level exam in order to achieve the desired merit. We find that these students are entitled to be treated in the same way as the students who graduated in June 2016 as a vested right had accrued in their favour under the 2013 Regulations. These students had taken decisive steps before the promulgation of the 2016 Regulations such as the SAT II exam in preparation for admission to medical and dental colleges under the 2013 Regulations. We also find that even though the Appellants sat for the MDCAT in October, 2017, it was done out of abundant caution to save their future careers and as such does not mean that they had accepted the 2016 Regulations as they were under challenge before the learned Single Judge. Even otherwise due to the challenge to the 2016 Regulations which started in October 2016 there was confusion as to how the 2017-18 admissions would take place. Therefore we grant the same benefit to the Appellants/Petitioners before us in order to protect their interests and future careers as medical and dental practitioners. In this regard we note that most students who opt to enter the medical profession decide to become doctors very early in their lives. Preparing for admission in medical and dental colleges is not a random or last minute decision but requires planning and preparation with years of hard work. Furthermore entry into colleges being so competitive requires that this is a thought through decision. Students are therefore eager and highly charged in their desire to get admission in medical and dental colleges and plan for the same very early in life.

30. As the primary function of PMDC is to create a uniform standard in medical education it is also necessary to look at the manner in which PMDC brought about the 2016 Regulations. They were notified on 27.10.2016 which in our opinion is surprising given that as per the 2013 Regulations and the 2016 Regulations the entire admission process commences in October and is finalized in November. It appears that the PMDC thought it advantageous to change or improve the admission process with no notice to the stakeholders, just before the MDCAT exam was to take place. Naturally the regulations were challenged and by order dated 19.12.2016 were suspended allowing the admission process to continue under the 2013 Regulations. In our opinion this was a highly irresponsible decision on the part of PMDC which should have thought about the best interest of the students and the devastating effect changes would bring not to mention the confusion it would cause to the admission process. It is unfortunate that PMDC being responsible for the future of candidates interested in pursuing a career in medicine or dentistry has shown very little interest in the motivation and merit that these candidates bring when they apply for admission in medical and dental colleges. Equally disturbing is the fact that PMDC while devising uniform standards did not cater to the various different systems and standards in education up to F.Sc level or its equivalent and instead has made this an issue of the "haves and have not". By creating standards a

system must be put in place which enables all students to compete equally for admission in medical and dental institutions to ensure that the best students were selected. PMDC being the standard making authority cannot give preference to one particular system of education over the other as this is not its mandate. To the contrary it is required to ensure that all candidates are able to compete for admission on equal footing, hence the requirement to create a uniform criteria for admission. In this case since there are two definite systems of education on the strength of which students apply for admission to medical and dental colleges it is necessary to balance the eligibility criteria for admissions as well as the centralized entry test to ensure that no one system is put to a disadvantage. We therefore are of the view that the Appellants/ Petitioners have made a compelling argument with respect to their disadvantaged position which should be considered compassionately by PMDC to ensure that ultimately the best students enter into medical and dental institutions. In this regard we note that the court in its constitutional jurisdiction cannot replace the opinion of experts by commenting on the content of the MDCAT exam. The learned Single Judge therefore has erred while expressing his satisfaction that students of A level are not placed in a disadvantaged position in relation to those who have undergone the F.Sc exam. This matter is best considered and decided by the forum which is authorized to make policies on such issues.

31. This brings us to the challenge raised by PAMI on behalf of private medical and dental colleges against CAP, consequent to which they do not have the ability to admit students in their medical and dental institutions. It is their case that PMDC cannot take over the right of admitting students and that this function is regulated by the UHS which is the affiliating university. We are told that there are three affiliating universities in the Punjab for medical and dental colleges. The question before us is whether prescribing the conditions for admission allows PMDC to take over the right of colleges to choose their students as per the eligibility criteria and replace it with a centralized system managed by the UHS. As we have already noted that all medical and dental institutions are recognized and registered with the PMDC. Private medical and dental colleges have to be affiliated with a recognized degree awarding university which in this case is the UHS. The UHS was established under the University of Health Sciences, Lahore Ordinance 2002 ("2002 Ordinance") and Section 4 provides for the power to affiliate or disaffiliate colleges and other medical institutions in the prescribed manner. Section 37 provides for the prescribed manner which medical institutions are required to follow for affiliation with UHS. Section 34 of the 2002 Ordinance provides that Statutes may be made to prescribe and regulate the affiliation and disaffiliation of medical institutions and related matters. The Statutes for Affiliation of Medical Institutions, 2011 provide for the terms and conditions on which affiliation to medical colleges is granted. In terms of Clause 13 admissions are to be made in accordance with the eligibility criteria, notified by the UHS and any one admitted in violation of the prescribed criteria can be restrained from making admission for the next academic session. The clause further provides that admission shall not be in excess of the approved intake and private medical and dental colleges shall admit students only after the final order of merit for public colleges is determined. Further that no institution in the

private sector can charge a fee more than that prescribed by the UHS and any violation against the Statutes can be reported to the Syndicate for action in exercise of power under Section 27 of the 2002 Ordinance. Therefore the right of granting admission to students is a matter inter alia between the affiliated colleges and the UHS. Allowing the affiliated college to admit students on the given criteria in terms of the permissible intake is a right that the college has whilst it is affiliated with the UHS. This right is given by UHS to the affiliated college under the statute for the duration of the affiliation. PMDC has nothing to do with this right nor does the right to admission in private colleges fall within its regulatory control. As per its mandate PMDC is required to prescribe the conditions for admission in courses of training in medical and dental colleges which criteria will be followed by the UHS. The regulations that were issued from time to time in order to achieve this purpose essentially provided the eligibility criteria for admission, the timeline on the basis of which the admission process is to commence and end and the order of merit while allocating weightage to the components that make up the merit. Hence, the admission process is regulated by the criteria laid down which ensures that entry into medical and dental colleges is not below the given merit, in terms of the prescribed process within the given time. The counsel for PMDC argued at length to explain the manner in which private colleges were exploiting students by charging a donation from them in order to guarantee admission. He argued that in doing so private colleges were compromising the merit set out by PMDC and admitting students well below the merit while students who had achieved the merit were unable to get admission in private colleges because they could not afford to pay the donation. A large number of documents were placed before us to show the letters that were issued by PMDC requiring colleges to implement the 2016 Regulations. We have gone through the documents and find that they are simply letters issued from October 2016 informing different colleges of the 2016 Regulations and requiring them to comply with the same. Despite the numerous allegations raised against private colleges before us neither PMDC nor UHS were able to show a single letter or cite a single example of any action taken against any college for allegedly violating the prescribed merit or the admission process.

32. From what has been argued before us and is evident as per the minutes of meeting of the Standing Committee of the Ministry of Health Services Regulations and Coordination held on 16.6.2016, one of the prime factors for creating a centralized admission program was to control the practice of overcharging students in the name of donation by private colleges. After due consideration of the arguments and the record before us we are of the opinion that there are three fundamental flaws in the CAP as introduced under the 2016 Regulations. First that it was done in haste, without consulting stakeholders; second that it was done without considering the rights of the students to choose a college of their liking and convenience and finally it was done without considering the fact that both PMDC and UHS have sufficient powers to curtail and prevent violations of the 1962 Ordinance or the regulations framed thereunder. If at all the issue is to control the merit given by the PMDC while admitting students in private colleges clearly there were more effective ways of achieving this purpose. Notwithstanding the aforesaid

we are also of the opinion that granting admission in private colleges is a condition regulated under the Statute for Affiliation of Medical Institutions under the 2002 Ordinance and does not fall within the domain of the PMDC. While PMDC can provide the eligibility criteria and the standard of merit on which admissions should be granted, it cannot take away the right to admit students in private colleges. Not only is this beyond the mandate of the 1962 Ordinance it also encroaches upon the fundamental right of private colleges to carry out their business and admit students of their choice. We are also of the opinion that in order to facilitate the regulatory requirement of creating standards the legislature delegated its authority to prescribe for the conditions for admissions in medical and dental institutions. In doing so PMDC can make regulations setting out the conditions for admission, meaning that it can set the criteria on which admissions should be made but the law maker in its wisdom did not require PMDC to control the admissions of private institutions in totality because in order for the medical profession to develop and grow both public and private colleges have to play their roles. In this regard, the Federal Government has allowed the establishment of private medical and dental colleges to meet the growing demand. Furthermore by delegating the authority to prescribe the conditions for admission and affiliation, regulatory control is given to PMDC through which it can fulfill the mandate of the 1962 Ordinance. Again the law maker in its wisdom deemed it necessary to allow PMDC to set the criteria for admission so that the criteria can be adjusted as per the demands of the market. It is a facilitative power given to PMDC to retain control over the medical profession and does not allow PMDC to go beyond the intent of the primary legislation nor does it allow PMDC to deal with any subject matter not specifically enumerated in the enabling statute. The power to make rules being delegated legislation is simply for the advancement of the basic objective of the law and no more. It is often seen that Parliament delegates its legislative function to regulators where it may not have the required expertise on technical matters or it may be unable to respond to change in a timely manner or to the specific needs. Therefore it gives flexibility in the application of the law by delegating its power to legislate. This Court has already held in the case cited at Independent Newspapers Corporation (Pvt) Ltd and others v. Federation of Pakistan and others (PLD 2017 Lahore 289) that whenever there is delegated legislation the regulator may run the risk of overstepping its boundary and going beyond the authority delegated to it. That is why superior courts need to examine the question as to whether the rules and regulations under the statute are inconsistent with the statute itself and whether the rules and regulations achieve the purpose of the statute. Reliance is also placed on Khawaja Ahmad Hassan v. Government of Punjab and others (2005 SCMR 186) wherein the august Supreme Court of Pakistan held that:

The subordinate power of framing rules granted by the statute cannot be exercised to override the expression provisions of the statute itself. It is well settled by now that a statutory rule cannot enlarge the scope of the section under which it is framed and if a rule goes beyond what the section contemplates, the rule must yield to the statute. The authority of executive to make rules and regulations in order to effectuate the intention and policy of the Legislature must be exercised within the limits of mandate given to the rule making authority and the rules framed under

enactment must be consistent with the provision of the said enactment. The rules framed under a statute, if are inconsistent with the provisions of the statute and defeat the intention of Legislature expressed in the main statute, same shall be invalid.

33. In the case cited at Pakistan through Secretary Finance, Islamabad and 5 others v. Aryan Petro Chemical Industries (Pvt) Ltd. Peshawar and others (2003 SCMR 370) the august Supreme Court of Pakistan has held that statutory rules and regulations cannot enlarge the scope of the section under which they have been framed. The authority must make the regulations in order to effectuate the intention of the legislature within the limits of the mandate given to the authority. The rules if inconsistent with the provisions of the statute and defeat the intention of the legislature shall become invalid. The rule making authority cannot clothe itself with powers that has not been given to it. On the basis of the dicta of the Superior Courts we are of the opinion that Regulation 9(6)(7)(8) and (11) of the 2016 Regulations are ultra vires the mandate of the 1962 Ordinance and the Constitution, therefore liable to be struck down.

34. Counsel for the UHS also relied upon various judgments of the august Supreme Court of Pakistan to urge the point that time and again students have challenged the criteria set by the PMDC with respect to admission in medical and dental colleges and the court has repeatedly disallowed such challenges holding that the PMDC is competent to set the criteria and merit for admission into medical and dental colleges. Reliance was placed on 2004 SCMR 1570 (supra) in which the court held that there was no vested right to medical colleges nor was the authority debarred from setting a maximum age limit for taking such courses. This is purely an administrative matter relating to a policy decision of the government which the courts are always reluctant to interfere with. Reliance was also placed on 2012 CLC 1071 (supra) in which the court held that the weightage criteria set by the PMDC for admissions falls within the domain of their regulatory function and no vested right was available to students on the basis of any previous weightage criteria. The court also found that the regulations framed by the PMDC are neither arbitrary nor discriminatory and required weightage to be measured through mathematical calculation and exactness. We have gone through the cases relied upon and find that they are distinguishable from the instant case. In this case the students do not claim any quota or special treatment nor do they require that the admission criteria be changed. They simply require equal and fair treatment under the law given that the 2016 Regulations changed in October, 2016 when they had completed one year of their A level and hence are entitled to the same treatment as the A level students of June, 2016. Even otherwise, the students have demonstrated the havoc caused when policies are changed without any thought on the rippling effect it will have. Any change in policy must be made keeping in mind the rippling effect that change will bring in the months or years to come. In this case PMDC failed to take into consideration the impact of the 2016 Regulations on the students who were in the midst of their A level in October 2016 and had taken decisive steps under the 2013 Regulations. Given that the 2016 Regulations cater to the admission process for

medical and dental colleges and given that the PMDC regulates the admission criteria it was incumbent upon them to bear in mind the various different systems from which candidates would eventually come to take the MDCAT exam and the impact on those students. It is on account of such sudden decisions, without any consultative process that gives rise to unnecessary litigation and in this case unpleasant litigation initiated by students fighting for a chance to compete for admission in medical and dental colleges. As the standard making authority, PMDC must consider and appreciate the time and effort put in by students to compete for admissions in medical and dental colleges because at the end of the day the purpose of the standards they set is to regulate the admission process and ensure that the prescribed merit enters into the profession.

35. For the above reasons we hold and declare as under:
(i) that the Council constituted under the Amendment Ordinance ceased to exist as of 25.4.2016 with the lapse of the Amendment Ordinance and the constitution and composition of the Council as under the 1962 Ordinance stood revived as on 25.4.2016. However the constitution of the Council and all acts, orders and decisions including the 2016 Regulations taken by the Council after 25.4.2016 shall remain protected under the de facto doctrine until the legal Council is constituted as per law;
(ii) that the Federal Government shall constitute the Council in terms of Section 3 of the 1962 Ordinance within three months' time;
(iii) that the existing Council shall carry out the day to day business of PMDC till the constitution of the new Council and shall not frame any new regulations or amend existing regulations under the 1962 Ordinance;
(iv) that Regulations 9(6)(7)(8) and (11) of the 2016 Regulations qua the centralized admission program is beyond the authorized mandate of PMDC under the 1962 Ordinance and inconsistent with the intent of the stated Ordinance, hence declared to be without lawful authority and of no legal effect, therefore struck down;
(v) that students who completed their A level in June 2017 are entitled to be admitted into medical and dental colleges on the basis of their SAT II score for the 2017-18 session;
(vi) that all decisions of the Council post 25.4.2016 including the 2016 Regulations along with the issues raised by private medical and dental colleges as well as students be placed before the CCI, to review the standards and criteria set under the 2016 Regulations to ensure compliance of the Constitution within the next six months;
(vii) as a future course of action PMDC will work under the supervision and control of the CCI and all policies and regulations prepared by them shall be approved by the CCI and will be binding if they are compliant with the constitutional mandate;
(viii) For the above reasons this appeal along with connected appeals mentioned in Schedule A and the writ petitions mentioned Schedule B are allowed and the impugned judgment is set aside.

(JAWAD HASSAN) (AYESHA A.MALIK)
JUDGE JUDGE
Schedule-A

Details of ICAs mentioned in judgment dated 7.12.2017
passed in ICA No.98703/2017

Sr. No	ICA No.	Parties Name
1	98703/17	Muhammad Fahad Malik v. Pakistan Medical and Dental Council etc.
2	103604/17	Taha Ahmed Tarin v. Pakistan Medical and Dental Council etc.
3	103163/17	Hubaib Haider v. Federation of Pakistan etc.
4	103157/17	Muhammad Osama v. Federation of Pakistan etc.
5	103166/17	Shaniyaal Shahid v. Federation of Pakistan etc.
6	101133/17	Ahmad Iqbal v. Pakistan Medical and Dental Council etc.

(JAWAD HASSAN) (AYESHA A.MALIK)
JUDGE JUDGE

Schedule-B

Details of writ Petition mentioned in judgment dated 7.12.2017
passed in ICA No.98703/2017

Sr. No	WP No.	Parties Name
1	109796/17	Urwa Ikram etc. v. Pakistan Medical and Dental Council etc.
2	107875/17	Ujala Anjum etc. v. Pakistan Medical and Dental Council etc.
3	104665/17	Pakistan Association of Private Medical and Dental Institutes v. Pakistan Medical and Dental Council etc.
4	104589/17	Rubail Ata Bajwa v. Pakistan Medical and Dental Council etc.
5	101763/17	Mahnoor Ahsan Bhoon etc. v. Pakistan Medical and Dental Council etc.
6	102355/17	Azeem Izhar v. Federation of Pakistan etc.
7	109795/17	Hamzah Ahmad Siddiqui v. Pakistan Medical and Dental Council etc.
8	110470/17	Arbaz Khan v. Pakistan Medical and Dental Council etc.
9	110467/17	Muhammad Ali v. Pakistan Medical and Dental Council etc.
10	107222/17	Shalamar Medical and Dental College v. Pakistan Medical and Dental Council etc.

(JAWAD HASSAN) (AYESHA A.MALIK)
JUDGE JUDGE
KMZ/M-192/L Order accordingly.

PLJ 2018 Lahore 102

***Present*: MRS. AYESHA A. MALIK, J.**

M/s. MAQBOOL ASSOCIATES (PVT.) LIMITED through Duly Authorized Attorney and 2 others--Petitioners

versus

LAHORE DEVELOPMENT AUTHORITY (LDA) through Chief Engineer and 3 others--Respondents

W.P. No. 39099 of 2016, heard on 7.9.2017.

Punjab Procurement Rules, 2014--

----R. 21--Constitution of Pakistan, 1973, Art. 199--Issuance of letter regarding blacklisting--Show-cause notice--Written reply order of blacklisting--Contractual obligations--Termination of contract--Question of--Weather Petitioner No. 3 failed to perform its contractual obligations or weather respondent LDA was at fault and illegality terminated contract--Determination--Challenge to--There is absolutely no provision of law that allows Respondent LDA to pass any such direction to Respondent PPRA nor can they through "CC" of impugned order direct PPRA to take action against petitioners--Not only is this a glaring violation of due process but is absolutely contrary to requirements of Punjab Procurement Regulatory Authority Act and Rules--It is also noted that Respondent LDA in "CC" at No. 1 directed Pakistan Engineering Council not to renew enlistment of three petitioners--There is no legal basis for making such a direction--Impugned order does not explain how public safety and security was compromised nor does it explain that how lesser length impacted entire project and resulted in a safety or security hazard--It appears that blacklisting order was issued simply to deny petitioners right to participate in public tenders--Therefore, impugned order of blacklisting is not sustainable under law--Petition was allowed.

[Pp. 107, 108 & 109] A & B

Mr. Tafazzul Haider Rizvi, Mr. Haider Ali Khan and Mr. Muhammad Usman, Advocates for Petitioners.

Mr. Faisal M. Buttar, AAG for Respondents.

Mr. Faisal Mehmood Khan, Advocate for Respondent No. 1.

Date of hearing: 7.9.2017.

JUDGMENT

Through this Writ Petition, the Petitioner has impugned letter dated 30.11.2016 issued by Respondent No. 1 whereby the Petitioners have been blacklisted by the Lahore Development Authority ("LDA") for five years, such that they will not be able to participate in any tender of the LDA.

2. The Petitioners are engaged in the business of construction and development and are three separate legal entities, each of whom have executed and completed different projects including projects of the Respondent LDA. Petitioner No. 3 which

is joint venture company of Petitioners No. 1 and 2, after a competitive bidding process was awarded the contract for works on the Orange Line Metro Train Project, Package-II ("Project") which works had commenced. However, a dispute arose between the parties which is now pending before an Arbitrator.

3. Counsel for the Petitioners argued that the Respondent LDA issued the impugned order of blacklisting without following due process. A show-cause notice was issued on 3.11.2016 to Petitioner No. 3, to which reply was filed on 10.11.2016. However, the impugned order of blacklisting was issued to all three Petitioners on 30.11.2016. Hence no due process was followed with respect to Petitioners No. 1 and 2 and they were simply blacklisted. In this regard, learned counsel has relied upon the case titled *Messrs Habib Rafiq (Pvt.) Ltd. through Authorized Representative v. Government of Punjab through Chief Secretary and another* (2015 CLD 72). Counsel for the Petitioners further argued that the subject matter of the blacklisting is pending before the Arbitrator which arbitration was referred with the consent of the parties. Therefore, he argued that the Respondents cannot impose any liability on the Petitioners given that the Arbitrator still has to decide on whether Petitioner No. 3 is liable for the alleged faulty works on Grids No. 358 and 359 of the Project. Learned counsel further stated that the reasons provided in the impugned order for blacklisting the Petitioners are not available to the Respondents as there is no proof whatsoever that Petitioner No. 3 failed to perform the contract or attempted to undermine the safety, security and stability of the structure of the project by constructing 22 piles of lesser length at Grids No. 358 and 359. He explained that so far as the dispute of 22 piles in Grids No. 358 and 359 is concerned, the deficiency pointed out by the Respondent LDA was corrected and by May 2016 the sixth bill with reference to the stated Grids was paid and cleared by the stated Respondents. Thereafter simply to harass the Petitioners, the Respondents took up the issue of Grids No. 358 and 359 in order to justify terminating the contract and to initiate a campaign of maligning the Petitioners by registering an FIR against them and initiating inquiries against them.

4. On behalf of the Respondent LDA, learned counsel explained that the Petitioners did not fulfill their contractual obligation with reference to the Project and that the Petitioners compromised in the quality of works which is evident from the construction of Grids No. 358 and 359, hence the contract was terminated. Therefore he explained that show cause notice was issued on 3.11.2016 to which reply was filed on 10.11.2016 and ultimately the blacklisting order was issued on 30.11.2016. Learned counsel argued that due process was followed and no illegality is made out against the impugned order. Learned counsel further stated that the dispute is pending before the Arbitrator, however the pendency of that dispute does not affect the blacklisting order as the blacklisting order is a penal consequence for non-compliance of the contract with the Respondent LDA which cannot be stopped on account of pendency of the civil dispute.

5. Heard and record perused.

6. The impugned blacklisting order has been issued under Rule 21 of the Punjab Procurement Rules, 2014 ("Rules") which provides that:

> Subject to sub-rule (3), if a procuring agency is satisfied that a contractor has acted in a manner detrimental to the public interest or good practices or has consistently failed to perform his obligation under the contract or his performance has not been up to mark or he is found indulging in corrupt or fraudulent practice, the procuring agency may, after affording him an opportunity of hearing and through a notification, debar him from participating in any public procurement process of the procuring agency for such period as the procuring agency may determine in the light of the circumstances of the case.

In terms of the Rules, a mechanism for blacklisting is provided in the schedule appended with the Rules which provides that:

1. The procuring agency may, on information received from any resource, issue show cause notice to a bidder or contractor.
2. The show-cause notice shall contain:

(a) precise allegation, against the bidder or contractor;

(b) the maximum period for which the procuring agency proposes to debar the bidder or contractor from participating in any public procurement of the procuring agency; and

(c) the statement, if needed, about the intention of the procuring agency to make a request to the Authority for debarring the bidder or contractor from participating in public procurements of all the procuring agencies.

3. The procuring agency shall give minimum of seven days to the bidder or contractor for submission of written reply of the show cause notice.
4. In case, the bidder or contractor fails to submit written reply within the requisite time, the procuring agency may issue notice for personal hearing to the bidder or contractor/authorize representative of the bidder or contractor and the procuring agency shall decide the matter on the basis of available record and personal hearing, if availed.
5. In case the bidder or contractor submits written reply of the show-cause notice, the procuring agency may decide to file the matter or direct issuance of a notice to the bidder or contractor for personal hearing.
6. The procuring agency shall give minimum of seven days to the bidder or contractor for appearance before the specified officer of the procuring agency for personal hearing.
7. The procuring agency shall decide the matter on the basis of the available record and personal hearing of the bidder or contractor, if availed.
8. The procuring agency shall decide the matter within fifteen days from the date of personal hearing unless the personal hearing is adjourned to a next date and in such an eventuality, the period of personal hearing shall be reckoned from the last date of personal hearing.
9. The procuring agency shall communicate to the bidder or contractor the order of debarring the bidder or contractor from participating in any public procurement with a statement that the bidder or contractor may, within thirty days,

prefer a representation against the order before the Managing Director of the Authority.

10. The procuring agency shall, as soon as possible, communicate the order of blacklisting to the Authority with the request to upload the information on its website.

11. If the procuring agency wants the Authority to debar the bidder or contractor from participating in any public procurement of all procuring agencies, the procuring agency shall specify reasons for such dispensation.

12. The Authority shall immediately publish the information and decision of blacklisting on its website.

13. In case of request of a procuring agency under para 11 or representation of any aggrieved person under Rule 21, the Managing Director shall issue a notice for personal hearing to the parties and call for record of proceedings of blacklisting. The parties may file written statements and documents in support of their contentions.

14. In case of representation of any aggrieved person or procuring agency under Rule 21, the Chairperson shall issue a notice for personal hearing to the parties and may call for the record of the proceedings. The parties may file written statements and documents in support of their contentions.

15. In every order of blacklisting under Rule 21, the procuring agency shall record reasons of blacklisting and also reasons for short, long or medium period of blacklisting.

16. The Authority shall upload all the decisions under Rule 21, available with it, on its website. But the name of a bidder or contractor shall immediately be removed from the list of blacklisted persons on expiry of period of blacklisting or order of the competent authority to that effect, whichever is earlier.

17. An effort shall be made for electronic communication of all the notices and other documents pursuant to this mechanism or process.

In terms of the record show cause notice was issued to Petitioner No. 3 on 3.11.2016, to which reply was filed on 10.11.2016. Thereafter personal hearing was given to Petitioner No. 3 after which the impugned order for blacklisting was issued on 30.11.2016. No show cause notice was issued to Petitioners No. 1 and 2, no hearing was given to them nor has any order been passed against them. The impugned order under *"Copy for information to"* states as follows:

i. The Director General, LDA.

ii. Managing Director, PPRA, S&GAD, GoP with a request to upload the information on the website. It is further requested to debar both the contractors from participating in any public procurement of all procuring agencies in Punjab for the reasons specified in Para 2 above.

ii. The Project Coordinator, PMU, LDA.

iv. The Engineer/Project Director, LOLMTP (Package-Il), LDA.

v. The Registrar, M/s Pakistan Engineering Council (PEC), Ataturk Avenue (East) G-5/2, Islamabad with a request not to renew the enlistment of contractors M/s Ch. A. Latif & Sons (Pvt.) Ltd ad M/s Maqbool Associates (Pvt) Ltd.

vi. The Project Manager, NESPAK-CEC(JV), LOLMTP.

vii. Office Copy.

7. Interestingly it is through the 'CC' that the Respondent LDA directed the Respondent Punjab Procurement Regulatory Authority (**"PPRA"**) to debar all three Petitioners from participating in public procurement of any procuring agency in Punjab. In this regard, there is absolutely no provision of law that allows Respondent LDA to pass any such direction to Respondent PPRA nor can they through the "CC" of the impugned order direct PPRA to take action against the Petitioners. Not only is this a glaring violation of due process but is absolutely contrary to the requirements of the Punjab Procurement Regulatory Authority Act and the Rules. It is also noted that the Respondent LDA in the "CC" at No. 1 directed the Pakistan Engineering Council not to renew the enlistment of the three Petitioners. Again there is no legal basis for making such a direction. Learned counsel for Respondent LDA when confronted with the basis for directing Respondent PPRA as well as Pakistan Engineering Council was unable to explain under what provision of law, LDA draws the authority to make such a request. Therefore to the extent of Petitioners No. 1 and 2, there is no blacklisting order. The 'CC Note' at the end of the impugned order cannot be considered as a blacklisting order against Petitioners No. 1 and 2 as due process was not followed for blacklisting the stated Petitioners. Hence implementation of the impugned order against Petitioners No. 1 and 2 is illegal and therefore set aside. Furthermore the directions given to Respondent No. 2, PPRA and Respondent No. 3, Pakistan Engineering Council are also without any legal basis and the Respondent No. 1, LDA is cautioned from resorting to such practices as it cannot direct Respondent PPRA or the Pakistan Engineering Council from not fulfilling their statutory obligations.

8. So far as Petitioner No. 3 is concerned, the grounds mentioned in the impugned order dated 30.11.2016 for blacklisting are as follows:--

(a) There is no doubt that the contractor failed to perform his contractual obligation under various clauses of the contract document.

(b) The contractor has not raised the issue of Black listing in any Court of law.

(c) As per "Schedule" (sub-section (6) of Rule 21) para 1 to 8, all actions, such as issuance of show-cause notice, personal hearing and decision, are to be taken by the "procuring agency."

(d) The Contractor' attempt to undermine the safety, security and stability of the structure of the project by constructing lesser length of 22 piles at two grids (358 & 359) is a solid ground to black list him besides other reasons.

The issue of Ground (a) is admittedly in dispute before the Arbitrator, hence it cannot be used as a basis to blacklist Petitioner No. 3 as the Arbitrator has yet to determine whether the Petitioner No. 3 failed to perform its contractual obligations or whether Respondent LDA was at fault and illegally terminated the contract. Ground (b) is astonishingly a novel concept which finds no basis in the law as Petitioner No. 3 is not required to raise the issue of blacklisting in any Court of law prior to the issuance of any notice or order of blacklisting. Hence there is no legal basis for this ground. The main ground relied upon by the Respondent LDA is Ground (d) which holds Petitioner No. 3 liable for the *safety, security and stability of the structure of the project with reference to Grid Nos. 358 and 359.* This matter

is also in dispute before the Arbitrator and at this stage it is premature for the Respondents to levy this allegation because so far as Grids No. 358 and 359 are concerned, admittedly the lesser length issue was corrected and improved upon and thereafter certified by the Engineer as required under the contract. The allegation, if any, against Petitioner No. 3 is that it intended to compromise on public safety and security in collusion with the staff of LDA as well as that of NESPAK. This issue was also considered in WP No. 40127/2016 titled *Maqbool Associates (Pvt.) Limited etc. v. Anti-Corruption Establishment Lahore through its Director General etc* wherein the same Petitioners challenged an inquiry initiated by the Federal Investigation Agency with reference to the same Grids No. 358 and 359. It was mentioned in that case that during the pendency of the writ petition, FIR No. 2/2017 dated 27.1.2017 was registered against the petitioners which was also with malafide intent to harass the petitioners. The issue in the FIR is of whether the lesser lengths were made with malafide intent in collusion with LDA and NESPAK employees which issue is under investigation. Therefore at this stage it cannot form a ground for blacklisting Petitioner No. 3. Furthermore the impugned order does not explain how public safety and security was compromised nor does it explain that how the lesser length impacted the entire project and resulted in a safety or security hazard. It appears that the blacklisting order was issued simply to deny the petitioners the right to participate in public tenders. Therefore, the impugned order of blacklisting is not sustainable under the law.

9. In view of the aforesaid, the instant Writ Petition is allowed and impugned order of blacklisting dated 30.11.2016 issued by Respondent LDA to the Petitioners is set aside. The Respondents are directed to immediately remove the blacklisting order against the Petitioners from the LDA and PPRA website.

(Y.A.) Petition allowed

PLJ 2018 Lahore 341 (DB)

***Present*: MRS. AYESHA A. MALIK AND JAWAD HASSAN, JJ.**

GOVERNMENT OF THE PUNJAB, SECRETARY HOME DEPARTMENT through Deputy Secretary (Police) Interior Department, Lahore etc.--Petitioners

versus

QANOOT FATIMA etc.--Respondents

I.C.A. No. 497 of 2017, heard on 2.11.2017.

Law Reforms Ordinance, 1972 (XII of 1972)--

----S. 3--Constitution of Pakistan 1973, Arts. 4 & 25--Gender discrimination--Convention for elimination of all forms of discrimination against women--Duties of signatory states highlighted--International law--Recruitment process--Quota system explained--Due representation--Counter-Terrorism Department--Appellants invited applications for post of corporals in CTD department, participated in recruitment process, fell in merit list--Respondents were denied appointments on stance that female candidates could not be appointed against open merit seats--Challenge to--Appeal was allowed and directed to appoint female--Validity--Appellants issued an advertisement for posts of corporals in CTD--Subsequent to advertisement, notification was issued fixing a quota of 5% for female candidates--Female candidates can only be adjusted against 5% quota and remaining seats must be allocated to male candidates--Contention Art. 25(3) of Constitution permits seats to be reserved for Women as a special measure for protection of women--Reservation of seats for women in public sector employment is an affirmative action to ensure that women get equal opportunity and equal access while applying for public sector jobs--When a candidate meets merit, he or she cannot be placed on a quota list simply because of their gender, disability or being a minority--Quota was fixed to facilitate and encourage representation from groups which were considered to be under represented and cannot be deemed as maximum representation from that group--Reserved seats for female candidates means that department should ensure that at least 5 % of all candidates employed by CTD are female candidates and it does not bar them from employing all female candidates who fall within merit--Fixation of quota for women in no way bars female candidates from competing on open merit and being appointed on account of their succeeding on open merit--Concept of quota is to ensure representation and participation of females in public sector and quota represents critical value below which it will be deemed that females are underrepresented--Quota does not bar department from appointing female candidates beyond 5%--Appeal was dismissed.

[Pp. 346, 347 & 348] A, B, C & E

Convention for Elimination of all Forms of Discrimination Against Women--

----Art. 4--Constitution of Pakistan 1973, Arts. 4 & 25--Gender discrimination--Duties of signatory states highlighted--International law--Recruitment process--Quota system explained--Due representation--Counter-terrorism department--Art. 4

of Convention for elimination of all forms of discrimination against Woman ("CEDAW") obligates member states to take temporary measure, such as quotas, to neutralize effect of barriers hindering women's participation in public sector--Art. 5 of CEDAW also requires that appropriate measures are taken to modify social and cultural patterns of conduct for men and women with a view to achieve elimination of prejudices, customary and other practices which are based on idea of inferiority of women or on stereotype roles for men and women--Government is required to devise policies which will remove obstacles and barriers for participation of women in all walks of life, be it political, social, economic or cultural--This participation is based on fundamental principle that men and women must be treated equally and there can be no discrimination on basis of gender--Government of Punjab amongst other measures took some positive steps when introducing Punjab Women Empowerment Package 2012 which required quota for women in public service employment to be increased--However essence of fixing such quota and commitment under CEDAW has been compromised by relegating female candidates who competed on open merit and satisfy merit criteria, yet are adjusted against reserved seats--Essence of fixing quotas for women in public service was to enhance their participation and to ensure that equal opportunity is given to women applying for public sector jobs.
[Pp. 347 & 348] D

Constitution of Pakistan 1973--

----Arts. 4, 18, 19 23 & 25--Gender discrimination--Convention for elimination of all forms of discrimination against women--Fundamental Right of Employment--Violation of constitutional mandate--By reducing participation to their respective quotas, appellants had in fact created another quota of abled bodied Muslim men, ensuring that open merit seats were filled by abled bodied Muslim men--When women are reduced to only reserved seats, quota acts as a bar to employment and loses its facilitative objective as well as created another group or class which is given employment--By denying female candidates their right to employment on merit, respondents have ensured that post of corporals is filled by men--Equal opportunity and equal access has effectively been denied, hence constitutional mandate violated--Seats were filled up by those who did not necessarily meet merit--By reducing female candidates to 5% quota, merit is compromised as candidates who satisfy merit are ousted on account of their gender and candidates who do not meet merit or lower in merit are included--In effect mediocracy is promoted and very purpose of setting up a rigorous induction plan is compromised--Competence cannot be measured through gender lens--Competence must be seen strictly on basis of standards set--High Court also deprecated practice by not allowing female field work by holding that even though female corporals are hired, they are not assigned field work because they are considered to be vulnerable and weak, hence they are given office jobs and no field work--This justification cannot be appreciated or given legal sanctity because if women have applied for post of corporals in CTD and have qualified physical and mental tests set by appellants then those who fall on merit must be trained along with their male counterparts and must be allowed to

participate in field work--Reasoning given is precisely kind of gender stereotyping which Art. 5 of CEDAW requires to be prevented--Instead of treating male and female candidates as equal appellants have devised their own understanding of how to appoint female corporals--Gender stereotyping or classification based on stereotype roles or social expectations tantamount to discrimination which is not permissible under Constitution and goes against constitutional mandate of equality. [Pp. 349 & 350] F & G

Mr. Muhammad Ijaz, AAG on behalf of the Appellants along with *Rai Muhammad Tahir,* Additional IG Police/CTD, *Jawad Qamar,* SSP/ CTD and Altaf Hussain, DSP/Legal, CTD for Appellants.
Mr. Naveed Iqbal Sivia, Advocate for Respondents.

Date of hearing: 2.11.2017.

JUDGMENT

Mrs. Ayesha A. Malik J.--The instant appeal along with connected ICAs No. 475/17, 487/17 and 488/17 arise out of the common order dated 2.3.2017 passed by the learned Single Judge in WP No. 1134/2015.

2. In November, 2013 the Government of Punjab (Appellant here) invited applications for the post of corporals in the Counter Terrorism Department, Punjab ("CTD"). In terms of the advertisement both men and women could apply. Accordingly the Respondents before this Court applied for the post of corporals. They cleared the tests and interview and came on the merit list. However, they were not appointed as the Appellants were of the opinion that female candidates could not be appointed against the open merit seats. The Appellants appointed 75 female corporals against a 5% quota for women and denied the Respondents' appointment because they did not fall within the merit of the top 75 female candidates. The Respondents challenged the decision of the Appellants and *vide* order dated 5.11.2014 passed in WP No. 22217/2014, a direction was given to the Appellants to hear the Respondents and pass a speaking order. The Home Secretary, Punjab heard the Respondents and through order dated 6.1.2015 rejected the representation of the Respondents on the ground that the top 75 female candidates were selected and since the Respondents did not fall within the merit of the top 75 female candidates, they cannot be appointed. In this regard, the Appellants relied upon notification dated 30.9.2014 issued by the Secretary, Government of Punjab, Home Department which provides that Competent Authority has been pleased to fix 5% female quota in the recruitment process of Corporals in Counter Terrorism Department, Punjab, in view of approval of the Chief Minister dated 11.11.2013. The Respondents challenged the order of 6.1.2015 by filing WP No. 1134/2015 wherein the learned Single Judge set aside the order of 6.1.2015 and directed the Appellants to appoint the Respondents.

3. The Government of Punjab has impugned order dated 2.3.2017 passed by the learned Single Judge in W.P. Nos. 1134/2015, 190/2015, 13326/2015 and 3687/2015 on the ground that 5% quota was fixed for the recruitment of female corporals in the CTD. 75 female candidates were adjusted against the 5% quota out of 1500 corporals and the Respondents before this Court being female applicants could not be appointed because their merit was less than the 75 female candidates who were appointed against the women quota. The impugned order, however directed the Appellants to appoint the Respondents and send them for training. Hence these appeals.

4. Mr. Muhammad Ijaz, AAG on behalf of the Appellants argued that the recruitment process commenced after the advertisement was issued in November 2013. However inadvertently the advertisement did not mention the 5% quota allocated for women applicants. He explained that 1500 corporals were to be appointed out of which 1425 would be male corporals and 75 female corporals. The quota was fixed by the competent authority much before the advertisement keeping in mind the nature of the job and the practical risks involved. In this regard Rai Muhammad Tahir, Additional IG Police/CTD explained that CTD is a counter terrorism force which plans and executes counter terrorism measures, operations and investigations. A transparent recruitment process was undertaken to select the best candidates in which written test, psychological test, medical examination and physical test were carried out in order to ensure that the appointees are not only physically but mentally capable to meet the challenges of the job. Given the strenuous and dangerous requirements of the job, it was decided that out of the total strength of corporals being appointed, 5% should be women. He explained that the women corporals are not sent out in the field, as they are considered to be vulnerable and at risk. However in order to ensure that women are represented in the CTD, the required quota is maintained. As per his explanation, the CTD cannot appoint women beyond the given quota as the department needs corporals who will go into the field to carry out counter terrorism operations from time to time, whereas the female corporals are given desk jobs and cannot be sent out to do field work. As per his contentions it is a high paying job which should be given to men who are well suited for the job.

5. On behalf of the Respondents, learned counsel argued that the Respondents before this Court applied for the post of corporals and came on the open merit for the said post. The Appellants selected the top 75 female candidates and appointed them thereby restricting the other female candidates who came on the merit, simply on account of notification dated 30.9.2014. It is the case of the Respondents that fixing a female quota and restricting the female recruitment to the extent of the quota is discriminatory and prevented the Respondents from being appointed on merit.

6. Heard and record perused.

7. The Appellants issued an advertisement in November 2013 for the post of corporals in the CTD. Subsequent to the advertisement, notification dated 30.9.2014 was issued fixing a quota of 5% for female candidates. It is the case of the Appellants that female candidates can only be adjusted against the 5% quota and that the remaining seats being 1425 must be allocated to male candidates. As per their understanding even though the Respondents came on the open merit, they cannot be appointed because their merit was below the merit of the 75 female candidates who were appointed against the women quota. The impugned order finds that for the process of recruitment of corporals, the advertisement published in the newspaper did not stipulate a 5% quota for women. The quota was notified on 30.9.2014, after the advertisement even though it was approved by the Chief Minister on 11.11.2013 through a summary placed before him. Therefore, since the notification came much after the advertisement and after the commencement of the recruitment process, the Court set aside the impugned order dated 6.1.2015 and directed the Appellants to appoint the Respondents and to send them for their training with the remaining batches.

8. We have heard the case at length and are of the opinion that while the learned Single Judge has relied upon the notification dated 30.9.2014 and held that it was not applicable to the recruitment process, the act of the Appellants of not appointing the Respondents even otherwise is discriminatory. We are of the opinion that the matter in issue goes beyond the issuance of the notification of 2014 fixing a 5% quota for women candidates. We find that the general understanding of the Appellants for recruitment against reserved seats is totally misconceived and goes against the spirit of reserving seats. Article 25(3) of the Constitution of Islamic Republic of Pakistan, 1973 (**"Constitution"**) permits seats to be reserved for women, as a special measure for the protection of women. This special measure was considered necessary to ensure equal opportunity for women to encourage their participation in the public sector. The rationale of Article 25(3) was considered in *Mst. Attiyya Bibi Khan and others v. Federation of Pakistan through Secretary of Education (Ministry of Education), Civil Secretariat, Islamabad and others* ***(*****2001 SCMR 1161)** wherein the august Supreme Court of Pakistan, while striking down a quota fixed for doctors' children for admission in medical colleges, upheld the requirement of reservation of seats for women and for those who are socially or educationally backward or are considered under- developed classes in order to ensure their advancement in society. Therefore in terms of the dicta laid down by the august Supreme Court of Pakistan reservation of seats can be made with the objective to secure genuine equality amongst different classes or groups. In order to ensure substantive equality the Constitution required measures to be taken to overcome the disparity and barriers which permit substantive equality. Therefore reservation of seats for women in public sector employment is an affirmative action to ensure that women get equal opportunity and equal access while applying for public sector jobs.

9. Article 4 of the Convention for the Elimination of all forms of Discrimination against Woman **("CEDAW")** obligates member states to take temporary measure,

such as quotas, to neutralize the effect of barriers hindering women's participation in the public sector. Article 5 of the CEDAW also requires that appropriate measures are taken to modify social and cultural patterns of conduct for men and women with a view to achieve the elimination of prejudices, customary and other practices which are based on the idea of inferiority of women or on stereotype roles for men and women. Pakistan is a signatory to CEDAW since March, 1996, hence is required to take positive steps to achieve the standards set by CEDAW. The Government is therefore required to devise policies which will remove obstacles and barriers for the participation of women in all walks of life, be it political, social, economic or cultural. This participation is based on the fundamental principle that men and women must be treated equally and there can be no discrimination on the basis of gender. The Government of Punjab amongst other measures took some positive steps when introducing the Punjab Women Empowerment Package 2012 which required quota for women in public service employment to be increased. However the essence of fixing this quota and the commitment under CEDAW has been compromised by relegating female candidates who competed on open merit and satisfy the merit criteria, yet are adjusted against reserved seats. In our opinion, the essence of fixing quotas for women in public service was to enhance their participation and to ensure that equal opportunity is given to women applying for public sector jobs. The objective was never to reduce female participation to a quota.

10. In the present cases 49272 candidates applied out of which 9679 were female candidates. 12101 candidates passed the physical test, out of which 3544 were female candidates. 11835 appeared in the written test out of which 2948 candidates qualified including 730 female candidates. 1889 candidates were shortlisted out of which department chose only 75 female candidates and the remaining were all men. The Respondents before the Court came within the merit of the 1500 who were to be selected, in fact they were placed within the first 400 on the merit. They qualified at every level yet were denied appointment. The understanding of the Appellants on this issue totally negates the purpose of fixing reserved seats and the objective of encouraging women to apply to such posts. When a candidate meets the merit, he or she cannot be placed on a quota list simply because of their gender, disability or being a minority. The quota is fixed to facilitate and encourage representation from groups which are considered to be under represented and cannot be deemed as the maximum representation from that group. We are of the opinion that the 5% reserved seats for female candidates means that the department should ensure that at least 5% of all candidates employed by CTD are female candidates and it does not bar them from employing all female candidates who fall within the merit. The fixation of quota for women in no way bars female candidates from competing on the open merit and being appointed on account of their succeeding on the open merit. The concept of a quota is to ensure representation and participation of females in the public sector and the quota represents the critical value below which it will be deemed that females are under represented. Essentially the quota ensures that in the very least 5% of the candidates should be women which will signify the very minimum representation of females in that department. Hence a quota does not

bar the department from appointing female candidates beyond 5%. Since the Respondents fall within the required merit, in fact were on the higher side on the merit, it was incumbent upon the Appellants to appoint them.

11. We are also of the opinion that the act of the Appellants runs contrary to the very spirit of creating reserved seats, be it for women, disabled or minorities. By reducing the participation of the aforementioned classes to their respective quotas, the Appellants have in fact created another quota of abled bodied muslim men, ensuring that the open merit seats are filled by abled bodied muslim men. When women are reduced to only the reserved seats, the quota acts as a bar to employment and loses its facilitative objective as well as created another group or class which is given employment. By denying female candidates their right to employment on merit, the Respondents have ensured that the post of corporals is filled by men. Equal opportunity and equal access has effectively been denied, hence the constitutional mandate violated. Also it means that the seats are filled up by those who do not necessarily meet the merit. By reducing the female candidates to the 5% quota, the merit is compromised as candidates who satisfy the merit are ousted on account of their gender and candidates who do not meet the merit or lower in merit are included. In effect mediocracy is promoted and the very purpose of setting up a rigorous induction plan is compromised. Competence cannot be measured through the gender lens. Competence must be seen strictly on the basis of the standards set. In this case, the standard was the combined result of the written test, psychological test, physical test, medical examination and interview. The selected female corporals all satisfied the merit. The Respondents also fulfilled the criteria but were ousted simply because they are women. Reserved seats or quotas are positive actions required to achieve substantive equality. It is a measure taken for promoting equality and is the bedrock of international conventions providing for protection against discrimination on the basis of sex, race and disability. Hence the act of the Appellants of employing only 75 women when the Respondents being female candidates were eligible on merit is discriminatory and against the spirit of the Constitution.

12. We also find it necessary to comment on the justification offered to us for restricting the employment of female corporals to 75. We were informed that even though female corporals are hired, they are not assigned field work because they are considered to be vulnerable and weak, hence they are given office jobs and no field work. This justification cannot be appreciated or given legal sanctity because if women have applied for the post of corporals in the CTD and have qualified the physical and mental tests set by the Appellants then those who fall on the merit must be trained along with their male counterparts and must be allowed to participate in the field work. The reasoning given is precisely the kind of gender stereotyping which Article 5 of the CEDAW requires to be prevented. Instead of treating male and female candidates as equal the Appellants have devised their own understanding of how to appoint female corporals. In our opinion this justification given amounts to discrimination because female corporals are being treated differently simply on account of their gender. Therefore gender stereotyping or classification based on stereotype roles or social expectations tantamount to

discrimination which is not permissible under the Constitution and goes against the constitutional mandate of equality.

13. For what has been discussed above, all the appeals are dismissed and impugned order dated 2.3.2017 passed by the learned Single Judge in W.P. No. 1134/2015 is maintained.

(Z.I.S.) Appeals dismissed

PLJ 2018 Lahore 228
***Present*: MRS. AYESHA A. MALIK, J.**
NAYAB SOHAIL--Petitioner
versus
PUNJAB PUBLIC SERVICE COMMISSION through its Secretary and 2 others--Respondents
W.P. No. 27454 of 2016, decided on 28.9.2017.

Constitution of Pakistan, 1973--

----Art. 199--Constitutional petition--Advertisement for post of Lecturer (Deaf field)--Equivalence of degree--Disqualification--Validity--Degree of MA (Special Education) cannot be equated with M.Ed. Special Education as per QEDC since MA (Special Education) is a four year degree programme and has 66 credit hours whereas M.Ed Special Education is one year degree programme and has only 36 credit hours--Petition was dismissed.
[P. 230] A

Mr. Hassan Fareed, Advocate for Petitioner.
Mr. Anwaar Hussain, Addl. A.G. for Respondent No. 1.
Mr. Faisal Mukhtar, Law Officer for Respondent No. 2.
Date of hearing: 28.9.2017.

ORDER

Through this petition, the petitioner seeks a direction to Respondent No. 1 to appoint her on the post of Lecturer (Deaf Field) BS-17.

2. The facts of the case are that the petitioner applied for the post of 'Lecturer (Deaf Field) BS-17' through proper channel with reference to the advertisement issued by Respondent No. 1. Provisional interview call letter was also issued to the petitioner after fulfilling the requirements prescribed by Respondent No. 1. The petitioner being second on the merit list was recommended to the Provincial Government for the post of Lecturer (Deaf Field) on contract basis for five years in the Punjab Special Education Department on 29.4.2016. Subsequently Respondent No. 2 forwarded the appointment of selected candidates including the petitioner to Respondent No. 1 by stating that selected candidates are not qualified for the post as per rules and regulations of Special Education Department. The petitioner approached Respondent No. 1 through application dated 24.8.2016 stating that her degree of Masters in Special Education is equivalent to the degree of M. Ed Special Education but till date no reply has been given by Respondent No. 1. Learned counsel for the petitioner argued that the petitioner was selected and appointed to the post of Lecturer (Deaf Field) after fulfilling the requirements/criteria, hence she cannot be denied the post.

3. Report and parawise comments have been filed on behalf of Respondents No. 1 and 2. Learned Law Officer argued that as per the Service Rules the required qualification for the post of Lecturer (Deaf Field) was MA (Special Education) whereas Respondent No. 1 recommended the candidates for the post who possess degree of M.Ed Special Education. Respondent No. 1 considered the request of the Administrative Department and revised its earlier recommendation through letter dated 15.8.2016. The recommendation of the petitioner was also withdrawn along with two other recommendees. Learned Law Officer further submitted that Qualification Equivalence Determination Committee ("QEDC") *vide* its minutes dated 16.5.2016 has also decided the issue and declared that M.A Special Education is not equivalent to M.Ed (Visually Impaird). Therefore in the light of QEDC's decision the petitioner was not eligible for the said post.

4. Heard and record perused.

5. The basic grievance of the petitioner is that she possesses the degree of M.Ed which is equal to MA (Special Education) degree which should be considered for the post of Lecturer (Deaf Field). The petitioner has relied upon letter dated 23.1.2017 issued by the Higher Education Department to show equivalence of MA (Special Education) with M.Ed. Special Education. The letter of 23.1.2017 reads as follows:

> The Higher Education Commission recognizes Master of Education in Special Education degree held by you from University of Education, Lahore after 'Post Graduate Diploma in Teaching the Deaf/15-year schooling' as equivalent to corresponding Master's degree in the relevant field involving 16 years of schooling.

The aforesaid letter of 23.1.2017 issued by the Higher Education Department does not provide that M.Ed. Special Education as equal to MA (Special Education), hence cannot be applied to this case. Furthermore the degree of MA (Special Education) cannot be equated with M.Ed. Special Education as per the QEDC since MA (Special Education) is a four year degree programme and has 66 credit hours whereas M.Ed Special Education is one year degree programme and has only 36 credit hours.

6. Under the circumstances, no case for interference is made out. Petition is *dismissed*.

(M.M.R.) Petition dismissed

2018 P L C (C.S.) Note 23
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
SENIOR MEMBER BOARD OF REVENUE
Versus
MUHAMMAD SOHAIL and others
I.C.As. Nos.72076, 72070 and 72080 of 2017, heard on 28th September, 2017.

Civil service---

----Contractual employee of Public Body---Nature of service---Dismissal and reinstatement of such employee ---Such contract employee was governed by the doctrine of "master and servant" and there was no right for such an employee to seek reinstatement and in event of arbitrary dismissal or unwarranted termination of employment could sue for damages---No vested right existed on basis of which contractual employee could seek reinstatement by invoking Constitutional jurisdiction of High Court; such contract of service could not be specifically enforced---Where grievance of an employee was not governed by statutory Rules of service---Constitutional petition was not maintainable. [para. 6 of the judgment]
[Case-law referred]

Muhammad Shan Gul, Addl. A.G. with Muhammad Ejaz, AAG and Babar Rehman, Director Monitoring, Land Record Authority for Appellant.
Muhammad Ahsan Bhoon, Talaat Farooq Sheikh, Malik Muhammad Awais Khalid and M. Mansoor Humayun for Respondents.
Date of hearing: 28th September, 2017.

JUDGMENT

AYESHA A. MALIK, J.--- This judgment decides upon the issues raised in I.C.As. Nos.72076/2017, 72070/2017 and 72080/2017 as all the appeals arise out of the same order dated 30.8.2017 passed by the learned Single Judge in W.Ps. Nos.12840/2017, 10883/2017 and 5885/2017. The Appellant before the Court is Senior Member Board of Revenue through Director General, Punjab Land Record Authority, Lahore who is aggrieved by the order of the learned Single Judge dated 30.8.2017 passed in W.Ps. Nos.12840/2017, 10883/2017 and 5885/2017 whereby the termination of the Respondents' contracts was declared illegal.

2. The relevant facts are that the Government of Punjab through the Project Management Unit of the Board of Revenue launched the Land Record Management and Information System Project to digitalize the land records of the Province. For this purpose, the recruitment process for Service Centre Officials ("SCO") against 477 vacant posts was initiated and posts were advertised on 6th and 7th October 2015. The Respondents and others applied for the posts. All candidates were called for computer based typing test and interview wherein as per the policy, one of the qualifying requirement was a typing speed of 40 words per minute. 452 SCOs were

selected and assigned to different Arazi Record Centres in the Tehsils of the Province. All SCOs were employed on contract for a period of one year and the contract was to expire on 30.6.2017. Subsequently several complaints were lodged against the working of the SCOs, hence the department probed into the matter and decided to re-take the typing test to evaluate the performance of the SCOs. The re-take results showed that only 9% of the SCOs were able to type at 40 words per minute. The majority were unable to type at 40 words per minute with more than 51% having a speed of below 20 words per minute. The matter was entrusted to the Anti-Corruption Establishment ("ACE") for proper investigation. After a preliminary investigation, the ACE registered FIR No.11/2016 against the accused officials who had compromised on the merit in the recruitment process. The ACE recommended judicial action against the delinquent officials in terms of its report dated 9.6.2017. Apprehending their possible removal 44 of the SCOs filed W.P. No.4050/2017 wherein the Court vide its order dated 10.2.2017 transmitted the petition to the Director General, Punjab Land Record Authority to treat it as a representation and decide it after providing a hearing to all through a speaking order within a period of four weeks. As a result of this direction, 452 SCOs were issued notice for personal appearance for 16.3.2017. 438 SCOs appeared before the competent authority. They were given a hearing and were confronted with their typing test from the re take examination. They were unable to explain their poor performance, hence the competent authority terminated their contracts in terms of clause 17 of the contract with payment of one month's salary in lieu of notice.

3. Mr. Muhammad Shan Gul, Addl. AG on behalf of the Appellant argued that the Respondent SCOs were all contract employees whose contracts were terminated simplicitor without any stigma in terms of clause 17 of the contract which clearly provides that your contract shall be liable to termination on one month's notice or on payment of one month's pay in lieu thereof on either side, without assigning any reason. He further argued that the impugned judgment has ignored the settled principle laid down by the august Supreme Court of Pakistan that contract employees cannot enforce their contract through a writ petition, that the terms and conditions of service of the SCOs are not governed by any statutory rules and further that the contract itself contemplates that it can be terminated with or without notice and one month's salary in lieu of notice. In this regard, he has placed reliance on the cases titled Abdul Wahab and others v. HBL and others (2013 SCMR 1383), Pakistan Defence Officers' Housing Authority and others v. Lt. Col. Syed Jawaid Ahmed (2013 SCMR 1707), Syed Nazir Gillani v. Pakistan Red Crescent Society and another (2014 SCMR 982), Muhammad Yusuf Shah v. Pakistan International Airlines Corporation (PLD 1981 SC 224), Anwar Hussain v. Agricultural Development Bank of Pakistan and others (PLD 1984 SC 194) and Raziuddin v. Chairman, Pakistan International Airlines Corporation and 2 others (PLD 1992 SC 531). He further argued that even otherwise the contract period ended on 30.6.2017 after which the Respondents have no right to continue in service nor do they have any right to regular appointment in terms of clause 11 of the contract. Reliance was placed on the cases titled Pakistan Telecommunication Co. Ltd. through Chairman v. Iqbal Nasir and others (PLD 2011 SC 132), Nadeem Shahid and another v.

Chairman, State Life Insurance Corporation of Pakistan and 3 others (2003 PLC (C.S.) 719), Agha Salim Khurshid and another v. Federation of Pakistan and others (1998 SCMR 1930), The Secretary, Government of the Punjab, through Secretary Health Department, Lahore and others v. Riaz ul Haq (1997 SCMR 1552) and Aurangzeb v. Messrs Gool Bano Dr. Burjor Ankalseria and others (2001 SCMR 909). Finally the learned Law Officer argued that the impugned order is even incorrect on the facts as the learned Single Judge held that no personal hearing was given and that no complaint was given from the public or from any official and further that the petitioners had passed their typing test yet their services were dispensed with. Learned Law Officer argued that all three findings of the learned Single Judge are contrary to the record and the facts. He has relied upon order dated 28.3.2017 issued by the Director General, Punjab Land Records Authority to urge the point that the Respondents were given a personal hearing, that they were confronted with their typing test result and that Annexure-C of the appeal shows the nature of some of the complaints that were filed against the SCOs.

4. Mr. Muhammad Ahsan Bhoon, Mr. Talaat Farooq Sheikh, Malik Muhammad Awais Khalid and Mr. M. Mansoor Humayun, Advocates for the Respondents argued that the Respondents were treated in an arbitrary manner with mala fide intent. All candidates qualified the recruitment process and were appointed after following of codal formalities. The Appellant has not been able to show any illegality in the recruitment process. Learned counsel further argued that there is no provision for re-take of typing test nor was there any justification for terminating the contract through an omnibus order without considering the case of each and every SCO on his individual merit. It is their case that all Respondents were qualified and even project employees can be regularized in terms of the dicta laid down by the august Supreme Court of Pakistan in the case titled Rizwan Javed and others v. Secretary Agriculture Livestock and others (2017 PLC (C.S.) 712). It is also their case that they were never heard and that they were never given a fair chance to defend themselves and that the Appellants have misconducted themselves and abused their authority. Reliance has been placed on the cases titled Collector of Customs and Central Excise, Peshawar and 2 others (2004 SCMR 303), District Coordination Officer, District Dir Lower and others v. Rozi Khan and others (2009 SCMR 663) and Jawad Ali and others v. Superintendent Jail and others (2017 PLC (C.S.) 587).

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

6. The Respondents do not dispute that they are contract employees nor do they dispute that the contract was for one year which expired on 30.6.2017. It is their case that the contract was terminated arbitrarily without due process and it is also their case that not only should they be reinstated in service but they should be treated as regular employees. The contract period ended 30.6.2017 and at this point there is no contract between the parties and furthermore in terms of what has been argued before us there is no will of the employer that is the Appellant, to extend the contract of the Respondents. In terms of the impugned order dated 30.8.2017 passed

by the learned Single Judge, the order dated 28.3.2017 issued by the Director General, Punjab Land Records Authority being the order of termination of contract was set aside and all consequent acts were declared to be illegal as they were without affording the Respondents a fair trial as required under Articles 4 and 10-A of the Constitution of Islamic Republic of Pakistan, 1973. We are of the opinion that the impugned order has failed to take into consideration the settled principle of law on the subject by the august Supreme Court of Pakistan. In the case titled 'Federation of Pakistan, Chamber of Commerce and Industry, Karachi v. Ali Ahmed Qureshi' (2001 SCMR 1733), the august Supreme Court of Pakistan held that a contract employee is governed by the principle of master and servant and there is no right for seeking reinstatement under the contract and in the event of arbitrary dismissal or unwarranted termination of employment, an employee is entitled to sue for damages. In the case titled 'Federation of Pakistan through Secretary Law, Justice and Parliamentary Affairs v. Muhammad Azam Chattha' (2013 SCMR 120) the august Supreme Court of Pakistan held that there is no vested right on the basis of which the respondents employed on contract can seek reinstatement through a constitutional petition. The august Supreme Court of Pakistan has held that a contract employee instead of pressing for his reinstatement of service for the left over period can at best claim damages to the extent of the un-expired period of service. It has also been held that contract of service cannot be specifically enforced. A contract employee is governed by the doctrine of master and servant and in the event of arbitrary dismissal or unwarranted termination of employment, the employee can sue for damages equal to wages, allowances and other benefits which would have been otherwise been payable under the contract of employment. It has also been held by the august Supreme Court of Pakistan in the case titled 'Abdul Wahab and others v. HBL and others' (2013 SCMR 1383) that where service grievance is agitated by a person who is not governed by statutory rules of service, before the High Court, in terms of Article 199 of the Constitution, such petition shall not be maintainable. Furthermore in terms of the dicta laid down by the august Supreme Court of Pakistan, a contract employee has no right to be in service beyond the contract period. Reliance is placed on the cases titled 2001 SCMR 909 (supra) and PLD 2011 SC 132 (supra).

7. Therefore for what has been argued before us, the Respondents do not have any right to continue under the contract as the contract expired on 30.6.2017. With respect to the termination, the contracts were terminated in terms of clause 17 which reads as under:-

You shall be on probation for three months. During probation your contract shall be liable to termination without notice. After expiry of the probation period your contract shall be liable to termination on one month' notice or on payment of one month's pay in lieu thereof on either side, without assigning any reason.

The Respondents were paid one month's salary in lieu of notice. Some of the Respondents filed W.P. No.12840/2017 wherein an interim order was issued on 3.5.2017 with a direction that until the next date of hearing operation of impugned order shall remain suspended. Consequent to the said order, the Respondents were

paid their salaries for the months of May and June, 2017 hence have been paid their salaries under the contract and were also given a hearing pursuant to an order of the Court. The Respondents have no vested right after the expiry of the contract to seek renewal or regularization. Furthermore even with reference to the challenge to the termination of the contract the Respondents could not have been reinstated as per the law laid down by the august Supreme Court of Pakistan.

8. Under the circumstances, all the appeals are allowed and the impugned order dated 30.8.2017 passed by the learned Single Judge in W.Ps. Nos.12840/2017, 10883/2017 and 5885/2017 is set aside.KMZ/S-72/L

Order accordingly.

2018 [M] C.L.R. 1744
[Lahore]
Present: **AYESHA A. MALIK, J.**
Saleem Enterprises
Versus
Federation of Pakistan, etc.
W.P. No. 39536 of 2016, decided on 18th April, 2017.

Constitution of Pakistan, 1973---

---Art. 199---National Tariff Commission Act, 2015, S. 5---Contention Chairman and Members were not appointed under Act and in terms dicta laid down in PLD 2016 SC 808---Further contended that Chairman and Members did not fulfil requirement of Section 5 of Act---Contention regarding Chairman and Members holds no force and was without merit---Argument was misconceived not only on account of de facto doctrine but also on the basis of dicta held in PLD 2009 SC 879 where in august Supreme Court of Pakistan declared appointments of various Judges of High Court as illegal but saved all acts and judgments pronounced by them on the basis of defacts doctrine.

(Paras 1, 2, 8, 9, 12)

Ref: 1995 SCMR 1593, PLD 1998 SC 161, PLD 1998 SC 1445, PLD 2003 SC 724, 2007 PLC (CS) 663, PLD 2009 SC 879.

عدالت عالیہ نے (*De facto* doctrine)کے تحت کمیشن کے تمام اقدامات کو جائز قرار دیا ہے۔

For the Petitioners: Shafqat Mehmood Chohan, Adnan Ahmad Paracha, Muhammad Shahid Paracha, Muhammad Azam Zafar, Muhammad Siddiq Mughal, Ms. Madiha Amin, Muhammad Ramzan Chaudhary, Muhammad Raheel Kamran Sheikh, Barrister Saad Ehsan Warraich, Amir Saeed Rawan, Amjad Farooq Bismil Rajpoot, Muhammad Mansha Sukhera, Ghulam Murtaza, Rashid Javaid Lodhi, Muhammad Saleem Chaudhary, Rana Adnan Ahmad, Monam Sultan, Amir Iqbal Basharat, Malik Muhammad Arshad, Naeem Khan, Ch. Muhammad Ali, Ch. Tariq Mehmood, Mian Muhammad Bashir, Ahmad Jahanzaib Hanjra, Mian Altaf Hussain Bhatti, Amjad Pervaiz Chaudhary, Khawaja Muhammad Bilal, Rana Munir Hussain and Malik Muhammad Arshad, Advocates.

For the Respondents: Nasar Ahmad, DAG and Tahir Mehmood Ahmad Khokhar, Assistant Attorney General for Pakistan alongwith Kausar Ali Zaidi, Joint Secretary (Admn), Ministry of Commerce, Islamabad.

For the Respondents National Tariff Commission: Ahmad Sheraz, Advocate.

Muhammad Azeem Daniyal, Advocate.

Shehzad A. Elahi and Ch. Muhammad Ali, Advocates.
Jahanzaib Awan, Advocate.
Asad Ahmad Ghani, Advocate.
Asad Leghari, Advocate vice Makhdoom Ali Khan, Advocate.

Date of hearing: 18th April, 2017.

JUDGMENT

AYESHA A. MALIK, J. --- This common judgment decides upon the issues raised in the Writ Petitions detailed in Schedule "A", appended with the judgment as all the Petitions raise common questions of law and facts.

2. The Petitioners are primarily importers of ceramics tiles, steel, hardware, chemicals, packaging and paper material, amongst other things from China who have challenged the Notice of limitation, Notice of Preliminary Determination and Notice of Final Determination, collectively referred as ("The Notices") issued by Respondent No. 2, National Tariff Commission ("Commission"). The common grievance of the Petitioners is that the Commission could not issue the Notices essentially on account of the fact that the Commission does not exist in accordance with the provision of the National Tariff Commission Act, 2015 ("Act") as the Chairman and the Members of the Commission have not been appointed by the Federal Government as required under the Act and in terms of the dicta laid down by the august Supreme Court of Pakistan in the case titled *"Messrs Mustafa Impex, Karachi and others v. The Government of Pakistan through Secretary Finance, Islamabad and others"* (PLD 2016 SC 808). It is also the grievance of the Petitioners that the Chairman and the Members of the Commission do not fulfill the requirements of Section 5, of the Act and were not eligible to be nominated Chairman or Members of the Commission.

3. The counsel for the Petitioners argued that the Notices were required to be issued by a duly constituted Commission, however since it was not constituted in accordance with the requirements of the Act as per the dicta laid down in Mustafa Impex, hence there was no lawfully constituted Commission which could have issued the Notices. The Counsel further argued that the orders of the Commission are all *coram non judice* and without jurisdiction. Therefore, the Petitioners have prayed that their writ petitions be accepted, the Notices and consequent proceedings be set aside for being without lawful jurisdiction. It was also argued that the Members and the Chairman of the Commission do not qualify the criteria given in Section 5 of the Act for the position of Member and Chairman of the Commission. The specific argument was that the Chairman does not qualify as per the given criteria since he holds a B.Sc. (Honour) degree and does not have a Master's degree in the relevant specialization as contemplated under the Act. It was also argued that the Notification appointing Chairman and Members dated 05.09.2016 did not satisfy the requirements of Mustafa Impex and since the matter was never placed

before the Federal Cabinet, therefore the said Notification and the appointments are illegal for being contrary to the Act. Learned counsel argued that neither the decision of the Cabinet dated 22.03.2017 specifically contemplates nor can the cabinet give retrospective applicability to the Notification dated 05.09.2016 as it is in violation of the Constitutional requirement that the matter be duly considered by the Cabinet.

4. Report and parawise comments have been filed by Respondent Commission in W.P. Nos. 38543/16 and 38544/16. Learned counsel for the Commission stated that the same report and parawise comments will be applicable in all the petitions. Report and parawise comments have also been filed by Respondent International Steels Limited in W.P. Nos. 18847/2016 and 4168/2017. In W.P. 38543/16, report and parawise comments have also been filed by the Respondent Century Paper and Board Mills Limited, Karachi. Arguments were made on behalf of the Federation in support of the appointment process, the constitutionality of the decision making process for appointing the Members and Chairman of the Commission and with respect to their satisfying the eligibility criteria.

5. The Petitioners have raised two issues before the Court; the first is with respect to the appointment of the Commission and the second is with respect to the illegality of the Notices on account of the fact that a lawful Commission has not issued the Notices. The entire case of the Petitioners is premised on the ground that the Commission was not appointed or notified as required under the law.

6. With respect to the eligibility of the Chairman and the Members of the Commission Section 5 of the Act reads as follows:--

Qualification and eligibility of members. (1) All members of the Commission shall be citizens of Pakistan and shall be employed with the Commission on a full-time basis.

(2) A member of the Commission shall:--

(a) have at least a masters or professional degree or qualification from an accredited university or institute in international trade laws, business and commercial laws, economics, accountability, tariffs and trade, commerce and trade, or a trade-related subject; knowledge of trade remedy Laws would be an advantage; and

(b) have at least fifteen years of professional work experience in international trade law, business and commercial laws, economics, accountability, harmonized tariffs, commerce and trade, tariffs and trade or other trade-related technical field; direct work experience in trade remedy laws would be an advantage.

(3) The Federal Government shall select upto two members from the Commission's experiences technical officers provided that they meet the eligibility and qualification requirements specified in sub-sections (1) and (2).

The Petitioners have argued that the Chairman is not duly qualified as he holds a B.Sc. (Honours) degree and therefore, did not fulfil the requirements of Section 5 (2)(a) of the Act. They argued that the Chairman did not have a Master's degree or a Professional degree or qualification from an accredited University or Institute in international trade law, business or commercial law. In response to this argument, the Deputy Attorney General for Pakistan, Mr. Nasar Ahmad placed on record the *curriculum vitae* of the Members as well as of the Chairman. He stated that all the Members of the Commission are fully qualified to hold the post and that their appointments were processed through a Selection Committee which considered all the requirements of Section 5 of the Act. With respect to the Chairman Mr. Qasim M. Niaz has a Master's degree in Strategic Studies with BA (Honours) in Economics from the London School of Economics. This degree is equivalent to a Master's degree obtained from any institute in Pakistan. He also has 40 years of experience in the civil service including acting as Secretary Commerce, Joint Secretary Commerce and Economics and Minister of Pakistan to the European Union. Mr. Abdul Khaliq the Member has a degree in Economics and Law and he is also a fellow of Cost and Accounts. He has worked with the Commission since 1990 in different capacities and has experience with regard to the working of the Commission. Ms. Rubina Athar Ahmad the Member is M. Phil. (Economics) and a Master's degree in Economics. She has worked with the Federal Board of Revenue; the World Bank and with the IMF and has helped to formulate several tax policies. She has also served as Joint Secretary (Commerce), Government of Pakistan. Mr. Tipu Sultan the Member has a Master's degree in Applied Economics with emphasis on International Trade. He has worked with the Trade Development Authority of Pakistan; the Ministry of Commerce; Export Promotion Bureau and with the Commission itself. He stated that all Members of the Commission are qualified and that no specific allegation has been levelled against the Members, yet their CVs are being relied upon. Counsel for the Petitioners when confronted with this material were unable to refute the same, therefore, with respect to their allegations on the eligibility of the Chairman and the Members no illegality has been made out. And it is found that the requirements of Section 5 of the Act are fulfilled with respect to the appointment of the Chairman against whom specific allegations were issued.

7. The next issue is with regard to the appointment process of the Commission which as per the allegation was in contravention to the requirements of Mustafa Impex. The Counsel argued that the dicta of Mustafa Impex has not been followed as the Notification dated 05.09.2016 was issued without consulting the Cabinet. On the other hand, the learned DAG Mr. Nasar Ahmad stated that the Cabinet deliberated on the appointments of the Chairman and the Members and approved the same on 22.03.2017. In this regard, a summary was first place before the

Cabinet detailing the process undertaken, *prior* to the judgment of Mustafa Impex, when the Prime Minister approved the recommendations for the Chairman and Members. All relevant documents showing the decision of the Cabinet and the summary placed before the Cabinet are available on the record. In terms of the record a summary was placed before the Cabinet on 22.03.2017 to confirm/ratify the nominations made. The Cabinet considered the matter and approved the nominations in the following terms:--

The Cabinet disposed of the Summary dated 20th March, 2017 submitted by Commerce Division by circulation in terms of rule 17(1)(b) read with rule 19(1) of the Rules of Business, 1973 on the subject regarding Reforming the National Tariff Commission (NTC) Ministry of Commerce, Islamabad and accorded approval.

8. The process of appointments including the advertisement and short listing was completed *prior* to the pronouncement of Mustafa Impex which was 18th August, 2016. The Prime Minister gave his approval to the recommendations of the Special Selection Committee on 03.09.2016 and accordingly the Notification was issued on 05.09.2016. Therefore in this particular case the selection process was completed *prior* to Mustafa Impex. Subsequently in order to comply with the requirements of Mustafa Impex the matter was placed before the Cabinet for its approval. The Petitioners argued that the subsequent approval does not cure the defect of not placing the recommendations before the Cabinet in the first instance. However, it is noted that since the selection process was completed *prior* to Mustafa Impex, the Cabinet was required to comply with the judgment of the august Supreme Court of Pakistan and cure the defect. Therefore the Cabinet deliberated on the appointments of the Members and Chairman and approved the same. The *de facto doctrine* is applicable to the decision of the Cabinet in terms of the dicta laid down by the august Supreme Court of Pakistan in the case cited at *Chairman, Pakistan Broadcasting Corporation, Islamabad v. Nasir Ahmad and 3 others* (1995 SCMR 1593) wherein it has been held that *this doctrine is intended to avoid confusion which may be created by acts of officers and persons not legally entitled to perform such duties and have in fact continue to do so without any objection.* In another case titled *Malik Asad Ali and others v. Federation of Pakistan through Secretary Law, Justice and Parliamentary Affairs, Islamabad and others* (PLD 1998 SC 161) the august Supreme Court of Pakistan held that *this de facto doctrine is a doctrine of necessity to bring about regulatory and prevent confusion in the conduct of public business and promote security of private rights*. The august Supreme Court of Pakistan also held in the case cited at *Mehram Ali and others v. Federation of Pakistan and others* (PLD 1998 SC 1445) that the *principle of de facto exercise of power by a holder of the public office is based on sound principles of public policy to maintain regularity in the conduct of public business, to save the public from confusion and to protect private rights which a person may acquire as a result of exercise of power by the de facto holder of the office.* In another case cited at *Managing Director, Sui Southern Gas Company Ltd. v. Ghulam Abbas and others* (PLD 2003 SC 724) it has been held by the august Supreme Court of Pakistan that

de facto doctrine is doctrine of necessity to bring about regularity and prevent confusion in the conduct of public business and promote security of private rights. In *Mushtaq Ahmed Korai v. Zarai Tarqiati Bank Limited through President and another* (2007 PLC (CS) 663), the Hon'ble Division Bench of Sindh High Court held that the *bona fide* actions of public functionaries in ordinary discharge of their duties should not be struck down merely on the ground of subsequent findings as to any legal infirmity either in the appointment or with respect to the powers of the Tribunal exercised in the ordinary course of business and declared otherwise in subsequent findings. Therefore the argument that the Cabinet could not have subsequently ratified the decision of the Prime Minister in this case holds no force and is without merit.

9. Another argument raised by the Petitioners was that the Cabinet could not have given effect to the Notification dated 05.09.2016 retrospectively and that at best the appointments of the Chairman and Members would have to be notified afresh meaning thereby that all acts and decisions taken by the Commission prior to the decision of the Cabinet dated 22.03.2017 were null and void. This argument is also misconceived not only on account of the *de facto doctrine* as discussed above but also on the basis of the dicta held in the case cited at *Sindh High Court Bar Association through its Secretary and another v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others* (PLD 2009 SC 879) wherein the august Supreme Court of Pakistan declared the appointments of various Judges of the High Court as illegal but saved all acts and judgments pronounced by them on the basis of the *de facto doctrine*. It is also noted that the Act provides under Section 4 that there shall be a Commission comprising of five members appointed by the Federal Government in the prescribed manner. The Section however does not require that the appointment of the Chairman or the Member be notified for the purposes of constitution of the Commission under Section 4 of the Act. In the same way the National Tariff Commission Rules, 1990 ("Rules") does not require for the Member or Chairman of the Commission to be notified to be valid appointments as per Section 4 of the Act. Therefore the Notification dated 05.09.2016 is the effective date of appointment of the Commission and a fresh Notification was not required after the Cabinet's ratification.

10. The next point that was argued before the Court was with respect to the Notices and their legal effect. Prior to the filing of the instant Petitions some of the Petitioners had in an earlier round challenged the appointment of the earlier Chairman Mr. Muhammad Abbas Raza and Member Mr. Niamatullah Khan and the proceedings undertaken by them at the time. The argument was the same that since a validly constituted Commission had not initiated the Notice of Initiation or subsequent proceedings, hence the entire process undertaken by that Commission was illegal and without lawful authority. The Court in W.P. No. 28351/16 *vide* judgment dated 24.10.2016 set aside the appointments of the Chairman Mr. Muhammad Abbas Raza and in W.P. No. 4735/16 *vide* judgment dated 15.03.2016 directed that the Federal Government to appoint a National Tariff Commission as

per the requirements of the Act within three months' time and till such time a duly constituted Commission was appointed, the Notice of Initiation already issued by the Commission will remain intact. The Court further directed that once a proper Commission was appointed it shall proceed further on the basis of the Notice of Initiation already issued. In fact the Notice of Initiation was held in abeyance until the appointment of a lawfully constituted Commission. The said Commission was appointed on 05.09.2016 which Notification has been impugned in these Petitions. The judgment dated 15.03.2016 passed in W.P. No. 4735/16 was impugned before the august Supreme Court of Pakistan in Civil Petitions No. 1262-L to 1265-L of 2016 which judgment was upheld by the august Supreme Court of Pakistan by holding *that the points raised have been properly taken care by the learned proceedings are protected under the de facto doctrine as has been held in numerous judgments of this Court. The commission which has been constituted now shall examine the imitation of proceedings in question and if those are found to be valid it may continue with them.* Therefore the challenge to the Notices is also without merit.

11. During the course of arguments learned counsel for the Respondent Commission stated that the Petitioners in W.P. No. 6042/2017 had earlier filed Petitions which are also pending before this Court in the matters being heard. While their Petitions were pending these Petitioners filed W.P. No. 6042/2017 in order to obtain interim orders from the Court which they were earlier denied. He explained that the Petitions were argued at length and interim order earlier granted were withdrawn after the Court was informed of the saving of the Notice of Initiation in W.P. No. 4735/16 *vide* judgment dated 15.03.2016. He specifically referred to W.P. No. 5240/17, 5242/17 and 5236/2017 and stated that every Petitioner in the W.P. No. 6042/2017 is a Petitioner in one of these petitions. He stated that the Court while hearing the cases did not grant any interim relief relating to these petitioners in the afore-mentioned writ petitions and instead heard arguments on day to day basis that too with the consent of all the parties. However, the Petitioners with *mala fide* intent filed a fresh petition before another Court without disclosing the pendency, the arguments made and the fact the interim relief was not granted. They managed to get an interim order from this Court by misrepresenting the facts before the Court to take the benefit of an order which they were otherwise not entitled to. In response counsel for the Petitioners argued that even though the certificate does not disclose pendency of other writ petitions, the fact that other writ petitions are pending is contained in Ground (k) of W.P. No. 6042/2017. However learned counsel when confronted with the fact that the petitions are identical and the relief sought is also identical tried to rationalize this act of Petitioners, however, was not able to justify why a fresh petition was filed and interim order was sought given that the Petitioners have already filed petitions and were not granted any interim order by this Court. He also could not show the difference between the instant Petition and that filed by the Petitioners earlier.

12. It is noted that these cases are contested cases which were part heard by this Court on regular basis from 22.02.2017 to 18.04.2017. On 10.03.2017 an adjournment was granted to the Federation in order to respond to the issues raised with respect to the constitution of the Commission and the eligibility of the Members. The cases were argued at great length in W.P. No. 39536/2016 alongwith connected Petitions and interim relief was either not granted in fresh cases or withdrawn in earlier cases. It is also noted that the day to day arguments proceeded with the consent of the parties given that the Court did not grant interim relief. This fact was not disclosed by the Petitioners in W.P. Nos. 5240/17, 5242/17 and 5336/17 being the Petitioners in W.P. No. 6042/17 and instead they portrayed inconsistency in the Court's order. These acts of the Petitioners were *mala fide* with the intent to abuse the process of the Court and to obtain an order without disclosing the proper facts. Under the circumstances, the Petitioners in W.P. No. 6042/17 are imposed cost in the amount of Rs. 100,000/- each for filing a petition without disclosing the earlier W.P. Nos. 5240/17, 5242/17 and 5236/17, which will be deposited with the Deputy Registrar (Judicial) of this Court within one week's time positively on account of frivolous petition and abusing the process of the Court. If the Petitioners fail to deposit the cost within the stipulated period of time, the same shall be recovered from them as arrears of land revenue.

13. In view of the aforesaid, no case for interference is made out. All the Petitions are dismissed.

Petitions dismissed

P L D 2018 Lahore 356
Before Ayesha A. Malik, J
MUHAMMAD SHAHID---Petitioner
Versus
PUNJAB ENVIRONMENTAL TRIBUNAL, LAHORE and others---Respondents
Writ Petition No.74381 of 2017, heard on 18th January, 2018.

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

----S. 12---Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations, 2000, Regln. 3 & Sched. 1---Punjab Poultry Production Act (XLVII of 2016), Ss. 12, 13 & 14---Control poultry shed---Initial environmental examination and environmental impact assessment, requirements of---Scope---Close proximity of a poultry farm from human settlement was a cause of great concern---Poultry facilities were undoubtedly a source of odor and smell which adversely affected the life and health of the people living in the vicinity---Flies, rodents and other pests were an additional menace to the local area, its health and well-being---Proper areas must be made and control mechanisms put in place for managing and storing poultry feed to avoid flies and other pests---Furthermore water pollution and use of pesticides damaged the surface water and ground water and gave rise to water borne diseases---Other serious impacts on the environment were the disposal of waste water and dead birds---Proponent of a project for poultry shed must provide a detailed dead bird management plan which should not adversely impact the environment---Schedule 1 of the Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations, 2000 provided that poultry projects with total cost more than Rs.10 million were required to file initial environmental examination, but the Environmental Protection Agency must in the first instance look at the impact a project had on the environment, before it considered the cost of the project for requirement of initial environmental examination---Section 12 of the Punjab Environmental Protection Act, 1997 was clear that the object of the assessment reports was to ascertain whether there was an adverse impact on the environment, which being mandatory in nature could not be avoided.

(b) Punjab Environmental Protection Act (XXXIV of 1997)--

----S. 12---Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations, 2000, Regln. 3 & Sched. 1---Punjab Poultry Production Act (XLVII of 2016), Ss. 12, 13 & 14---Control poultry shed---Initial environmental examination and environmental impact assessment, requirements of---Scope---Plea of petitioner (owner of poultry control shed) that he was not required to file any Initial environmental examination and environmental impact assessment as his project fell below rupees one million, as given in Sched. 1 of the Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations, 2000; held, that petitioner commenced construction of his project without an approval from the Environment Protection Agency---Said Agency made two site visits but failed to consider the

nature of the project and its impact on the environment and instead recommended in a cursory manner, that measures be adopted to prevent an adverse impact on the environment---Such direction was given without any mention of the probable causes of the impact on the environment---Perusal of the Punjab Poultry Production Act, 2016 revealed that the establishment of a poultry farm had a direct bearing on the environment and therefore would impact the environment---Sections 12, 13, 14 & 15 of the said Act set out the requirements for establishment of a poultry farm and called for biosecurity measures, poultry waste management and reporting in case of poultry disease---All said requirements were directly related to the well-being of the local inhabitants and the environment---Said requirements directly impacted the environment, hence the petitioner was required to file an environmental impact assessment prior to the construction of his project---Furthermore, the distance of the petitioner's poultry farm was 100 meters from a human settlement which was in contravention to the requirement of S.12 of the Punjab Poultry Production Act, 2016, which clearly stipulated that the poultry farm must be 500 meters from human settlements---Said ground in itself was sufficient to restrain the construction of the poultry farm of the petitioner as it was in contravention to the law---Environmental Tribunal had rightly restrained the Environmental Protection Agency from granting any approval to the petitioner with respect to the poultry farm until the matters in issue raised in the complaint were decided---Constitutional petition was dismissed accordingly.

Hafiz Muhammad Saleem for Petitioner.
Kh. Salman Mehmood, A.A.G. along with Nabila, Assistant Director Legal, Environmental Protection Agency, Lahore for Respondents.
Date of hearing: 18th January, 2018.

JUDGMENT

AYESHA A. MALIK, J.--Through this Petition, the Petitioner has impugned order dated 21.7.2017 issued by Respondent No.1, Punjab Environmental Tribunal, Lahore.

2. The facts of the case are that the Petitioner was constructing a control poultry shed under the name of Chaudhary Protein Farm Control Shed at Chak No.8/11-L, Tehsil Chichawatni, District Sahiwal. A notice was issued to the Petitioner under Section 21(3)(b) of the Punjab Environmental Protection Act, 1997 ("Act") on 1.3.2017 stating therein that construction of the poultry farm is illegal and in contravention to the provisions of the Act. The Petitioner responded to the show cause notice on 20.4.2017 denying all allegations. In the meanwhile, Respondent No.3, Assistant Director Environment, Sahiwal carried out a site inspection of the poultry farm and issued its report on 24.1.2017 in terms of which it was stated that the land on which the shed is being constructed is agriculture land on which commercial/industrial activity is being undertaken without any permission or conversion of the status of the land. It was also stated in the report that within 100

meters is a residential colony which is in violation of the requirements of the law which prescribes a minimum of 500 meter distance.

3. With respect to the environment approval, it was stated in the report that no environment approval has been sought, hence it was recommended that action be taken against the Petitioner. Notices were issued to the Petitioner by the Environmental Protection Agency ("EPA"), however the Petitioner did not respond. Another complaint was filed by Respondent No.4 before the Environmental Tribunal on 23.5.2017. The Environmental Tribunal took notice of the matter and ultimately issued the impugned order dated 21.7.2017. In terms of the impugned order, the EPA was restrained from granting any approval to the Petitioner with respect to the poultry farm until the matters in issue raised in the complaint were decided. One of the disputes pending before the Environmental Tribunal is with respect to the value of the unit as the Petitioner alleged that he was not required to take any environment approval since his unit fell under Regulation 3 read with Schedule 1 of the Pakistan Environmental Protection Agency (Review of IEE and EIA) Regulations, 2000 ("Regulations"). Subsequent thereof the EPA in compliance with the order issued by the Environmental Tribunal on 19.7.2017 again carried out another site inspection to determine the construction cost of the unit. As per the report 90% of the work is completed and the unit has been converted from a control shed to a semi control shed to reduce cost. Consequently the estimated cost has been reduced from Rs.120,000,000/- to Rs.5,000,000/-. It was also stated in the report that measures should be adopted to prevent adverse effects on the environment which are likely to be caused by the operation of the poultry shed and that there should be some plantation as well to improve the environment of the area.

4. Learned counsel for the Petitioner argued that the Environmental Tribunal has no jurisdiction in the matter as it cannot hear the complaint directly when the matter is pending before the EPA. He also argued that no environmental approval was required as the cost of the project was less than rupees one million which is the basic cost for the purposes of an Initial Environmental Examination ("IEE"). So far as the Environmental Impact Assessment ("EIA") as per Section 12 of the Act, it is also not required as the project does not fall under Schedule II of the Regulations. Therefore it was argued that the impugned order is without jurisdiction and illegal.

5. Report and parawise comments have been filed by Respondents Nos.2 and 3 and Respondent No.4. In terms of the arguments made by the Counsel, the Environmental Tribunal acted under the law and passed a restraining order on 21.7.2017 directing Respondent No.2 to refrain from issuing an environmental approval until the next date of hearing along with a direction to the Petitioner for not making his project functional. It was also argued that in terms of the Punjab Poultry Product Act, 2016 ("Poultry Act"), a poultry farm must be at least 500 meter away from nearby human settlement and that the Petitioner's poultry farm was in breach of this requirement. The Counsel argued that the Petitioner's farm is located in an agricultural area without any permission to do commercial/industrial activity

and the same would cause an adverse impact on the environment. Further that the poultry farm is being constructed in violation of the Poultry Act.

6. The basic issue in the instant Petition is with respect to the jurisdiction of the Environmental Tribunal and the requirement of IEE and EIA as stipulated in Section 12 of the Act read with the Regulations. For ease of reference Section 12 of the Act read with Regulations 3 and 4 of the Regulations are reproduced below:

12. Initial environmental examination and environmental impact assessment.-
(1) No proponent of a project shall commence construction or operation unless he has filed with the Provincial Agency an initial environmental examination or where the project is likely to cause an adverse environmental effect, an environmental impact assessment, and has obtained from the Provincial Agency approval in respect thereof.
(2) The Government Agency shall:
(a) review the initial environmental examination and accord its approval, or require submission of an environmental impact assessment by the proponent; or
(b) review the environmental impact assessment and accord its approval subject to such conditions as it may deem fit to impose, or require that the enviromnental impact assessment be re-submitted after such modifications as may be stipulated, or reject the project as being contrary to environmental objectives.
(3) Every review of an environmental impact assessment shall be carried out with public participation and no information will be disclosed during the course of such public participation which relates to
(i) trade, manufacturing or business activities, processes or techniques of a proprietary nature, or financial, commercial, scientific or technical matters which the proponent has requested should remain confidential, unless for reasons to be recorded in writing, the Director General of the Provincial Agency is of the opinion that the request for confidentiality is not well-founded or the public interest in the disclosure outweighs the possible prejudice to the competitive position of the project or its proponent; or
(ii) international relations, national security or maintenance of law and order, except with the consent of the Government; or
(iii) matters covered by legal professional privilege.
(4) The Provincial Agency shall communicate its approval or otherwise within a period of four months from the date the initial environmental examination or environmental impact assessment is filed complete in all respects in accordance with the prescribed procedure, failing which the initial environmental examination or, as the case may be, the environmental impact assessment shall be deemed to have been approved, to the extent to which it does not contravene the provisions of this Act and the rules and regulations made thereunder.
(5) Subject to subsection (4) the Government may in a particular case extend the aforementioned period of four months if the nature of the project so warrants.
(6) The provisions of subsections (1), (2), (3), (4) and (5) shall apply to such categories of projects and in such manner as may be prescribed.
(7) The Provincial Agency shall maintain separate registers for initial environmental examination and environmental impact assessment projects, which shall contain

brief particulars of each project and a summary of decisions taken thereon, and which shall be open to inspection by the public at all reasonable hours and the disclosure of information in such registers shall be subject to the restrictions specified in subsection (3).

Regulations 3 and 4

3. A proponent of a project falling in any category specified in Schedule I shall file an IEE with the Federal Agency and the provisions of section 12 shall apply to such project.

4. A proponent of a project falling in any category specified in Schedule II shall file an EIA with the Federal Agency and the provisions of section 12 shall apply to such project.

In terms of Section 12 of the Act, no project shall commence construction or operation unless it has obtained permission from the Provincial Agency after having filed either an IEE or EIA. The Regulations provide for the instances when an IEE is to be filed, however, Section 12 clearly mandates that if a project has an adverse impact on the environment an EIA must be filed. Adverse effect on the environment has been defined in Section 2(i) of the Act as follows:-

Impairment of, or damage to, the environment and includes:

(a) impairment of, or damage to, human health and safety or to biodiversity or property;
(b) pollution; and
(c) any adverse environment effect as may be specified in the regulations.

In this case, the contention of the Petitioner is that he is not required to file any IEE or EIA as his project falls below rupees one million, as given in Schedule 1 of the Regulations. Schedule I provides that poultry, livestock, stud and fish farms with a total cost of more than rupees one million requires an IEE. However, irrespective of the requirement given in the Regulations Section 12 clearly mandates that an EIA.is to be filed if there is an adverse impact on the environment. The question therefore is whether the poultry farm will have an adverse impact on the environment. In terms of the complaint filed by Respondent No.4, there are two major grievances which show that there is an adverse impact on the environment. The first is that the surrounding area is an agricultural area and the Petitioner has commenced construction of his project without any permission from the competent authority. The second grievance is that the poultry farm is 100 meter from a human settlement and will have an adverse impact on the environment and compromise the health and living conditions of the residents of the area. There is merit in both grounds however, the EPA did not consider any of the aspects of running a controlled or semi controlled poultry shed which will impact the environment. In terms of the information provided by the Respondents, poultry farms are a source of odor and smell as well as flies, rodent and other pests. These can give rise to diseases such as cholera, typhoid, malaria and dengue. Furthermore improper disposal of waste water can pollute the water and soil. The proponent of a project must provide a detailed dead bird management plan which should not adversely impact the

environment. Unfortunately both the site reports relied upon failed to consider these aspects which are essential for the establishment of a poultry farm. The close proximity of the poultry farm from human settlement is a cause of great concern. Poultry facilities are undoubtedly a source of odor and smell which adversely affects the life and health of the people living in the vicinity. Flies, rodents and other pests are an additional menace to the local area, its health and well being. Their presence is mainly related to the manner in which the feed is managed and stored for which proper areas must be made and control mechanisms put in place to avoid flies and other pests. Furthermore water pollution and use of pesticides will damage the surface water and ground water and give rise to water borne diseases. Other serious impacts on the environment are the disposal of waste water and dead birds. Both issues call for proper measures to be adopted to ensure minimum impact on the environment. Under the circumstances the EPA must in the first instance look at the impact a project has on the environment, before it considers the cost of the project. In such cases Section 12 of the Act is clear that the object of the assessment reports is to ascertain whether there is an adverse impact on the environment. This being mandatory in nature cannot be avoided.

7. In the case cited at Ms. Imrana Tiwana and others v. Province of Punjab and others (2015 CLD 983), a Full Bench of this Court held:
EIA is nature's first man-made check post, nothing adverse to the environment is allowed to pass through. It is for this reason, that environmental assessment is an onerous function. It is through the tool of EIA that EPA gets to regulate and protect the environment and as a result the life, health, dignity and well being of the people who inhabit the environment. Environmental Assessment is, therefore, a substantive exercise as every step in this process cautiously guards the fundamental rights of the people. Review of EIA is not inter parties or an adversarial , exercise but are inquisitorial proceeding carried out under the public gaze and open to public scrutiny. The review process is incomplete without effective public participation and technical advice of the experts.

In this case the Petitioner commenced construction of his project without an approval from the EPA. The EPA made two site visits but failed to consider the nature of the project and its impact on the environment and instead recommended in a cursory manner, that measures be adopted to prevent an adverse impact on the environment. This direction was given without any mention of the probable causes of the impact on the environment. In this regard a bare review of the Poultry Act reveals that the establishment of a poultry farm has a direct bearing on the environment and therefore will impact the environment. Sections 12, 13, 14 and 15 set out the requirements for establishment of a poultry farm and call for bio-security measures, poultry waste management and reporting in case of poultry disease. All these requirements are directly related to the well being of the local inhabitants and the environment. These requirements directly impact the environment, hence the Petitioner was required to file an EIA prior to the construction of his project.

8. Furthermore, in this case the distance of the Petitioner's poultry farm is 100 meters from a human settlement which is in contravention to the requirement of Section 12 of the Poultry Act which clearly stipulates that the poultry farm must be 500 meters from human settlements. This ground in itself was sufficient to restrain the construction of the poultry farm of the Petitioner as it is in contravention to the law. In such a situation, there are no remedial measures which can be adopted as the poultry farm is in close proximity to human settlement putting the health of the residents to risk and polluting the environment.

9. The other ground urged by the counsel for the Petitioner is with respect to the jurisdiction of the Environmental Tribunal on proceeding with the complaint of Respondent No.4. Section 21 of the Act provides for the jurisdiction and powers of the Environmental Tribunal. As per Section 21 an Environmental Tribunal can take cognizance of any offence under Section 17(1) on a complaint filed by the Provincial Agency or an aggrieved person, who has given notice of not less than 30 days to the Provincial Agency of the alleged contravention and his intention to complain before the Environmental Tribunal. Section 17(1) provides for the penalties imposed if a person contravenes any provisions of Sections 11, 12, 13 or 16 or any other order issued thereunder. In this case the contravention alleged is of Section 12 and the requirement of filing an IEE or EIA. In fact the Petitioner did not obtain any approvals from the Environmental Protection Agency or the relevant authority, to carry out commercial/industrial activity in an agriculture area. Respondent No.4 issued notice to the Director General, Punjab Environmental Protection Agency, Lahore clearly informing him that he will be filing a complaint before the Environmental Tribunal for redressal of his grievance. The complaint was then filed on 23.5.2017. Therefore as per Section 21 of the Act, the Environmental Tribunal has jurisdiction to hear a complaint of an aggrieved person who has issued notice, as required, to the EPA.

10. Under the circumstances no case for interference is made out. Petition is **dismissed.**
MWA/M-31/L Petition dismissed.

KLR 2018 Civil Cases 184
[Lahore]
Present:AYESHA A. MALIK, J.
Asma Rauf
Versus
Punjab Public Service Commission through its Secretary, etc.

Writ Petition No. 3627 of 2017, decided on 28th September, 2017.

CONCLUSION
(1) The degree of M.A. (Special Education) cannot be equated with M.Ed. (Special Education).

Constitution of Pakistan (1973)---

---Art. 199---Equivalence of degree---Principle of---Petitioner sought a direction to respondent No. 1 to appoint her on the post of Lecturer (Deaf field) BS-17---The basic grievance of the petitioner was that she possessed the degree of M.Ed. which was equal to M.A. (Special Education) degree which would be considered for the post of Lecturer (Deaf field)---The petitioner had relied upon letter issued by HEC to show equivalence of M.A. (Special Education) with M.Ed. Special Education---Ruling: The referred letter issued by HEC did not provide that M.Ed. (Special Education) as equal to M.A. (Special Education) hence could not be applied to said case---The degree of M.A. (Special Education) could not be equated with M.Ed. Special Education could not be equated with M.Ed. (Special Education) as per the QEDC---Petition dismissed.
(Paras 1, 2, 5, 6)
معزز عدالت عالیہ نے آئینی درخواست ہذا کو مسترد کرتے ہوئے قراردیا تھا کہ ایم اے (سپیشل ایجوکیشن) کی ڈگری کسی صورت بھی ایم ایڈ (سپیشل ایجوکیشن) کے برابر نہ تھی۔
For the Petitioner: Usman Dar, Advocate on behalf of counsel.
AnwaarHussain, Addl. A.G. alongwithShahidMehmood, Superintendent in the office of Respondent No. 1 and Faisal Mukhtar, Law Officer in the office of Respondent No. 2.
Date of hearing: 28th September, 2017.

ORDER

AYESHA A. MALIK, J. --- Through this Petition, the Petitioner seeks adirection to Respondent No. 1 to appoint her on the post of Lecturer (Deaf Field) BS-17.

2. The facts of the case are that the Petitioner, applied for the post of 'Lecturer (Deaf Field) BS-17' through proper channel with reference to the advertisement issued by Respondent No. 1. Provisional interview call letter was also issued to the Petitioner after fulfilling the requirements prescribed by Respondent No. 1. The Petitioner being fourth on the merit list was recommended to the Provincial Government for the post of Lecturer (Deaf Field) on contract basis for five years in the Punjab Special Education Department on 29.4.2016. Subsequently Respondent No.2 forwarded the appointment of selected candidates including the Petitioner to Respondent No. 1 by stating that selected candidates are not qualified for the post as per rules and regulations of Special Education Department. The Pensioner approached Respondent No. 1 through application stating that her degree of Masters in Special Education is equivalent to the degree of M.Ed. Special Education but till date no reply has been given by Respondent No. 1. Learned counsel for the Petitioner argued that the Petitioner was selected and appointed to the post of Lecturer (Deaf Field) after fulfilling the requirements/criteria, hence she cannot be denied the post.

3. Report and parawise comments have been filed on behalf of Respondents No. 1 and 2. Learned Law Officer argued that as per the Service Rules the required qualification for the post of Lecturer (Deaf Field) was MA (Special Education) whereas Respondent No. 1 recommended the candidates for the post who possess degree of M.Ed. Special Education. Respondent No. 1 considered the request of the Administrative Department and revised its earlier recommendation through letter dated 15.8.2016. The recommendation of the Petitioner was also withdrawn alongwith two other recommendees. Learned Law Officer further submitted that Qualification Equivalence Determination Committee ("QEDC") vide its minutes dated 16.5.2016 has also decided the issue and declared that M.A.Special Education is not equivalent to M.Ed. (Visually Impaird). Therefore in the light of QEDC's decision the Petitioner was not eligible for the said post.

4. Heard and record perused.

5. The basic grievance of the Petitioner is that she possesses the degree of M.Ed. which is equal to M.A. (Special Education) degree which should be considered forthe post of Lecturer (Deaf Field). The Petitioner hasrelied upon letter dated 23.1.2017 issued by the Higher Education Department to show equivalence of M.A. (Special Education) with M.Ed. Special Education. The letter of 23.1.2017 reads as follows:---

The Higher Education Commission recognizes Master of Education in Special Education degree held by youfrom University of Education, Lahore after 'Post Graduate Diploma in Teaching the Deaf/15-year schooling' as equivalent to corresponding Master's degree in the relevant field involving 16 years of schooling.

The aforesaidletter of 23.1.2017 issued by the Higher Education Department does not provide that M.Ed. Special Education as equal to M.A. (Special Education),hence cannotbeappliedtothiscase.FurthermorethedegreeofM.A. (Special Education)cannotbeequatedwith M.Ed. Special Educationas per the QEDC sinceM.A. (Special Education) is a four year degree programmeand has 66 credit hours whereas M.Ed. Special Education is one year degree programme and has only 36 credit hours.

6. Under the circumstances, no case for interference is made out. Petition is dismissed.

Petition dismissed.

KLR 2018 Civil Cases 194

[Lahore]

Present:AYESHA A. MALIK, J.

Z.A. Constructors

Versus

Province of Punjab, etc.

Writ Petition No. 13242 of 2014, decided on 19th March, 2018.

CONCLUSION

(1) There is a billing dispute which cannot be determined by High Court in Constitutional petition.

Constitution of Pakistan (1973)---

---Art. 199---Billing dispute, jurisdiction of---Maintainability of---The basic issue in this petition was one of payment in lieu of the services rendered by the petitioner for improvement and renovation of Medical Blocks, as per contract---The petitioner had based his entire case for payment on the "inspection certificate" which showed that the work was completed---The amount in dispute had not been paid on account of deficient work and no completion certificate had been issued on the basis of which the petitioner could take its payment---This was a billing dispute which could not be determined by High Court in Constitutional petition---Petition dismissed.

(Paras 1, 2, 5, 6)

معزز عدالت عالیہ نے معاملہ زیر نزاع بابت تنازعہ بل پائے جانے کی بناء پر آئینی درخواست ہذا کو ناقابل سماعت قرار دیتے ہوئے مسترد کر دیا تھا۔

For the Petitioner: Hassan IqbalWarriach, Advocate.

AnwaarHussain, Addl. A.G.

For the Respondents No. 2 and 3:Rashid Mehmood Gill, Advocate.

Date of hearing: 19th March, 2018.

ORDER

AYESHA A. MALIK, J. --- Through this petition, the Petitioner has impugned order dated 25.10.2013 passed by Respondent No. 4, Governor of Punjab, whereby the order dated 30.08.2012 passed by Respondent No. 5, the Provincial Ombudsman was modified to the extent that the Petitioner shall be entitled to claim payment of his final bill subject to removal of defects in the execution of civil work.

2. The grievance of the Petitioner is that he entered into a contract for improvement and renovation of Medical blocks with Respondent No. 1 for the benefit of Respondents No. 2 and 3. The work was completed and completion certificate was issued by the Government ofPunjab, however payment was not made by the stated Respondents. The Petitioner filed a complaint before the Provincial Ombudsman, who vide its order dated 30.08.2012 decided the complaint in favour of the Petitioner while directing Respondents No. 1 to 3 to make payment to the Petitioner. However the Respondents filed an appeal before Respondent No. 4, the Governor of Punjab who decided the matter against the Petitioner vide order dated 25.10.2013. Hence, this petition.

3. Learned counsel for the Petitioner argued that the Petitioner completed the work in time and was issued completion certificate on 28.10.2009. Subsequent thereof, the Petitioner has been waiting for his payment, however, no payment has been made. Further argued that the Petitioner seeks payment from the Government of Punjab who is party to the contract with the Petitioner which is due since 2008.

4. Learned Law Officer submitted that Government of Punjab is not required to make any payment. The payment is due from Respondents No. 2 and 3. Further stated that the Government of Punjab only acts on behalf of the Agency, however the Agency is required to clear all bills and all payments must be made in this case by Respondents No. 2 and 3. In terms of the report and parawise comments filed on behalf of Respondents No. 2 and 3, the work was incomplete, there were many deficiencies which the Petitioner was informed and he was given time to complete the work and remove all the deficiencies, however no positive action was taken by the Petitioner. In this regard a survey was also carried out and the Building Research Station submitted its report on 15.02.2012 which concluded that the work was deficient as the specification given was not complied with by the Petitioner.

5. The basic issue in the instant petition is one of payment in lieu of the services rendered by the Petitioner for improvement and renovation of Medical Blocks, as per contract. The Petitioner has based his entire case for payment on the ‘inspection certificate’ which shows that the work is completed. It is noted that since the cost of the contract and administrative approval was granted by Respondents No. 2 and 3, and the work was for their benefits, therefore, they are the competent authority to issue completion certificate, on the basis of which the payment can be made to the Petitioner. The Petitioner has placed on record inspection certificate which is issued by Sub-Engineer, however, it is not completion certificate on the basis of which payment could be made.

6. With respect to the payment sought by the Petitioner, learned counsel for Respondents No. 2 and 3 submitted that the amount in dispute has not been paid on account of deficient work and no completion certificate has been issued on the basis of which the Petitioner can take its payment. The order of Respondent No. 4 (Appellate Forum) has relied upon the report dated 15.02.2012 issued by Building Research Station on the basis of which it is concluded that the work was not completed. This is a billing dispute which cannot be determined by this Court in Constitutional petition. The Appellate Forum has decided the matter in its entirety.

7. Under the circumstances, no illegality is made out in the impugned order. The petition stands dismissed.

Petition dismissed.

KLR 2018 Civil Cases 197

[Lahore]

Present:AYESHA A. MALIK, J.

Sheikh Muhammad Ismaeel Versus Lahore Development Authority and others

Writ Petition No. 294 of 2017, decided on 14th December, 2017.

CONCLUSION

(1) The process of exemption cannot be denied on the basis of the litigation.

Constitution of Pakistan (1973)---

---Art. 199---Exemption and allotment of land---Principle of---The petitioner had prayed that the exemption with reference to 13 Marlas land be finalized and the petitioner be issued an allotment letter for his plot alongwith all relevant documents and possession of the same---The respondents were denying the exemption on account of alleged dispute over the same land on the ground that the land was not mutated in the name of LDA---The 13 marlas land was mutated in favour of LDA vide mutation No. 17472 on 13.08.2016---Ruling: The process of exemption cannot be denied on the basis of that dispute---The respondents were directed to grant exemption against the deficient land measuring 13 marlas within one month's time---Petition allowed.

(Paras 1, 2, 5, 6)

تھا کہ غیر منقولہ جائیداد معزز عدالت عالیہ نے آئینی درخواست ہذا کو منظور فرماتے ہوئے قرار دیا بابت چھوٹ کا عمل محض مقدمہ بازی پائے جانے کے باعث متاثرنہ ہو سکتا تھا نیز مسئول علیہان کو مرلہ رقبہ اراضی اندر میعاد 1 ماہ عنایت کرے۔ 13ہدایت کی تھی کہ وہ سائل کو

For the Petitioner: Muhammad NaeemSadiq, Advocate.

For the Respondents:Ahmad Ali Ranjha, Advocate.

Date of hearing: 14th December, 2017.

JUDGMENT

AYESHA A. MALIK, J. --- Through this Petition, the Petitioner hasprayed that the exemption with reference to 13 Marlas land befinalized and the Petitioner be issued an allotment letter for his plot alongwith all relevant documents and possession of the same.

2. Learned counsel for the Petitioner argued that the Petitioner is owner in possession of land measuring 1 kanal, 14 Marlas falling in Khasra No.779, situated in the revenue estate of JhugianNagra. This land was acquired and against 1 Kanal, 1 Marla the Petitioner was granted exemption in the SabzaZar Housing Scheme. The present dispute relates to 13 Marlas land for which the exemption matter remained pending. The Petitioner relied upon the Revenue Officers report dated 21.12.2016 on the basis of which the 13 Marlas of land is mutated in favour of the LDA vide mutation No.17472 on 13.08.2016. The Petitioner also relied upon the working paper for exemption cases of the scrutiny committee issued by the Deputy Director DLD-IV, LDA, which shows that the Petitioner is entitled to exemption against remaining land measuring 13 Marlas.

3. Report and parawisecomments have been filed by the Respondent LDA. Learned counsel for the stated Respondent argued that the matter is still pending before the Civil Court and the Petitionerhas filed a Civil Revision before the Additional District Judge, Lahore titled "Muhammad Ismaeelv. Muhammad Munir and LDA" and presently the plot does not stand in the name of the LDA.

4. Arguments heard and record perused.

5. In terms of the record, the Petitioner is entitled to exemption against 13 Marlas land against his previous ownership of 1 Kanal, 14 Marlas. The Respondents are denying the exemption onaccount of alleged dispute over the same land and on the ground that the land is not mutated in the name of the LDA. In terms of the report issued by the Revenue Officer dated 21.12.2016, the 13 Marlas land was mutated in favour of the LDA vide mutation No. 17472 on 13.08.2016. The claim of the Petitioner is also strengthened from theworking paper for exemption cases by the security committee Ref.File No.SZR-JN/3503+A issued by Deputy Director, LDA, in which it was clarified that the case titled "Muhammad Munirv. LDA" pending before the Court has no nexus with the property of the Petitioner and the process of exemption cannot be denied on the basis of that dispute.

6. In view of the above, this Petition is allowed and the Respondents are directed to grant exemption against deficient land measuring 13 Marlaswithin one month's time of the receipt of certified copy of this order alongwith all related consequences. Compliance report shall be submitted to the Deputy Registrar (Judicial) of this Court.

Petition allowed.

KLR 2018 Civil Cases 199
[Lahore]
Present:AYESHA A. MALIK, J.
Ahmad Hassan Warriach
Versus
District Coordination Officer, Sargodha, etc.
Writ Petition No. 28494 of 2014, decided on 14th December, 2017.

CONCLUSION
(1) Arbitration is invoked if there is a dispute with reference to the amounts due under the contract.

Constitution of Pakistan (1973)---

---Art. 199---Admission of liability---Payment of---The petitioner sought an amount of Rs. 401,394/- which was stated to be due to him for the works that was construction of 04 new class rooms (24' x 16') and boundary wall in Government Higher Secondary School---The respondents did not deny the price variation sought by the petitioner---There was a class admission of the liability owed to the petitioner---Ruling: There was no reason to the petitioner to avail any remedy under the contract as arbitration was invoked if there was a dispute with reference to the amounts due under the contract---Liability was admitted and there was no dispute, hence the petitioner was entitled to the payment of Rs. 401,934/---Respondents were directed to release the amount of Rs. 401,934/- to the petitioner immediately---Petition dismissed.
(Paras 1, 2, 4, 5)
معزز عدالت عالیہ نے مسئول علیہان کی جانب سے رقم کی ادائیگی بابت ذمہ داری قبول کئے جانے کے باعث سائل کو رقم زیر نزاع کی وصولی کا حق دار ٹھہراتے ہوئے مسئول علیہان کو متذکرہ رقم فوری طور پر سائل کو ادا کرنے کی ہدایت کی تھی۔
For the Petitioner: Muhammad MoazzamSherKallu, Advocate.
Kh. Salman Mehmood, AAG alongwith Hafiz Zain-ul-Abideen, Law Officer in the office of Respondent No. 6 and Adnan, SDO Building on behalf of Respondent No. 1.
Date of hearing: 14th December, 2017.

ORDER
AYESHA A. MALIK, J. --- Through this petition, the Petitioner seeks an amount of Rs.401,934/- which is stated to be due to him for the works that is construction of 04 new c/rooms (24' x 16') and boundary wall in Government Higher Secondary School, Midhranjah, Tehsil Bhalwal, DistrictSargodha.

2. At the very outset, it is noted that in terms of orders dated 16.6.2015 and 14.10.2015, the only grievance of the Petitioner is that letter of EDO, Works and Services, Sargodha dated 8.10.2013 was not being implemented and the learned Law Officer at the time sought time to seek instructions with respect to release of funds pursuant to the letter of 8.10.2013. Learned Law Officer sought several dates and on 16.11.2017 again sought time to file a fresh report and parawise comments. Today the learned Law Officer stated that the Respondents will rely upon the earlier report andparawise comments which have been filed by Respondents No. 3 to 6 and do not wish to file fresh report and parawise comments.

3. In terms of the report and parawise comments filed by Respondents No.3 to 6, the Petitioner is entitled to receive the price variation of Rs.401,934/-. Learned Law Officer argued that this admission was made on the wrongful understanding of order of the Ombudsman, Punjab dated 6.6.2013 wherein the Ombudsman ordered the Petitioner to avail the remedy available under the contract including arbitration and thereafter appeal to the competent authority. Learned Law Officer argued that the letter of 8.10.2013 while relying on the order of the Ombudsman directed that the funds in the amount of Rs.401,934/- be released for payment to the Petitioner. However on 25.10.2013 this letter of 8.10.2013 was withdrawn as the District Officer Building stated that he did not have knowledge of the order of the Ombudsman when the letter of 8.10.2013 was executed. Hence the Petitioner was advised to avail his remedy under the contract.

4. I have gone through the record and it appears that the Petitioner filed a complaint before the Ombudsman for release of payment of price variation. The Ombudsman on 6.6.2013 ordered that the Petitioner can avail his contractual remedy which includes arbitration.In this case, the Respondents do not deny the price variation sought by the Petitioner. They only want theimplementation of the order of the Ombudsman or else avoid payment on account of the order of theOmbudsman. Given that there is a clear admission of the liability owed to the Petitioner in the report and parawise comments, there is no reason to the Petitioner to availany remedy under the contract asarbitration is invoked if there is a dispute with reference to the amounts due under the contract. In this case the liability is admitted and there is no dispute, hence the Petitioner is entitled to the payment of Rs. 4,01,934/-.

5. In view of the aforesaid, the instant petition is allowed and the Respondents are directed to release the amount of Rs. 401,934/- to the Petitioner immediately.
Petition allowed.

KLR 2018 Civil Cases 202
[Lahore]
Present:AYESHA A. MALIK, J.
Iftikhar Ali Khan
Versus
Chairman, Punjab Provincial Transport Authority, etc.
Writ Petition No. 5485 of 2017, decided on 31st October, 2017.

CONCLUSION
(1) All the facilities and amenities must be upgraded at the bus stands.

Constitution of Pakistan (1973)---

---Art. 199---Desealing of bus stand---Upgradation of---Facilities and amenities---The license of the petitioner had been suspended giving him an opportunity to upgrade all facilities and ensure that the amenities available at the stand were in accordance with the requirements of the license---The respondents were directed to deseal the premises of the petitioner and give access to the petitioner so that he could upgrade all the facilities at the D-class Bus Stand in accordance with the license issued by the respondents---Petitioner could not operate his business by ply buses from the stand until and unless the license was not restored by the competent authority---Ordered accordingly.
(Paras 1, 2, 3)
معزز عدالت عالیہ نے سائلکی منجمد شدہ جائیداد غیر منقولہ کو بہتر مقاصد کے لئے تیار کرنے کی غرض سے غیر منجمد کئے جانے کی ہدایت کی تھی۔
For the Petitioner: GhulamHaider, Advocate.
Kh. Salman Mahmood, AAG with Hafiz Yousaf, Law Officer, Transport Department.
Date of hearing: 31st October, 2017.

ORDER
AYESHA A. MALIK, J. --- The basic grievance of the Petitioner is that his D-Class Bus Stand license has been suspended on 08.12.2016 and that his premises have also been sealed by the Respondents. Learned counsel for the Petitioner stated that the Petitioner is willing to ensure compliance of all the requirements for issuance of D-Class Bus Stand License. However, in order to fulfill the requirements the premises have to be desealed so that the Petitioner can upgrade all facilities as per the requirements. Learned counsel further stated that the Petitioner will not ply any bus or carriage from the D-Class Bus Stand until it does not meet with the requirements of the license to the satisfaction of the Respondents.

2. On behalf of the Respondents, learned Law Officer, on instructions, stated that the license of the Petitioner has been suspended giving the Petitioner an opportunity to upgrade all facilities and ensure that the amenities available at the stand are in accordance with the requirements of the license. Learned Law Officer argued that the premises of the Petitioner will be desealed and the Petitioner should ensure that all the facilities are upgraded whereafter an application can be moved to the Respondents for site inspection and restoration of the license of the Petitioner.

3. Under the circumstances, the Respondents are directed to deseal the premises of the Petitioner and give access to the Petitioner so that he can upgrade all the facilities at the D-Class Bus Stand in accordance with the license issued by the Respondents. However, it is clarified that the Petitioner cannot operate his business by ply buses from the stand until and unless the license is not restored by the competent authority.

4. Disposed of accordingly.

Ordered accordingly.

KLR 2018 Civil Cases 215

[Lahore]

Present:AYESHA A. MALIK, J.

Sahara for Life Trust

Versus

University of Health Sciences, Lahore, etc.

Writ Petition No. 26150 of 2016, decided on 15th February, 2018.

CONCLUSION

(1) The Court can direct the Federation of Pakistan to issue recognition of the Medical and Dental Colleges.

Pakistan Medical and Dental Council Ordinance (1962)---

---S. 11---Notification granting recognition---Issuance of---The basic grievance of the petitioner was that its session for the year 2015-16 had not been notified by the Federation of Pakistan even though it had been recommended by the PMDC in its letter---The college was inspected and recommended however it was not notified---Ruling: Federation of Pakistan was directed to issue notification letter in favour of the petitioner medical college for the Session 2015-16 for inclusion of its name in the First Schedule in terms of Section 11 of the Ordinance within one week---The Court could direct the Federation of Pakistan to issue recognition and the same in no way infringed upon the duty casted on the Executive Committee formed by the august Supreme Court of Pakistan---Petition allowed.

(Paras 2, 3, 5, 6, 7)

Ref. PLD 2018 Lahore 75.

معزز عدالت عالیہ نے آئینی درخواست ہذاکو منظور فرما کر وفاقِ پاکستان کو ہدایت کی تھی کہ وہ اندر میعاد ایک ہفتہ سائل کو وابستگی سند بابت نوٹیفکیشن جاری کرے۔

For the Petitioner: Khalid Ishaq, Advocate.

For thePMDC: Noshab A. Khan, Advocate.

Nasar Ahmad, DAG.

Date of hearing: 15th February, 2018.

ORDER

AYESHA A. MALIK, J. --- Through this petition, the Petitioner, who runs a medical college by the name of Sahara Medical College, seeks a direction from this Court that the Respondent No. 3, Federation of Pakistan be directed to issue a notification granting recognition of the Medical College for the Session 2015-16.

2. Learned counsel for the Petitioner argued that the Petitioner applied for recognition of its medical college for the session 2015-16, pursuant to which the college was inspected and a recommendation was issued in favour of the Petitioner for its registration to Respondent No. 3, Federation of Pakistan. The matter was delayed considerably. In the meanwhile, the Petitioner filed W.P. No. 3606/2016 praying therein that Respondent No. 3 be directed not to wait for the formal issuance of the Notification and to complete its process for the affiliation of the Medical College, as per its letter dated 16.04.2015, wherein it had been stated that the affiliation shall be granted subject to recognition by the PMDC. This Court through its order dated 30.03.2016 noted that the Petitioner medical college was recommended by Respondent No. 2, Pakistan Medical and Dental Council ("PMDC") for inclusion of its name in the First Schedule in terms of Section 11 of the Medical and Dental Council Ordinance, 1962 ("Ordinance"). Subsequently with the change in the Council of the PMDC the matter was delayed. This Court thereafter, directed PMDC to allow the process of admission and required PMDC to re-inspect the premises and forward its recommendations. Consequently, the recommendations were issued for 28.07.2016. Learned counsel argued that the recognition letter recommends recognition for the session 2016-17 whereas the Petitioner also sought recognition for the session 2015-16. Learned counsel argued that inadvertently 2015-16 session has not been notified whereas 2016-17 has been notified. Through this petition, learned counsel argued that a direction is sought to the Federation of Pakistan to notify the recognition for the session 2015-16 in order to streamline admission process and the registration of the students. Learned counsel argued that given the judgment of this Court in "Muhammad Fahad Malik v. Pakistan Medical and Dental Council, etc." (PLD 2018 Lahore 75) and in terms of the order dated 12.01.2018 passed by the august Supreme Court of Pakistan in Civil Appeals No. 3 and 4 of 2018 an Civil Petitions No. 3412 of 2017 and 45 of 2018, there is no PMDC and all matters pending there have been placed in the hand of Executive Committee. However in this case since the college has been recommended it does not need to be referred to the PMDC.

3. On behalf of the Federation of Pakistan, learned DAG argued that the role of the Federation of Pakistan is simply to notify the session recommended by the PMDC. In this case, the college was inspected twice and was recommended both time for recognition and the fact that college was recommended 2016-17 session suggest that the college has been recognized for 2015-16 session as the college has been verified during this period. Therefore, this Court can direct the Federation of Pakistan to issue recognition and the same in no way infringes upon the duty cast on the Executive Committee formed by the august Supreme Court of Pakistan through its order dated 12.01.2018.

4. Heard and record perused.

5. The basic grievance of the Petitioner is that its session for the year 2015-16 has not been notified by the Federation of Pakistan even though it has been recommended by the PMDC in its letter dated 28.07.2016. In terms of the said letter, the college was recommended for recognition for the year 2016-17, meaning thereby that Federation of Pakistan was to issue a notification for the 2016-17 session. In the backdrop of this recommendation in W.P. No. 3606/2016 which was filed by the Petitioner with respect to session 2015-16 and this Court passed an order dated 30.03.2016 in which it noted that the Petitioner applied for recognition on 11.03.2015 and affiliation on 29.03.2015 and was recommended for recognition on 15.01.2016. However, the Federation of Pakistan did not issue the notification in a timely manner. In the meanwhile, PMDC held its elections and a new Council was introduced on 05.12.2015. The new Council wanted to satisfy itself with respect to all pending applications for recognition, which included the application of the Petitioner. PMDC therefore, once again carried out another inspection and issued its recommendation on 28.07.2016 in favour of the Petitioner. These facts are not disputed by the PMDC or the Federation of Pakistan, hence the only question before this Court whether based on the recommendations, the Federation of Pakistan is required to issue a notification in terms of Section 11 of the Ordinance.

6. The record shows that the recommendation process started on 2015 for the 2015-16 session. The College was inspected and recommended however it was not notified. The College then underwent a second inspection in 2016 and was again recommended for registration for the 2016-17 session. At this time for 2015-16 session probably was inadvertently not mentioned in the letter dated 28.07.2016. It goes without saying that if the College is recommended for the 2016-17 session based on two inspections one in 2015 and one in 2016 the College was in fact recommended for both the 2015-16 and 2016-17 session. There is nothing on the record and nothing advanced by the counsel for PMDC expressing any reservations for the registration of the 2015-16 session.

7. For what has been stated above, this petition is accepted and Federation of Pakistan is directed to issue notification letter in favour of the Petitioner medical college for the session 2015-16 for inclusion of its name in the First Schedule in terms of Section 11 of the Medical and Dental Council Ordinance, 1962 within one week of receipt of certified copy of this order. Compliance report shall be submitted to Deputy Registrar (Judicial) of this Court. Copy DASTI on payment of usual charges.

Petition allowed.

Lahore High Court

Judge(s)

Ayesha A. Malik,

Muhammad Umair

VS

Inspector General Of Police, Punjab, Lahore, Etc.

Writ Petition No, 150144 of 2018

20/02/2018

Reported As [2018 [M] C.L.R. 676] [KLR 2018 Civil Cases 223], Result: Petition allowed

Practice Area: Constitutional Law

Tagged Statutes: Constitution of Pakistan, 1973 [Article, Article 199, Article 199*]

Cited In: 0Cited By: 0

ORDER

AYESHA A. MALIK, J. Through this petition, the Petitioner has impugned the actions of the Interview Committee wherein the Petitioner was asked to be re-measured for the post of Constable in the Punjab Police Department, Lahore.

2. The case of the Petitioner is that he applied for the post of Constable. He appeared for the running test and for the measurement test. He passed both the tests and was interviewed. During the process of the interview, the Interview Committee required that his measurement be retaken as they were of the opinion that he did not fulfill the measurement criteria. The measurement was retaken and there was a difference of a few centimeters on the basis of which the Petitioner did not fulfill the criteria, hence he no longer was qualified, for the, post of Constable. Learned counsel for the Petitioner argued that once the running test and measurement test was completed and the Petitioner was declared successful, there was no reason for the Interview Committee to require re-measurement.

3. Report and parawise comments have been, filed by Respondent No, 2. Learned Law Officer argued that many of the candidates were asked to be re-measured. He stated that it is well within the discretion of the Interview Committee to have a candidate re-measured if it was of the opinion that the candidate did not fulfill the measurement requirement.

4. Heard and record perused.

5. The basic grievance of the Petitioner is that he passed the measurement test. However when the measurement was taken in the presence of the Interview Committee he did not pass the said test. The Petitioner is aggrieved by the decision of the Interview Committee requiring re-measurement. However the grievance of the Petitioner is totally misconceived. The Interview Committee can call for re-

measurement if on seeing the candidate it is of the opinion that the candidate does not seem to fulfill the measurement requirement. In this regard, learned Law Officer informed the Court that 17 other candidates were re-measured and many of them did not meet the criteria, though they were declared successful. Hence no case of discrimination or malice on the part of the Interview Committee is made out.

6. Under the circumstances, the instant Petition is dismissed.

KLR 2018 Labour & Service Cases 36

[Lahore]

Present: AYESHA A. MALIK, J.

Kausar Zahoor

Versus

District & Sessions Judge, etc.

Writ Petition No. 29416 of 2014, decided on 20th February, 2017.

CONCLUSION

(1) Where a candidate is already working as a Govt. servant the period of his continuous service must be excluded from the upper age limit.

Punjab Civil Servants Recruitment (Relaxation of Upper Age Limit) Rules (1976)---

---S. 3(v)---Constitution of Pakistan, 1973, Art. 199---Upper age relaxation---Principle of---The petitioner had called in question the recruitment process for the post of drivers (BS-4) in the Daily Nawa-e-Waqt, Lahore---The grievance of the petitioners was that he had the requisite qualification and did exceptionally well in the written test, however, in order to accommodate respondent No. 2, the petitioner was given less marks in the interview reducing his overall merit so that respondent No. 2 could be appointed---There was nothing on the record to establish that any mala fide or deliberate effort was made by respondent No. 1 to reduce the marks of the petitioner---Ruling: Where a candidate was already working as a Govt. servant, the period of his continuous service must be excluded from the upper age limit---Petition dismissed.

(Paras 1, 2, 5, 6, 7)

معزز عدالت عالیہ نے مسئول علیہ نمبر 2 کی تقرری بمطابق قانون ہائےرعایت بالائی عمر پائے جانے کے باعث آئینی درخواست ہذا کو مسترد کر دیا تھا۔

For the Petitioner: Malik Allah Bakhsh Shakeel, Advocate.

For the Respondents: Anwaar Hussain, Addl. A.G. with Muhammad Farooq, English Clerk, Sessions Court, Mianwali.

Date of hearing: 20th February, 2017.

JUDGMENT

AYESHA A. MALIK, J. --- Through this petition, the Petitioner has called in question the recruitment process for the post of driver (BS-4) as advertised on 30.08.2014 in the Daily Nawa-e-Waqat Lahore.

2. The grievance of the Petitioner is that he has the requisite qualification and did exceptionally well in the written test, however, in order to accommodate Respondent No. 2, the Petitioner was given less marks in the interview reducing his overall merit so that Respondent No. 2 could be appointed. Learned counsel for the Petitioner further argued that Respondent No. 2 was overage at the time he applied and was not qualified for the post. However, since he was from the department and already working as Qasid, he was accommodated by Respondent No. 1 and offered the post of driver.

3. Reply and parawise comments have been filed on behalf of Respondent No. 1. Learned Law Officer explained that there were two vacancies for the post of driver (BS-4) which were advertised on 30.08.2014. Written test was conducted on 17.09.2014. Sixty-two candidates appeared out of whom thirty-three passed. Thereafter a driving test was conducted and only seven candidates qualified. These seven candidates were interviewed whereafter the merit list was prepared. The post was filled up by appointing the top two candidates. Respondent No. 2 was the top candidate securing seven more marks than the Petitioner. Learned Law Officer further pointed out that Respondent No. 2 secured highest marks in the driving test as well as in the interview. So far as the allegation that Respondent No. 2 was overage, he was already serving as a process server in the District Judiciary and applied for the post of driver when it was advertised. Therefore, he was given the benefit of Rule 3(v) of the Punjab Civil Servants Recruitment (Relaxation of Upper Age Limit) Rules, 1976 ("Rules") on the basis of which he is entitled to the benefit of age relaxation. Reliance was placed on the judgment dated 04.12.2013 passed in W.P. No. 19421/2012.

4. Heard and record perused.

5. The basic issue before the Court is whether the recruitment for the post of driver (BS-4) was illegal and whether Respondent No. 2 was appointed illegally without following the due process. The first allegation raised by the Petitioner is that he did exceptionally well and was deliberately given less marks in the interview. As per the marks sheet provided, Respondent No. 2 secures 35 marks in the interview whereas the Petitioner secures 10 marks in the interview. There is nothing on the record to establish that any mala fide or deliberate effort was made by Respondent No. 1 to reduce the marks of the Petitioner. The interview was carried out by a committee and as such there is nothing on the record on the basis of which the Petitioner has been able to satisfy the Court that he was deliberately given less marks. Even otherwise, in comparison with Respondent No. 2, the Petitioner has higher qualification marks, however the written test marks are the same and Respondent No. 2 has more marks in the driving test. Therefore, for the purpose of this allegation, there is no merit in the same.

6. The second allegation raised by the Petitioner is with respect to age relaxation given to Respondent No. 2. Learned counsel argued that minimum age relaxation for Respondent No. 2 is five years, however, he is admittedly 47 years of age, therefore, being overage he cannot be employed. The Respondents have relied upon the Rules where the period of continuous service can be excluded from the upper age limit for the benefit of Government servant. The relevant Rule 3(v) of the Rules is reproduced below:

In the case of a candidate already working as a Government servant, the period of his continuous service as such shall for the purpose of upper age limit prescribed under any service rules of the post for which he is a candidate, be excluded from his age:

Provided that the upper age limit shall not exceed 35 years for recruitment to any post to be filled in on the recommendations of the Punjab Public Service Commission on the basis of the combined competitive examination.

In terms of this Rule, where a candidate is already working as a Government Servant, the period of his continuous service must be excluded from the upper age limit. This is beneficial legislation which entitles those who are already working as Government Servants to have the total length of service excluded from their age, in order to bring them within the ambit of age requirement. Essentially serving candidates are given the benefit of their continuous years of service to the Government. In the event of any ambiguity, since it is beneficial in nature, it must be interpreted favourably to give benefit to the candidate. In this case, Respondent No. 2 was appointed as process server on 19.09.1991 and the last date of receipt of applications was 13.09.2014. The period that must be excluded from his age is from 19.09.1991 to 13.09.2014 being 22 years, 11 months and 26 days. Respondent No. 2's date of birth is 01.01.1967 and at the time of submission of applications his total age was 47 years, 8 months and 12 days, therefore, when 22 years, 11 months and 26 days are excluded from his age, he is more than 25 years of age bringing him within the ambit of the Rule. Even otherwise, it is noted that since this is beneficial legislation, the object of the Rules is to exclude the length of service from the age of the applicant so that the age of the candidate does not exceed 35 years for recruitment to any post to be filled in on the recommendations of the Punjab Public Service Commission. Essentially it means that a Government Servant should fall between the age given in this case being 25 years upto the upper age limit, which is 35 years. Therefore, as such no illegality is made out as Respondent No. 2 has been given the benefit of Rule 3(v) of the Rules in accordance with law.

7. Under the circumstances, no case for interference is made out. This petition stands dismissed.

Petition dismissed.

P L D 2018 Lahore 450
Before Ayesha A. Malik, J
AL-BARAKA BANK (PAKISTAN) LTD.---Petitioner
Versus
PROVINCE OF PUNJAB through Secretary Food and others---Respondents
Writ Petition No.4562 of 2016, decided on 12th April, 2018.

(a) Punjab Sugar Factories Control Act (XXII of 1950)--

----Ss.13, 16 & 23---Punjab Sugar Factories Control Rules, 1950, Rr.14 & 13---Constitution of Pakistan, Art. 199---Supply of sugarcane to sugar factories/mills---Role of Cane Commissioner---Payment to sugarcane growers within statutorily prescribed time---Statutory retention of title in favour of sugar cane growers after delivery of sugarcane to sugar mills---Superior statutory right of sugarcane growers for recovery of their dues from sugar mills, over secured creditors, such as Banks / Financial institutions---Scope---Question before High Court was whether bags of sugar pledged to Banks/Financial institutions by sugar mills, were amenable to sale by Cane Commissioner whilst exercising powers under the Punjab Sugar Factories Control Act, 1950 in order to satisfy the statutory right of sugarcane growers who had not been paid for sugarcane by Sugar Mills within prescribed statutory period and whether such sugarcane growers had a superior right of recovery over secured creditors---Held, that intent of Punjab Sugar Factories Control Act , 1950 and Rules framed thereunder, in specifying time of 15 days for payment to sugarcane growers was to ensure that cane growers were paid and that price owed to the cane grower was not only secured but also remained enforceable under the Punjab Sugar Factories Control Act, 1950---While recognizing ownership rights of cane growers, Punjab Sugar Factories Control Act, 1950 recognized that a debt was created with respect to price of sugarcane in favour of the cane grower which must be paid within fifteen days and consequently by construing such requirement to be a statutory retention of title clause in favour of the cane grower, special purpose of the Punjab Sugar Factories Control Act, 1950 was achieved---Sections 13 & 16 of the Punjab Sugar Factories Control Act, 1950 and R.14 of Punjab Sugar Factories Control Rules, 1950 gave special treatment to these purchase transaction(s), such that a unpaid cane grower did not transfer title in sugarcane supplied until payment was made in order to ensure compliance of the statutory condition to make payment in fifteen days---High Court observed that a statutory retention of title provision gave the unpaid seller of goods priority over other creditors (secured or unsecured) in the event that buyer failed to pay for the delivered goods, and as such cane growers sought enforcement of their right(s) as owners of the sugarcane---High Court further observed that enforcement of right of sugarcane growers did not prejudice rights of secured creditors (Banks) as the cane growers' sugar could not have been pledged with Banks in the first case; and that the sugarcane growers had necessary security by virtue of law to ensure payment for sugarcane delivered---Constitutional petition was allowed, accordingly.

[Case-law referred.]

(b) Sale of Goods Act (III of 1930)--

----Ss. 32, 21,22,23 & 24---Payment and delivery of goods---Passing of title of goods---Concept of delivery and passing of title under Sale of Goods Act, 1930---Scope---Delivery of goods and passing of title of such goods, were two separate events and it was not necessary that title was transferred when delivery was made to a buyer---Under Sales of Goods Act, 1930 payment and delivery were concurrent in terms of S.32 whereby unless otherwise agreed, a buyer must pay the seller when possession of goods was taken---General rule was that unless otherwise intended, payment must be made when the goods were delivered.

[Case-law referred.]

(c) Interpretation of statutes---

----Purpose of a statute/intent of the law---Construction---Intent of the law must be construed in context of the purpose of the Act and rights and obligations created under the Act---Construction of intent of the law must be such that it gave effect to meaning of the law---Words in a statute were given meaning to by their context and such context included the purpose of the law---Purpose must be derived from the text, not from extrinsic sources such as Legislative history or an assumption about the legal drafter's desire---Purpose must be defined precisely and not in a fashion that smuggled in the answer to the question before the decision-maker and purpose was to be described as concretely as possible and not abstractly---Purpose of a statute shed light on deciding which of the various textually permissible meanings should be adopted.

[Case-law referred.]

(d) Maxim--

----Nemo dat qui non habet (he who has not, cannot give)---Rights of unpaid seller(s) under the law---Retention of title clause(s)---Retention of ownership title with unpaid seller(s) after delivery of goods---Priority of unpaid sellers over other creditors, including secured creditors---Recognition of retention of title clauses as commercially viable way to do business on credit---Concept and scope of retention of title clauses and rights of unpaid sellers discussed in light of case-law from various jurisdictions.

[Case-law referred.]

Nasar Ahmad and Shazib Masud, Syed Ali Zafar, Mubashar Aslam Zar, Ahmed Pervaiz, Malik Akhtar Javed and Ali Raza Kabir, Ali Ameel Parvez Malik, Syed

Hammad Yousaf Gillani, Abdul Hameed Chohan and Sajjad Ali for Banks/Petitioners.

Barrister Rafay Altaf, Ch.Nisar Ahmad Anjum, Asad Jamal Akbar, Muhammad Abdullah Aslam Chaudhary, Amjad Iqbal Khan, Afzal Shah Bukhari, Rai Khurram Mehmood, Ch. Muhammad Asghar, M. Amir Latif Sehr Bhutta, Sardar Zulfiqar Umer Khan Thaheem, Ch.Muhammad Nabeel Ashraf, Rana Mustansar Asif, Rana Muhammad Hussain, Mian M. Hussain Bodla, Shahid Masood Khan, Ch. Faiz-e-Rasool Sidhu, Ch. Akbar Ali Tahir, Mahar Fazal ur Rehman, Sh. Aftab Umar, Munawar Ali Sidhu, Sardar Liaqat Ali Dogar, Muhammad Jahangir Asif, Ch. Muhammad Hussain, Muhammad Anwar Khan and Malik Zulfiqar Ali Khokhar for Cane Growers/Petitioners.

Anwaar Hussain, Additional Advocate General, Mrs. Samia Khalid, Additional Advocate General, Ahmad Hassan Khan, AAG along with Waqas Alam, Cane Commissioner, Punjab and Syed Sibte Hassan Sherazi, Assistant Cane Commisisoner, Punjab for Respondents.

Mian Junaid Razzaq, Hammad Khalid Butt and Sardar Tahir Naseem, for Respondent Brother Sugar Mills.

Arshad Nazir Mirza, for Respondent Pattoki Sugar Mills (in W.Ps. Nos.63883/17 and 64911/17.

Date of hearing: 24th November, 2017

JUDGMENT

AYESHA A. MALIK, J.---This judgment decides upon the issues raised in the instant Petition as well as the connected petitions detailed in Schedule "A" and "B", appended with this judgment, as all the petitions raise common questions of law and facts.

2. There are two sets of Petitioners before the Court, cane growers and Banks. The common Respondents before the Court are the Cane Commissioner, Punjab and three sugar mills being Brother Sugar Mills, Darya Khan Sugar Mills and Pattoki Sugar Mills ("the Sugar Mills").

3. The case of the cane growers is that they supplied sugarcane to the respective Sugar Mills for the year 2014-15 and 2016-17 yet no payment has been made to them. In this regard, their debt has been verified by the Cane Commissioner, Punjab yet no payment has been made to them. It was argued that the cane growers earn their bread and butter from payment of sugarcane delivered to the Sugar Mills. That the cane growers have fulfilled their obligation of supplying sugarcane to the Sugar Mills, however the Sugar Mills have not fulfilled their obligation to make payment for the sugarcane delivered. It was also alleged that this has become regular practice

that payments are delayed and that the cane growers are compelled to approach the Cane Commissioner and the courts for payments due to them. In these cases since the Sugar Mills refused to make payment to the cane growers, the Cane Commissioner took action under the Punjab Sugar Factories Control Act, 1950 ("Act") read with the Punjab Sugar Factories Control Rules, 1950 ("Rules") whereby bags of sugar lying in the godowns of the Sugar Mills were seized so as to sell them, in order to settle the debt of the cane growers. The learned counsel also argued that it is a gross violation of their fundamental right to do business and earn their livelihood, protected under the Constitution of Islamic Republic of Pakistan, 1973 as the Sugar Mills have taken the sugarcane from the cane growers, produced tons of bags of sugar, yet made no payment to the cane growers.

4. In the cases of the cane growers, who are to receive payment from Brother Sugar Mills, it was argued that if the amount which is lying in the custody of the Court from the sale of the bags of sugar is handed over to the Banks there is no chance of recovering any amount from the said sugar mill as it stopped operations in 2016 and all its assets have since been mortgaged with the Bank. It is important to note that the bags of sugar lying with Brother Sugar Mills in W.P. No.4562/2016 filed by Al-Baraka Bank (Pakistan) Limited were auctioned under the supervision of this Court vide order dated 21.03.2017 and the amount has been placed in the custody of the Deputy Registrar (Judicial) of this Court. So far as Darya Khan Sugar Mills and Pattoki Sugar Mills are concerned, the possession of the bags of sugar has been restored in favour of the Banks vide interim orders dated 14.9.2017 and 29.8.2017 passed in W.Ps. Nos.67851 and 63883 of 2017. It is also maintained that through a lengthy exercise this Court has verified the claims of all the cane growers before the Court, with respect to amounts due to them and a detailed report has been filed by the Cane Commissioner which is not disputed by the Sugar Mills.

5. The case of the Banks is that the Sugar Mills before the Court have pledged bags of sugar with the Banks against finance facilities availed by them and the creation of the pledge is not denied. The Cane Commissioner illegally and unlawfully evicted the respective muqadams of the Banks and forcibly took possession of the bags of sugar lying in the godowns of the Sugar Mills. The Banks have challenged the orders of the Cane Commissioner who seized the bags of sugar to satisfy the debt of the cane growers. It is their stance that the bags of sugar being pledged stock are in the possession of the Banks, who are secured creditors and no claimant including the cane growers has a right superior to that of the Bank. That the Bank is a secured creditor and has preferential rights which cannot be defeated by any claim especially that of an unsecured creditor such as the cane growers. Learned counsel for the Banks argued that the Banks in terms of Section 173 of the Contract Act, 1872 ("Contract Act") have the right to retain the pledged bags of sugar and keep it in their possession until the repayment of the debt. In the event that there is a default, the Bank can recover its debt under the Contract Act through sale of the pledged stock, without recourse to the courts. Hence the Bank must always retain possession over the bags of sugar in order to maintain its security against finances

availed. Essentially the counsel argued that the pledged security is a continuing security until all sums are paid to the Banks and the Banks are secured creditors consequent to the pledge.

6. On behalf of the Cane Commissioner, Punjab, Mrs. Samia Khalid, Additional Advocate General argued that the cane growers are before the Court for the protection of their statutory right whereas the Banks are before the Court for the protection of their contractual rights. She argued that the Cane Commissioner is obligated under the Act and the Rules to ensure payment is given to the cane growers for the sugarcane supplied and in the event that the sugar mill defaults in paying the cane grower, the Cane Commissioner has specific powers under the Act and the Rules to take necessary action in order to settle the debt of the growers. She argued that it was incumbent upon the Banks before creating the pledge, to ensure that the Sugar Mills have no liability against the bags of sugar offered for pledge especially with reference to payment of the cane growers. She further argued that in these cases the Banks extended finance facilities to the Sugar Mills to pay the cane growers, however the Sugar Mills did not utilize the funds as per its given purpose and the cane growers were never paid. She clarified that the amount sought by the cane growers is not a government due and the role of the Cane Commissioner is the performance of his statutory obligation. It is her submission that the law provides for a mechanism to be adopted by the Cane Commissioner to recover payments for the cane growers in the event of default. This obligation of the Cane Commissioner does not translate into recovery of government dues. Moreover the purpose of the Act and the Rules must be given effect to by the Courts in order to ensure that the cane grower does not suffer at the hands of the Sugar Mills and the Banks.

7. On behalf of Brother Sugar Mills, the Counsel did not deny the claim of the cane growers, however it is their contention that against the sale proceeds lying in the custody of this Court all amounts should be given to the Banks to settle the debts of the sugar mill and that the cane growers have no right to claim the price of the sugarcane from the pledged stock of the Banks. He explained that in terms of order dated 24.6.2016 in W.P. No.4562/2016 the total amount claimed by the cane growers is around Rs.820 million and the amount claimed by the Banks is more than Rs.800 million. That the sugarcane bags were auctioned by the orders of this Court and some stock of brown sugar remains to be auctioned. The counsel adopted the arguments of the Banks and pressed for release of all amounts in favour of the Bank.

8. From what has been argued before the Court, the basic issue which needs to be decided is whether the cane growers are entitled to recover amounts due to them through sale of bags of sugar by the Cane Commissioner under the Act or whether the Banks have priority over the bags of sugar for the settlement of their debt. In this regard, it is also in issue that if the bags of sugar are sold, priority of payment out of the sale proceeds, will be given to the Banks and not to the cane growers. Furthermore the parties dispute the role of the Cane Commissioner and whether the

Cane Commissioner can forcibly take possession of bags of sugar, in order to settle the debt of the cane growers. In order to resolve the disputes before the Court, it is necessary to first understand the nature of the rights sought to be protected and enforced.

Right of the Banks

9. The case of the Banks is that the Sugar Mills pledged bags of sugar with them, hence by virtue of being a secured creditor they have the right to retain possession of the bags of sugar and the right to sell the bags to recover amounts due to them against the finance facilities availed. The right of the Banks is provided under Section 172 of the Contract Act which defines and prescribes the conditions applicable to a pledge such that it is the bailment of goods as security for payment of debt. Bailment as per Section 148 of the Contract Act is the delivery of goods by one person to another person, which goods are either returned or otherwise disposed of as per the direction of the person delivering them. Effectively bailment is for a purpose and includes the power to retain the goods until the purpose for which delivery was given is achieved. Therefore Section 172 read with Section 148 of the Contract Act establishes the conditions for creation of a pledge such that the delivery of goods is necessary and that the pledgee retains the right to keep possession of the goods till repayment of the debt. Section 173 of the Contract Act gives the pledgee the right to retain the pledged goods, meaning thereby that the Bank has the right to retain the bags of sugar in their possession until the repayment of the debt. Hence the basic contention of the Banks is that the pledged stock maintained in the godowns of the Sugar Mills cannot be sold by the Cane Commissioner for settlement of any debt of the cane growers as the pledge of the bags of sugar in favour of the Banks is protected under the law. The other argument of the Banks is that they are all secured creditors whose rights are protected under the law and can only be curtailed if there is any other secured creditor who has priority or preference over the right of the Banks. In this case the debt of the cane grower, as argued by the Counsel for the Banks, is an unsecured debt meaning thereby that the cane growers do not have preference over the rights of the Banks. Reliance is placed on the case The Bank of Bihar v. The State of Bihar and others (AIR 1971 SC 1210). It was also argued that the Act does not give the cane grower any priority over secured creditors and that even the general law does not give them priority. That at best the debt of the cane grower is a government due, which does not get preferential rights over secured creditors. Reliance is placed on M/s Industrial Development Bank of Pakistan v. M/s Maida Limited and others (1994 SCMR 2248), United Bank Limited v. P.I.C.I.C and others (1992 SCMR 1731) and Collector of Customs, Karachi v. Naya Daur Motors (Pvt.) Ltd. and others (2015 SCMR 1376).

10. In terms of the law laid down by the august Supreme Court of Pakistan in 1992 SCMR 1731 (supra) a secured creditor is free to deal with its security and to realize it for the repayment of the debt as it chooses. Furthermore a secured creditor has

first priority for recovery of its dues from the sale of the security, in this case being pledged goods and that even government dues do not get preference over secured creditors. Reliance is placed on In Re: Saifee Development Corporation Ltd. (1989 MLD 3909), Orix Leasing Pakistan Limited v. Sunshine Cloth Limited (2001 PTD 3146), Polyolefins Industries Ltd. (In liquidation) v. Kosmek Plastics Manufacturing Co. Ltd. (2002 PTD 1638) and 2015 SCMR 1376 (supra). The gist of the law from the cases relied upon is that the pledged goods cannot be attached or sold for the satisfaction of claims other than the claim of the Bank being a secured creditor. Therefore, as per what was argued, the Banks' case is that the Cane Commissioner could not seize the bags of sugar because they have been pledged with the Banks and if the pledged bags are sold then the sale proceeds will be given to the Banks by way of priority over all other claimants. Hence the Banks seek protection and enforcement of their rights as pledgees under the Contract Act and seek priority as secured creditors in terms of the law pronounced by the august Supreme Court of Pakistan.

Right of the Cane Growers

11. As per the arguments of Mrs. Samia Khalid, Additional Advocate General, Sections 13 and 16 of the Act read with Rule 14(2) of the Rules imposes a statutory duty on the sugar mill to pay the cane grower the price of the sugarcane within fifteen days of delivery of the cane. She argued that sugar is an essential crop and that the sugar industry is regulated by a special law. That the supply of sugarcane and the payment of the said supply is an integral part of the whole transaction which is regulated under the Act. She argued that the purpose of the Act is to ensure that supply and payment of sugarcane is made. Hence the cane growers have a statutory right to receive the price of the sugarcane, within fifteen days of delivery, in accordance with the mandate of the Act and the Rules. Syed Ali Zafar, Advocate differed with this view and argued that Rule 14(2) does not confer a statutory obligation on the sugar mill nor do the Rules give the Cane Commissioner the right to recover payments due to the cane grower. As per his arguments Rule 14(2) merely confirms a contractual obligation of the sugar mill to make payment for the sugarcane supplied. He also argued that Rule 14 does not give priority to the cane growers over the rights of the secured creditors being the Banks. Hence as per his arguments the obligation to pay the cane growers is contained in the agreement between the parties for supply of cane at a given price and the cane growers have a contractual right to receive payment. Consequently in the event of non-payment the cane growers' remedy, at best is a suit for recovery of amounts due.

12. Mr. Anwaar Hussain, Additional Advocate General argued that the Act and the Rules provide for a comprehensive procedure for delivery and payment of sugarcane because the lawmaker needed to balance the relationship between the cane grower and the sugar mill. The cane growers do not have any bargaining power as they have to deliver sugarcane to the sugar mill. Under the circumstances the legislature deemed it necessary to protect the cane growers interest by ensuring

that the minimum price for sugarcane is fixed by the Provincial Government and that the sugar mill pay that price to the cane grower without any deductions. In this regard the Cane Commissioner was given the required powers under Section 6 of the Act to recover amounts due to the cane growers.

13. The relevant Act is the Punjab Sugar Factories Control Act, 1950 and the Rules framed thereunder. The preamble of the Act provides that the scope of the Act is to regulate the supply of sugarcane and the price at which the sugarcane may be purchased. As per Section 6 of the Act, the Provincial Government may appoint any officer, not below the status of a Collector, to be a Cane Commissioner to exercise the powers and duties conferred upon him under the Act and all powers and duties that may be prescribed by the Provincial Government from time to time. In terms of the Act, the Cane Commissioner ensures that sugarcane is purchased by the sugar mill during a crushing season. In this regard, Section 8 of the Act requires a sugar mill to inform the Cane Commissioner of its intent to start crushing, one month before the crushing season commences. As per the section, the crushing season begins on the 1st day of October and ends on the 30th day of June of the following year. Under Section 9, the sugar mill must provide an estimate of the quantity of sugarcane it requires for a particular crushing season. In terms of Section 10, the Cane Commissioner confirms the request and once the quantity of sugarcane is confirmed, he may after consulting the Board, declare any area to be a reserved area for the purposes of supply of sugarcane to a particular sugar mill, during a particular crushing season. Under Section 13 of the Act, the sugar mill is required to purchase quantified amount of sugarcane from the cane grower in the reserved area. The terms and conditions of the purchase are provided by the Cane Commissioner stipulating the quantity of cane to be delivered within a prescribed time, at the agreed to price. The price is fixed by the Government of Punjab through a notification in terms of Section 16 of the Act. Furthermore sugarcane from a reserved area must be purchased by the sugar mill and the cane grower must supply to the designated mills. The sugar mill is required to pay to the cane grower the amount fixed by the Provincial Government as the price of sugarcane without any deductions. Section 16 of the Act specifically states that no deduction shall be made from the price of the sugarcane due to a cane grower. In terms of Section 16-A, any person who fails to comply with the provisions of Section 16 of the Act, shall be punishable with imprisonment which may extend up to two years or with fine which may extend to twice the price of the sugarcane or twice the amount of quality premium due, as the case may be.

14. The Rules were framed under Section 23 of the Act. Rules 11 and 12 provide for the general provisions related to the purchase of sugarcane through a purchase centre and a licensed purchase agent. Rule 13 provides that the cane grower must receive the minimum price. In terms of Rule 14, the sugar mill must provide adequate facilities to the satisfaction of the Cane Commissioner for payment of the price of sugarcane and all payments for cane must be made within fifteen days of the delivery of sugarcane. Payment is to be made on the basis of the recorded

weight, directly to the cane grower and the occupier or purchasing agent shall be liable for all payments due for sugarcane supplied to him or on his behalf. In case a purchasing agent fails to make payment for the sugarcane purchased, the sugar mill shall be responsible for making such payments. Rule 14(6) provides that no deduction shall be made by way of fine or otherwise from the price of the sugarcane purchased, which would reduce such price to a figure below the prescribed rate. The only amount that can be deducted is a loan amount given to a grower to help with the cultivation. In case payment is not cleared within fifteen days, the occupier or purchasing agent shall be liable to pay interest at the rate of eleven percent per annum.

15. In terms of the Act and the Rules, the supply of sugarcane for a particular crushing season is regulated such that the quantity of sugarcane to be supplied is fixed by the Cane Commissioner and the price for the sugarcane is fixed by the Provincial Government. The Act and the Rules provide for a rational distribution of sugarcane to sugar mills so as to ensure that the requirement for sugar is met with. The sugar mill is bound to pay the price fixed by the Government and can make no deduction from the notified price. The entire process for weightment including the scales and weights used is regulated under the Rules through the Cane Commissioner. The Act and the Rules ensure that sugarcane is supplied to the sugar mill during a given crushing season and that the cane grower is paid for the sugarcane at the notified price. The Act and the Rules set out the terms and conditions for the purchase of sugarcane and require the Cane Commissioner to ensure that the mill is supplied sugarcane on time and that the cane grower is paid in a timely manner. The terms and conditions of the purchase are prescribed under the Rules whereby Rules 13 and 14 deal with weighments, scales, weights, purchasing centres and payment requirements. The stated Rules protect the rights of the sugar mills who are guaranteed supply of the required sugarcane from a particular area and particular cane growers. Conversely the cane growers have agreed to supply sugarcane to a particular sugar mill at a given price and are ensured payment under the law. Therefore the right of the cane growers to receive payment is not dependent on any contract or negotiated terms and conditions rather the Act requires the sugar mill to pay the price fixed by the Government under Section 16 of the Act. Furthermore Section 13(2)(3) and (4) requires the sugar mill to purchase the sugarcane from the cane grower on the prescribed terms and conditions which are provided for in the Rules. Hence the right to recover the price of the sugarcane is a statutory right and the cane growers before the Court seek protection of their statutory right to receive payment for the sugarcane purchased by the sugar mill.

16. One of the arguments raised by the Banks with reference to the nature of the cane growers right is that amounts due to the cane grower are government dues as the Cane Commissioner can only recover government dues, and government dues have no priority over the rights of secured creditors. This argument is totally misconceived as the cane grower has a statutory right to receive payment for the sugarcane delivered. The Act and the Rules create a regulatory framework which

recognizes the necessity of the sugar mill to receive sugarcane during a crushing season in order to meet the demand for sugar being an essential commodity. The Act and the Rules ensure that the sugar mill receives the desired quantity of sugarcane from the cane grower at a given time. The Act also requires that the cane grower be paid the minimum price for the sugarcane supplied. Hence the rights and obligations with reference to the supply of sugarcane are of the sugar mill and cane grower. As part of the scheme of the regulatory framework, keeping in mind the relationship of the sugar mill and cane grower, a regulator oversees the entire process of supply and delivery and a mechanism is created under the Act to recover amounts due to the cane grower through the Cane Commissioner. The powers of the Cane Commissioner for the purposes of recovery are the same as a Collector under the West Pakistan Land Revenue Act, 1967 ("LRA") as provided in Section 6 of the Act. This power as and when exercised by the Cane Commissioner is not to recover government dues but to recover amounts due to the cane grower. The regulatory framework puts the Cane Commissioner in a pivotal position to regulate the supply and delivery of sugarcane as well as to ensure that the cane grower is paid. Hence the Cane Commissioner while exercising power under Section 6 of the Act can recover amounts due to the cane grower and this power does not translate into recovering government dues. The Cane Commissioner acts as the regulatory authority who is empowered under the law to protect the rights of the cane grower in the same way as he is empowered under the Act to protect the rights of the sugar mills. Therefore the cane growers right to recover amounts due to them through the Cane Commissioner does not make their debt a government due.

The Law and Regulatory Framework

17. The Act is a special law specifically designed to regulate the purchase and delivery of sugarcane. The Rules were framed under Section 23 of the Act and must be read as an integral part of the Act itself. In this regard the Supreme Court of India held in the case titled National Insurance Company Limited v. Swaran Singh and others [(2004) 3 Supreme Court Cases 297)] that rules validly made under a statute become part of the statute and such rules are to be read as part of the main enactment. The Rules are statutory rules made in accordance with the powers conferred under the Act and have the force of law. Since the parties before the Court seek protection and enforcement of their rights, that is the Banks seek protection of their rights as secured creditors and the cane growers seek protection of their statutory rights to receive payment, the law, its purpose and the regulatory framework must be considered in order to appreciate the rights and the remedies available to the parties.

18. Sugarcane is an important cash crop and food crop being a vital source of income and employment for the farming community of Pakistan. Sugarcane contribution in the agriculture sector is 3.4% and to the Gross Domestic Product ("GDP") is 0.7%. Furthermore Pakistan occupies an important position globally in sugarcane producing countries, ranking within the top five producing countries.

Sugar is termed as an essential commodity under the Essential Commodities Act, 1957 ("1957 Act") meaning thereby that it is a regulated commodity in terms of price, trade and commerce and falls at Serial No.xxvii of the Schedule to the 1957 Act. Hence the Act is a special law which regulates the supply and purchase of sugarcane in order to meet the demand for sugar. The Act regulates the supply of sugarcane to sugar mills such that a specific quantity of sugarcane is grown in one crushing season by the cane growers and utilized by the sugar mills. This ensures that the desired production of sugar is achieved. The extent of regulating production of sugarcane is evident from Section 18 of the Act wherein the sugar mill can distribute approved seeds in order to control the quality of sugarcane. The preamble of the Act clearly sets out the purpose of the Act as regulating the supply of sugarcane intended for use in such factories and the price at which it may be purchased and for such other matters as may be incidental thereto. The lawmaker in its wisdom deemed it necessary to ensure that sugarcane is purchased during the given dates in the required quantity as agreed between the parties. Purchase of sugarcane is not a one sided obligation where the cane grower is compelled to deliver the sugarcane and the sugar mill is not compelled to make payment. The Act and the Rules recognize that the sugarcane must be purchased by the sugar mill at the notified price. The word 'purchase' is all encompassing, including both delivery and payment of price as its necessary ingredients. Without payment of the price the 'purchase' remains incomplete. Undoubtedly the purpose of the Act and the Rules will be frustrated if the price of the sugarcane is not paid to the cane growers within the contemplated time, as the law clearly envisions payment of the sugarcane being an integral part of the purchase of sugarcane by the sugar mill. Even otherwise it is noted that there can be no sale or purchase of sugarcane without payment of the price. To argue that the law focuses and ensures only delivery in favour of the sugar mill suggest that an undue advantage is given to the sugar mill to receive the sugarcane without any commitment or obligation to pay for the sugarcane. This cannot be the objective of the law because the Act regulates the entire business of the cane grower right from selection of seeds up to the delivery of the sugarcane. The cane grower is bound under the statute to deliver the sugarcane to the designated sugar mill. The objective behind regulating the business of the cane grower is that the cane grower delivers the required quantity of sugarcane for the price fixed by the government under Section 16 of the Act. This ensures that the land used for cane growing is used efficiently to match the demand for sugarcane to a given mill. It also ensures optimum and efficient use of milling capacity. The regulatory framework aims to provide certainty to the cane grower and the mill that sugarcane will be supplied and purchased. Hence the Act and the Rules when read together create a regulatory system within which the supply and payment of sugarcane are supervised and controlled by the Cane Commissioner. Consequently it goes without saying that the purpose of the Act and the Rules is to ensure that the cane grower is made payment for the sugarcane delivered.

19. For ease of reference Sections 13 and 16 of the Act and Rule 14 of the Rules being the relevant provisions are reproduced here under:

Section 13 Purchase of Cane in a Reserved Area

(1) A cane grower or a Cane Growers' Co-operative society in a reserved area may, if required to do so by the Cane Commissioner shall, offer in the form and by the date prescribed, and supply to the occupier of the Factory, for which the area is reserved, such quantity of cane grown by the cane grower or by the members of such Cane Growers' Co-operative Society, as the case may be as is generally prescribed for, or specially directed by the Cane Commissioner, for such cane grower or Cane Growers' co-operative Society.

(2) The occupier of a factory, for which an area is reserved, shall enter into an agreement in such form by such date and on such terms and conditions as may be prescribed to purchase the cane offered in accordance with subsection (1), provided that he shall not purchase or enter into an agreement to purchase cane from a person who is a member of a Cane Growers' Co-operative Society.

(3) Unless the Provincial Government otherwise directs, cane grown in a reserved area shall not be purchased by a purchasing agent or by any person other than the occupier of the Factory for which such area has been reserved except by any other grower for the bona fide purpose of seed.

(4) Cane grown in a reserved area shall not be sold by any person other than a cane grower or a Growers' Co-operative Society, provided that a cane grower or a Cane Growers' Co-operative Society may deliver cane intended for a factory through another cane grower of that area, or through a carrier.

(5) During the crushing season, the Provincial Government may, if it is satisfied that there is likely to be in the area reserved for a Factory any quantity of cane available for sale to the occupier of the Factory in excess of the quantity for which he is required to enter into an agreement, direct that cane shall not be purchased outside the reserved area until the occupier of the Factory enters into agreements to purchase all the cane offered to him in the reserved area.

Section 16 Power of Provincial Government to fix minimum price

(i) The Provincial Government, after consultation with the Board, may by notification, determine in respect of any area the minimum price to be paid by occupiers of Factories or purchasing agents for cane purchased in that area either generally or related to the sugar contents of the cane or direct that such minimum price shall be calculated in the manner prescribed.

(ii) The Provincial Government may from time to time vary by notification, the price fixed under subsection (i).

(iii) The occupier of a Factory or a purchasing agent shall not make any deduction from the amount due for cane sold to him by a cane grower or a Cane Growers' Co-operative Society, except such deductions as may be prescribed or as the Provincial Government may, by notification, from time to time, allow.

(iv) The Provincial Government may, after consultation with the Board, by notification, direct that in addition to the minimum price to be paid for cane, the occupier of a factory shall pay for special varieties of cane to be specified in the notification and which the cane grower or Cane Growers' Co-operative Society has agreed to supply, such additional price as the Provincial Government may direct.

Rule 14 Payments

(1) The occupier or purchasing agent shall provide adequate facilities to the satisfaction of the Cane Commissioner for the payment of the price of cane.

(2) The occupier or purchasing agent shall make all payments for cane at the purchasing centre within fifteen days of the delivery of cane:

Provided further that when a purchasing centre is closed, all payments must be made at the centre within a week of the closing of the centre and if any growers do not appear to receive payments within a week of the closing of the centre, payments to them should thereafter be made at the factory within 24 hours of demand.

(3) Payments shall be made on the basis of the recorded weight of the cane at the purchasing centre.

(4) Payments for cane purchased for a factory shall not be made to a representative of the growers (or to a representative of the person representing himself to be such grower) unless he is duly authorised by him in writing to received such payments:

Provided that no person who has purchased the cane from the grower, or who is employed by an occupier or a purchasing agent and no person who has lent money to the grower and no agent of such person, shall take such payments.

(5) An occupier and purchasing agent shall be liable for all payments due for cane supplied to him or on his behalf. If a purchasing agent fails to make payment for cane purchased by him for a factory, the occupier of such factory shall be responsible for making such payments:

Provided that notice or complaint of non-payment is given, or made in writing, to the occupier of the factory concerned, within three months of the date on which the purchasing centre at which the cane was supplied is closed.

(6) Except as provided in sub-rules (7), (8), (9) and (10) no deduction shall be made by way of fine or otherwise from the price of the cane purchased which would reduce such price to a figure below that calculated at the prescribed minimum rate. Recoveries of the dues of a Cane Growers' Co-operative Society may be made by deduction from the price payment for cane.

(7) When transport is provided by the occupier of the factory he may deduct the cost of transport according to the rate fixed by the Cane Commissioner.

(i) Deduction may be made, if cane is definitely below the average of standard cane for the area on account of delay in transport or natural causes, e.g., serious water logging, intensive insect attach, disease, or sever frost. The Cane Commissioner will issue general instructions for the guidance of the occupiers in regard to the extent to which such deductions are to be made and in cases of dispute the decision of the Cane Commissioner will be final.

(8) The Provincial Government, if satisfied that in any local area substantial quantity of cane will remain standing and unsold on the 1st June, and is not likely to be purchased at the prescribed minimum price, may by notification in the Gazette direct that in such area such deduction as may be specified in the Notification may be made from the price of the cane purchased after that date.

(9) If any loan has been advanced by an occupier or a purchasing agent for meeting the expenses of cultivation to the persons from whom cane has been purchased, the amount of such loan, together with simple interest thereon at a rate not exceeding 10 percent per annum for the period the loan has been outstanding may, subject to the terms of the agreements between the lender and the borrower, be deducted from the amount paid for the cane:

Provided that the amount of the loan is disproportionate to the area to be sown, or the assistance necessary to sow it, or the value of the cane to be delivered, and that no deduction is made in respect of a loan given more than three years previous to the date of the purchasing of cane.

Explanation - A loan for the purpose of this rule shall mean only an advance made in pursuance of an agreement to sow a definite area of sugarcane, and for enabling or assisting such area to be sown, or in pursuance of an agreement to deliver a certain amount of cane. The Cane Commissioner will decide on application from the occupier or purchasing agent concerned, whether a loan is proportionate to the area to be sown, or the assistance necessary to sow it, or the value of the cane to be delivered.

(10) The occupier or purchasing agent shall be liable to pay interest at the rate of eleven percent per annum or unpaid balance of payment for cane, from the date of

delivery of the cane, in case where such payment is not cleared within fifteen days of its delivery.

20. In terms of Section 13 of the Act, the cane grower offers the sugar mill such quantity of sugarcane, as is required by it. The sugar mill can accept the offer and purchase the sugarcane at the prescribed price as per the fixed terms and conditions provided by the Cane Commissioner. Rule 9 of the Rules provides for the general terms and conditions which govern the sale transaction. The offer by the cane grower is made in terms of Appendix II Form 6 of the Rules. The acceptance is made as per Appendix II Form 7 and Form 8. Rule 9(4) requires that purchase is made after issuance of a requisition slip. Therefore the basic terms, quantity and price are fixed by the Cane Commissioner and Government of Punjab respectively and the details being the time and date of delivery is agreed between the parties as approved by the Cane Commissioner. Even otherwise Section 13 read with Rules 10 and 14 and Forms 7 and 8 clearly establish that the sugarcane has to be purchased by the sugar mill and that the price of sugarcane has to be paid within fifteen days of the delivery of the cane. The word 'purchase' as per Black's Law Dictionary Tenth Edition, means the act or an instance of buying meaning to acquire something by paying for it. Furthermore Sections 13 and 14 of the Act controls the terms and conditions of purchase of sugarcane from a reserved area or assigned area. Purchase of the sugarcane involves a commitment on the delivery of cane and payment of the price, as fixed by the Government of Punjab. The sugar mill has to pay the price fixed by the Government and the cane grower must supply the sugarcane as per the agreed quantity. Hence the statute creates a clear obligation on the sugar mill to purchase the sugarcane delivered to it, meaning thereby to pay for the cane delivered to it. Rule 14(2) grants a fifteen day period within which the payment must be made. Consequently there is a clear statutory obligation on the sugar mill to pay the price of the sugarcane received by it within fifteen days of its delivery.

21. Section 16 of the Act grants the Provincial Government power to fix the minimum price at which sugarcane is purchased and ensures that the cane grower receives the minimum price. Section 16(iii) of the Act prohibits the sugar mill to deduct any amounts from the price fixed by the Government of Punjab meaning thereby that the cane grower is entitled to the price of the cane without any set off or deductions as further elaborated upon in Rule 14(6). The intent of Section 16 is to ensure that the cane grower is paid a fixed price for the sugarcane delivered to the sugar mill. It also ensures that the sugar mill is cognizant of its obligations to pay the price for the sugarcane purchased and does not leave anything to be negotiated between the parties. Since the lawmaker deemed it necessary to regulate the purchase of sugarcane through the Act, they intentionally gave the power to fix the price of the sugarcane to the Government so that the cane grower is ensured payment of the price of the sugarcane delivered. Section 16 of the Act effectively protects the cane grower from any unfair dealing by the sugar mill as it does not allow the mill to negotiate the price of the sugarcane.

22. Rule 14 provides for all matters relevant for the purposes of payment to the cane grower. Rule 14(1) and (2) requires that the Cane Commissioner satisfy himself that payment can be made and that payment is made within fifteen days of delivery of cane. In the event of delay or non-compliance of Rule 14(2), the sugar mill is liable to pay interest at the rate of 11% per annum or unpaid balance of cane from the date of delivery till payment is cleared. Rule 14(4) and (5) ensure that payment for cane purchased by a sugar mill is made to the grower even if through a representative or an occupier of the sugar mill. Rule 14(6) emphasis that no deduction can be made from the price of the cane purchased meaning thereby that sugar mill cannot settle any debt or payment due from the grower against the price of the sugarcane supplied. The only exception provided is in Rule 14(9), that too as per the prescribed conditions. Hence the objective of Rule 14 is to ensure that payment guaranteed under Section 16 of the Act is made to the cane grower for the sugarcane supplied to the sugar mill. It is noted that Rule 14 is in furtherance of the purpose of the Act which regulates the supply of sugarcane and the price at which it can be purchased.

23. Furthermore as per the arguments of Mrs. Samia Khalid, Additional Advocate General the prevailing practice is that a sugar mill issues a Cane Purchase Receipt ("CPR") to the cane grower providing the specific date, time and weight of the cane supplied along with the total amount due to the cane grower for the sugarcane supplied. Copies of the CPRs were placed on file. The CPR is an acknowledgement by the sugar mill that it has received sugarcane from the mentioned cane grower and is liable to pay for the delivery of the sugarcane. The issuance of the CPR by the sugar mill signifies that the cane grower has fulfilled its obligation under the Act and the sugar mill is obligated to pay the price as given in the CPR. Therefore the right of the cane grower to receive the price of the sugarcane delivered is a statutory right which has been recognized and acknowledged by the sugar mill when issuing a CPR.

24. Having examined the Act, the Rules and the regulatory framework, it is important to deliberate on the relevance of the purpose of the law and the context in which it must be examined. Time and again, in different cases, cane growers have approached the Court seeking payment from sugar mills to whom sugarcane has been delivered. The cane growers have argued on the strength of the purpose of the Act and the powers given to the Cane Commissioner under the Act, which is to regulate the delivery of sugarcane and ensure payment to the cane grower. This Court has seen, more often than not, cane growers in Court seeking a direction that the Cane Commissioner do his job and recover payments for the cane grower. The powers and duties of the Cane Commissioner are repeatedly invoked to recover amounts due to the cane grower in furtherance of the objectives of the Act and the Rules. The Courts have considered the regulatory framework under the Act in order to balance the rights of the sugar mills and the cane growers so that one does not take advantage of its position over the other. In the dispute before the Court the issue is not simplicitor recovery for amounts due to the cane growers from the

Sugar Mills. The rights of the Banks as secured creditors must be seen in their own independent context in order to conclude who gets priority with reference to the value of the bags of sugar.

Role of the Cane Commissioner

25. The role of the Cane Commissioner is in dispute, hence it must be examined so as to determine whether the Cane Commissioner is the competent authority to recover the cane growers' dues under the Act. The Cane Commissioner is appointed under Section 6 of the Act and as per Section 6(2) the Cane Commissioner is deemed to have powers of a Collector/DCO under the LRA and the Punjab Tenancy Act, 1887. The Cane Commissioner is the regulator under the Act who has been authorized to ensure that a sugar mill having declared its estimated quantity of cane required will start crushing during the crushing season. As per the Act the Cane Commissioner shall ensure that the sugar mill is supplied with sugarcane from the reserved area declared for this purpose. The Cane Commissioner has to notify the quantity of sugarcane required by a sugar mill during a crushing season one month before the crushing starts. Estimated quantity required by the sugar mill is declared and a commitment is taken from the cane growers in the area for the supply of sugarcane to a particular sugar mill. Section 13 prescribes for the procedure to be undertaken for the purchase of sugarcane in a reserved area wherein the cane grower has to supply sugarcane to a sugar mill. The Cane Commissioner can also by an order in writing prohibit the cultivation of any variety of sugarcane declared by the Government of Punjab to be unsuitable for distribution. It is noted that the cane grower can only use seeds of the variety permitted by the Government of Punjab. Section 21 provides for the penalties in the event that any person contravenes any provision of the Act or the Rules made thereunder.

26. The relevant power in these cases with reference to the Cane Commissioner is under Section 6(2) of the Act which gives the powers of the Collector/DCO as under the LRA to the Cane Commissioner. This Court has already held in judgment titled Haji Bashir Ahmad and others v. Cane Commissioner (PLD 2013 Lahore 81) that the Cane Commissioner can collect amounts due as arrears of land revenue for the benefit of the cane grower. The counsel for the Banks argued that the Cane Commissioner has no power to recover dues of the cane growers and that neither the Act nor Rules authorize the Cane Commissioner to recover the price of the sugarcane from the sugar mills. Furthermore that even if the Cane Commissioner can recover for the benefit of the cane growers, it cannot be given priority over the dues of the secured creditors. The basic argument is that the Cane Commissioner cannot declare the dues of the cane growers to be arrears of land revenue. Therefore he cannot recover the dues of the cane growers in terms of Section 6(2) of the Act. The counsel for the Banks argued that although the Cane Commissioner has been given powers of the Collector under Section 6(2) of the Act, there is no enabling provision in the Act which provides that sums due to the cane growers are recoverable as arrears of land revenue. In this regard Section 6(2) of the Act clearly

provides that the Cane Commissioner has the powers of a Collector/DCO under the LRA and Punjab Tenancy Act, 1887. Section 80 of the LRA provides for the procedure to be adopted by the Collector in order to recover arrears of land revenue. It was argued before the Court that the powers under Section 80 of the LRA are for the purposes of recovering arrears of land revenue meaning thereby that the powers can only be exercised to recover arrears of land revenue. Section 11 of the Act provides for surveys of reserved areas and authorizes the government to recover the cost of the survey from the sugar mill as arrears of land revenue. In view of Section 11 of the Act it was argued that the powers under Section 6(2) of the Act can only be read in conjunction with the requirement of Section 11 of the Act. I am of the opinion that the arguments are misconceived given that the basic role of the Cane Commissioner under the Act is regulatory, with the objective to ensure that sugarcane is delivered by the cane grower within time and that payment is made to the cane grower within fifteen days of delivery. Under the Act the Cane Commissioner is obligated to ensure that the purchase of sugarcane is completed within the crushing season. In terms of the Rules the Cane Commissioner regulates the entire process from cultivation to sale, including issuance of licenses for purchasing agents, weightment and payments made to the cane grower. In the event of a dispute the matter is referred to the Cane Commissioner as per Rule 17 who then settle the claims of the cane growers. In the event of non-compliance with any of the provisions of the Rules the Cane Commissioner can impose penalties under Rule 18. Hence the role of the Cane Commissioner as the regulator requires that he has powers to ensure that the mandate of the Act and the Rules is fulfilled such that the cane growers supply sugarcane and the sugar mill pays the price of the sugarcane.

27. The Act mandates the Cane Commissioner to recover the price of the sugarcane if the sugar mill does not pay the same within fifteen days' time by exercising powers under Section 6(2) of the Act. In order to effectuate the purpose of the Act the objective of Section 6(2) cannot be limited to be construed as collection of arrears of land revenue that too when Section 11 (4) of the Act, itself stipulates that the cost of the survey can be recovered as arrears of land revenue. The purpose of Section 6(2) of the Act is to empower the Cane Commissioner to recover the price of the sugarcane as mandated under the Act. Since the Act is a special law, a special mechanism has been created under the Act to enable the cane grower to recover its due. The lawmaker did not want the cane grower to pursue its dues through recovery suits and instead designed a mechanism where the role of the Cane Commissioner is such that it can exercise all the powers of the Collector in order to recover the cane growers' dues. Accordingly the Cane Commissioner is the competent authority and forum under the Act for the recovery of all dues of the cane grower. So for example, the Cane Commissioner by virtue of Section 6(2) of the Act can adopt the procedure and process given under Section 80 of the LRA to recover the dues of the cane grower. Interestingly the enabling provisions referred to by the counsel for the Banks, such as Section 54(A) of the Electricity Act, 1910, Section 55 of Provincial Employees' Social Security Ordinance, 1965, Section 41 of Regulation of Generation, Transmission and Distribution of Electric Power Act,

1997 and Section 29-A of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 do not give the powers of the Collector under the LRA to some authority for recovery of arrears of land revenue. Instead the laws simply by reference provide that amounts due are to be recovered as arrears of land revenue. By contrast Section 6(2) of the Act specifically gives the powers of the Collector as prescribed under the LRA to the Cane Commissioner so as to enable him to fulfill his obligation with respect to recovering the dues of the cane growers. In this regard Section 11(4) of the Act by reference requires recovery of dues for survey of reserved area as arrears of land revenue. Both the Sections when read together indicate the clear intent of the legislature to empower the Cane Commissioner in order to fulfill the mandate of the Act. As a result, the Cane Commissioner can adopt the powers and procedure provided under the LRA to recover the price of the sugarcane for the cane grower. If the Cane Commissioner did not have the power to recover the dues of the cane grower, the purpose of the Act would be defeated and would in fact give an unfair advantage to the sugar mill by compelling the cane grower to give delivery of sugarcane without any payment. This Court has on numerous occasions recognizes the critical role of the Cane Commissioner and upheld the powers of the Cane Commissioner with respect to recovery of amounts due to the cane growers. Reliance is placed on the judgments of this Court dated 9.2.2011 passed in W.P. No.21226/2010, 26.4.2010 in W.P. No.5664/2010, 20.5.2010 in W.P. No.8821/2010, 19.7.2012 in W.P. No.10238/2012, 29.5.2015 in W.P. No.16190/2015 and PLJ 2013 Lahore 9 (supra). Hence the Cane Commissioner is the competent authority through which the cane grower can recover its dues and the Cane Commissioner can exercise all the powers of the Collector under the LRA to recover these amounts.

The Dispute

28. The dispute as argued by the learned counsel is one of competing rights that is whether the Banks get priority over the bags of sugar because of the pledge in their favour or whether the cane growers get priority to receive payments due to them for the sugarcane delivered on account of their statutory right. The dispute arose because the cane growers were not paid for sugarcane purchased by the Sugar Mills since 2014 and 2016. Ultimately the Cane Commissioner took possession of the pledged bags of sugar to auction the same in order to settle outstanding dues of the cane growers. In W.P. No.4562/2016 the bags of sugar of Brother Sugar Mills were auctioned under the supervision of the Court vide order dated 12.7.2016 as there were allegations that the pledged stocks were being illegally removed by the mill owners. An amount of Rs.669,215,411/- is lying with the Deputy Registrar (Judicial) of this Court against which all Petitioners are claimants. With respect to the petitions of the Banks, the position of the Banks vis- -vis the pledge stock is as follows:

W.P. No.	Bank	Sugar Mill	Date of Pledge	Status

4562/16	Al-Baraka Bank (Pakistan)	Brother Sugar Mills	18-2-20-14	Suit Pending
4650/16	JS Bank Limited	Brother Sugar Mills	1-12-2014	Suit Pending
10377/16	Bank of Khyber	Brother Sugar Mills		Suit decreed
19515/16	Summit Bank Limited	Brother Sugar Mills	8-12-2014	No suit filed
25932.16	National Bank of Pakistan Limited	Brother Sugar Mills	2-7-2914	Information not provided
64254/17	MCB Bank Limited	Darya Khan Sugar Mills	11-11-2016	Information not provided
64911/17	MCB Bank Limited	Pattoki Sugar Mills	30.1.2017 24.3.2017	Information not provided
63883/17	United Bank Limited	Pattoki Sugar Mill	21-6-2016	No default
67851/17	Meezan Bank Limited	Darya Khan Sugar Mill	6.3.2017	No default

Opinion of the Court

29. The rights of the Banks as secured creditors are long standing and established starting from Federation of Pakistan v. Pioneer Bank Limited and others (PLD 1958 Dacca 535) where the court held that the attachment or sale to satisfy a government debt would not affect a mortgage which was created prior to the attachment or sale up to 2015 SCMR 1376 (supra) where the court held that the government will not get any preferential right over the right of the secured creditors, where a mortgage is created prior to government due. The rights of secured creditors are protected when the property is sold by any creditor or when the property is sold in liquidation proceedings as held in 1992 SCMR 1731 (supra). In Orix Leasing Pakistan Limited v. Sunshine Cloth Limited (2001 PTD 3146) it was held that no one could lay claim on the mortgaged property or on the proceeds realized from the sale thereof. The rights of secured creditors can only be curtailed and priority or preference can only be given when another secured creditor has a right prior in time to a secured creditor. Reliance is placed on 1994 SCMR 2248 (supra). Therefore so far as the rights of the Banks as secured creditors are concerned, there is no denying the legal position that secured creditors get priority over government dues and unsecured creditors.

30. Indian Courts have also examined the cane growers right to recover the price of sugarcane. The first judgment cited before the Court was State of Bihar v. Bank of Bihar Ltd. (AIR 1963 Patna 344) in which the court held that the acts of the rationing officer/cane commissioner of seizing the pledged sugar was lawful. This

judgment was subsequently overruled in AIR 1971 SC 1210 (supra). The facts of this case are the Sugar Mill obtained a cash credit facility by pledging sugar with the bank. The bags of sugar were kept in the godowns of the banks under the control of the bank. The rationing officer forcibly seized the sugar bags claiming that he would recover all dues against the sugar bags and that the cane growers had priority over the banks. The Supreme Court of India held that the rationing officer did not have any right of priority over the secured creditors as an unsecured creditor did not have a higher right than that of the pledger. In this case the cane growers' debt was unsecured, hence he did not have any priority. In another case State of M.P v. Jaora Sugar Mills Ltd and others (1997) 9 Supreme Court Cases 207) in a dispute over price and interest on delayed payment the Supreme Court of India held that the cane commissioner has the power to compel cane growers to supply sugarcane to the factory unit and has the incidental power to ensure payment to the cane grower. That the price fixed or agreed is a statutory price and bears the stamp of a statutory list charge on the sugar and assets of the factory over any other liability. In Rashtriya Kisan Mazdoor v. State of U.P. and another (2017) dated 9.3.2017 in a public interest case the court of Allahabad required that the price of the sugarcane be paid together with interest. The court held that the cane growers had a statutory entitlement to receive payment as of right and interest in the event of delayed payment. The court also held that the cane commissioner was duty bound to recover amounts due to the cane growers. In Agauta Sugar and Chemicals v. State of U.P and others (1997) 10 Supreme Court Cases 99, the appeal of the sugar mill was dismissed and the cane commissioner was directed to recover the price of the sugarcane by selling the sugar stock in hand, which would be sufficient to meet the price of the sugarcane and the interest on delayed payment. Hence most of the cases recognize that the cane grower must be paid the price of the sugarcane along with interest for delayed payment.

31. The aforementioned cases clarify that whilst banks have a right to possession over the bags of sugar pledged, the cane grower has a statutory right to recover the price of sugarcane delivered. This right of the cane grower is on account of the fact that he is the owner of the sugarcane delivered to the sugar mills. The cane grower sells sugarcane to the sugar mill as owner and the Act and the Rules envision a framework which protects the cane grower ownership rights as well as ensures that the right is enforceable. Hence in order to resolve the dispute this Court proceeds to examine the scheme of the Act and the Rules in the context of the cane grower's right as owner of the sugarcane.

32. As already stated the Act sets out to regulate the supply of sugarcane to sugar mills and the price at which the sugarcane shall be purchased. As per the preamble of the Act the mandate of the Act is to ensure that sugarcane is supplied to the sugar mills and that the cane growers are paid the price of that sugarcane. The purchase of sugarcane is regulated under Section 13 of the Act which clearly requires sugar mills to purchase from the cane grower a specified quantity of sugarcane and further requires the cane grower to supply sugarcane to a specified sugar mill within a

specified period. Section 16 of the Act regulates the price of the sugarcane such that the provincial government sets the minimum price and the sugar mill is required to pay the fixed price to the cane grower without any deduction. Rule 14(2) of the Rules requires the sugar mill to make all payments within fifteen days of the delivery of the cane and also provides that the sugar mills will be liable for all payments without any deductions. Rule 14(2) is a mandatory provision which imposes an obligation on the sugar mills to make payment for the sugarcane in fifteen days' time. Effectively the cane grower has the right to receive the price from the sugar mill within fifteen days' time. This right is a statutory right which ensures that the owner of the sugarcane is paid the price of the sugarcane delivered to the sugar mill. In the event that the payment is not made the sugar mill, in terms of Rule 14(10) is liable to pay interest at the rate of 11% per annum from the date of delivery of the cane till the date when the payment is made. Therefore the Act and the Rules when read together make it evident that the legislature in its wisdom, deemed it necessary to balance the rights of the cane grower and the sugar mill so that the supply of sugarcane is not delayed and the price of the delivered sugarcane is made on time. The special regulatory scheme ensures delivery and payment of sugarcane which is an essential crop and does not aim to achieve unjust enrichment to the benefit of the sugar mill.

33. Title is a significant element in a sale transaction as it impacts upon the rights, remedies and obligations of the seller and the buyer. Section 19 of the Sales of Goods Act, 1930 ("Sales of Goods Act") provides that where there is a contract for the sale of specific and ascertained goods the property in them is transferred to the buyer at the time when the parties to the contract intend it to be transferred. As per the Section for the purposes of ascertaining the intention of the parties the terms of the contract, the conduct of the parties and the circumstances of the case will be considered. Where the intent is not specified it will be for the court to ascertain the intent of the parties. With reference to transfer of title of the goods, Sections 20 to 24 of the Sales of Goods Act provides for the different rules to ascertain the intention of the parties, as to the time at which the property in the goods is to pass to the buyers. Section 20 provides where there is an unconditional contract for the sale of specified goods the property in the goods passes when the contract is made. Section 21 provides that where is a contract for sale of specified goods, and the seller is bound to do something in order to put the goods in a deliverable state the property in the goods does not pass until the seller has done what he is required to do. Section 22 provides where there is a contract for sale for specified goods and the seller is bound to weigh, measure or test the goods, the property in the goods will not pass until the seller has done what he is required to do. Section 23 pertains to unascertained or future goods. The property in the goods will pass when the goods are appropriated by the seller or by the buyer. Finally Section 24 provides that where the goods are delivered to the buyer 'on approval' or on return the property in the goods will pass when the goods are approved or accepted by the seller. Sections 20 to 24 lay down the circumstances on the basis of which the intent of the parties can be given effect to with respect to the transfer of the title in the goods. Consequently these sections when read together, make it clear that delivery of

goods and passing of title are two separate events and it is not necessary that title is transferred when delivery is made to the buyer. Reliance is placed on Messrs Alfarooq Shipping Co. Ltd. v. Messrs Vasa Shipping Co. Ltd. and 4 others (1980 CLC 1228), Pakistan Mercantile Corporation Ltd. v. Madan Mohan Oil Mills (1966 Dacca 181), Commissioner of Income Tax v. H.K.Patil (1994 PTD 330) and Ghulam Mustafa v. Officer on Special Duty, Federal Land Commission and another (1984 CLC 824). It is also important to note that as per the Sales of Goods Act payment and delivery are concurrent in terms of Section 32 whereby unless otherwise agreed, the buyer must pay the seller when possession of the goods is taken. Hence the general rule is unless otherwise intended, payment must be made when the goods are delivered.

34. The crucial test in these cases is therefore the intent of the law and the intent of the parties with reference to transfer of title when the goods are delivered to the buyer. So far as the intent of the parties is concerned that is often documented in the form of an agreement between the parties. In the cases before the Court, the intent of the parties is undisputed and evident from the CPRs that are issued by the Sugar Mill to the cane growers. The CPRs specify the quantity and the weight of the sugarcane delivered and the price which is to be paid to the cane grower. The CPRs evidence that the sugarcane has been received by the Sugar Mill and that the amount specified therein is due to the cane grower for the sugarcane delivered. Hence the CPR acknowledges the obligation of the Sugar Mill to pay the price of the sugarcane to the cane grower. Since Rule 14(2) of the Rules requires payment to be made in fifteen days, the issuance of the CPR is an acknowledgement of the obligation to pay the cane grower in fifteen days from the delivery.

35. With respect to the intent of the law that must be construed in the context of the purpose of the Act and the rights and obligations created under the Act. Essentially the construction of the intent of the law must be such that it gives effect to the meaning of the law. Justice Antonin Scalia of the US Supreme Court in Reading Law: The Interpretation of Legal Texts by Antonin Scalia and Bryan A. Garner (2012) expounded that the words of the law are given meaning to by their context and the context includes the purpose of the law. First, the purpose must be derived from the text, not from extrinsic sources such as legislative history or an assumption about the legal drafter's desire. Second, the purpose must be defined precisely and not in a fashion that smuggles in the answer to the question before the decision maker. Third, the purpose is to be described as concretely as possible not abstractly. More importantly the authors explain that purpose sheds light on deciding which of the various textually permissible meanings should be adopted. Similarly in the case of National Workers' Union v. P.R. Ramakrishnan [(1983) 1 SCC 228), the Supreme Court of India held that the law must be construed in accordance with the needs of the changing society, in the following words:

We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values.

If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree, it will shed that bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Law must therefore constantly be on the move adapting itself to the fast changing society and not lag behind.

The principles of interpreting an ongoing statute have been very succinctly set out by the leading jurist Francis Bennion in his commentaries titled Statutory Interpretation, 2nd Edition, page-617, as follows:

It is presumed Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law.

In construing on ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the original intention. Accordingly, the interpreter is to make awareness for any relevant changes that have occurred since the Act's passing, in law, in social conditions, technology, the meaning of words and other matters. That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will foresee the future and allow for it in the wording.

An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials.

The intent of the Act and the Rules in specifying the time for payment is to ensure that the cane grower is paid and that the price owed to the cane grower is not only secured but also remains enforceable under the Act. This is because the supply of sugarcane to the sugar mill is not an ordinary sale of goods. The legislature considered it to be a special transaction which required regulation and control and also required protection so far as the rights of the cane growers are concerned. The Act is designed to protect the suppliers and buyers of sugarcane which is a fast moving commodity due to its essential and perishable nature. The mandatory period for making payment secures the price of the sugarcane for the benefit of the cane

grower while giving the sugar mill the benefit of a fifteen day credit. Doing business on credit is an acceptable mode, however in the case of the sale of sugarcane the Act, while regulating and controlling the sale transaction cannot be interpreted so as to leave the cane grower helpless at the hands of the sugar mill. In such eventuality the entire scheme of the law is defeated if the rights of the cane growers are not protected such that their right to receive payment is not enforceable. The purpose of requiring the cane grower to deliver on credit, is to facilitate the buyer sugar mill, so that it can use the goods. This does not suggest that the Act leaves the cane grower without any remedy to recover its dues. Therefore to the mind of the Court, by specifying the time within which payment must be made the intent of the law is to protect the cane grower so as to secure his payment and to ensure that the cane grower's right to recover his dues from the sugar mill will not be subservient to any other right.

36. Sugarcane is a regulated crop from its cultivation to the sale made to the sugar mill and the statutory regulations which cast obligations on the cane grower and the sugar mill are to be interpreted in order to advance the purpose of the statute. The purpose of the statute as already stated is to ensure that sugarcane is supplied/delivered to the sugar mill within a specified time in the given quantity required and that the sugar mill pays the cane grower for the sugarcane delivered. Hence the terms and conditions are all regulated by the law. Despite the same the nature of the trade is such and the practice over time has shown that the cane grower delivers the sugar cane on time and yet the sugar mill delays payment considerably given the perishable nature of the goods once the sugarcane is delivered to the sugar mill, its crushing is almost immediate for the production of sugar meaning thereby that the buyer will immediately put the sugarcane to use without payment to the cane grower. Hence while recognizing the ownership rights of the cane growers the Act recognizes that a debt is created with respect to the price of the sugarcane in favour of the cane grower which must be paid within fifteen days. Consequently by construing this requirement to be a statutory retention of title clause in favour of the cane grower the special purpose of the Act is achieved. Sections 13, 16 of the Act and Rule 14 of the Rules gives special treatment to the purchase transaction, such that the unpaid cane grower does not transfer title in the sugarcane supplied until payment is made in order to ensure compliance of the statutory condition to make payment in fifteen days.

37. A statutory retention of title provision gives the unpaid seller of goods priority over other creditors (secured or unsecured) in the event that the buyer fails to pay for the delivered goods. Essentially an owner having a right to payment, looses control over the goods yet retains title so as to ensure that in case the price is not paid within time, title of the goods will not pass to the buyer. Hence the goods do not become the property of the buyer nor does it become part of the assets of the buyer. In this way the right of the unpaid seller to recover the price of its goods is secured because the buyer cannot transfer title or security interest over the goods since he does not have title in the goods. In terms of the Nemo Dat Qui Non Habet

Rule, (he who hath not cannot give) the law protects the unpaid seller as the buyer cannot give that which he does not have i.e. title in the goods. Retention of title clause is one of legally acceptable modes in which a merchant supplying goods to a retailer or a manufacturer on credit can secure his payment by retaining title to the goods until payment is made.

An RT clause is virtually the only way a trade creditor. For example, a merchant supplying goods to a retailer or a manufacturer on credit can obtain security for the credit she extends to her customer. These clauses are therefore significant to business people, lawyers, academics and others interested in commercial sales transaction.

RT clauses are also of considerable importance in a broader social and economic context. As a recent report on insolvency law in England observed, "credit is the lifeblood of the modern industrialized economy." A significant proportion of business credit is supplied by trade creditors. It is therefore vital to the health and free-flow of this "lifeblood" that sellers wishing to extend credit to merchant buyers be able to obtain security. Where a trade creditor requiring security has little option but to rely on an RT clause, as is currently the case in England, the effectiveness of such a clause becomes extremely important.

The significance of retention of title clauses is the priority it is given over all other creditors, including secured creditors because amounts are recovered as owners and not as creditors. Furthermore the retention of title ensures that payment is made to the seller even if the goods cannot be recovered, because the seller is seeking to recover the value of his goods which he gave to the buyer on the condition that the price will be paid within a specified time. Hence title is retained even though delivery is made which means that the buyer is not the owner of the goods until payment is made.

In its simplest form, an RT clause in a contract for the sale of goods is relatively uncomplicated to create. It merely provides that the seller supplies goods to the buyer on the condition that ownership of the goods (title) will not pass to the buyer until the goods have been paid in full. The reason for including this clause in a sales contract is to assure the seller that payment will ultimately be made. This assurance derives from the fact that an RT clause "allows the owner/supplier of goods to seize the property should the debtor fail in one of his primary obligations, notably, payment of the price". If the seller cannot get her money from the buyer, she can get her goods back.

However, it is not so much the possibility of reclaiming goods supplied that inspires sellers to include RT clauses in their contracts. In general, sellers are probably more interested in payment than the return of their goods. The principal significance of an RT clause from the seller's perspective is the potential priority it may give her vis- -vis other creditors in the event of the buyer's insolvency:

The broad purpose of an agreement that a seller retains title to goods pending payment of the purchase price and other moneys owing to him is to protect the seller from the insolvency of the buyer in circumstances where the price and other moneys remain unpaid. The seller's aim in insisting on a retention of title clause is to prevent the goods and the proceeds of sale of the goods from becoming part of the assets of an insolvent buyer, available to satisfy the claim of the general body of creditors (supra).

38. Several jurisdictions such as English, USA, Germany, Australia and Hong Kong recognize retention of title clauses as being a commercially viable way to do business on credit. The courts of these jurisdictions have held it to be a practical tool to secure payment of goods, sold on credit, where the goods are delivered prior to payment being made. In many jurisdictions it is left to the parties to agree contractually on a retention of title clause, however in order to secure the interest of unpaid sellers in a trade where sale on credit is common practice, the courts have stepped in to interpret the statute such that an implied retention of title arrangement is read into the law. The United States Court of Appeals for the Fourth Circuit in Nickey Gregory Company, LLC; Poppell's Produce Incorporated v. AgriCap, LLC, a/k/a AgriCap Financial Corporation (No.09-1130) held that the Perishable Agriculture Commodities Act, 1930 ("PACA") was enacted to suppress unfair business practice and was amended in 1984 to provide a unique credit protection to sellers of perishable commodities whereby during the credit period a trust for the benefit of the unpaid seller of the commodities was created and termed as a non-segregated floating trust, wherein title in the commodities stays with the unpaid seller, giving the seller the right of recovery, which right is superior to all other creditors. In another case the United States District Court for the Southern District of Texas Houston Division, Benny's Farm Fresh Products, Inc. v. Vine Ripe Texas, Inc., et al. (Civil Petition No.H-08-2669), found that the PACA trust includes all commodities received and all products derived from these commodities and any proceeds due from the sale of these commodities. The court held that PACA was designed to protect producers of perishable agricultural products most of whom entrust their products to a buyer and are dependent upon the buyers business acumen and fair dealing with respect to payment. Hence to give effect to the intent of the law the proceeds from the sale of the commodities were also to be held in trust until payment was made. In this way it is not uncommon even for the lawmaker to recognize the burden on commercial activities where sellers suffer a high risk of not being able to recover amounts due to them. Retention of title is read into the provisions of the law to give effect to the law and secure its purpose. The effect thereof is that the goods are held by the buyer in trust for the benefit of the unpaid seller until full payment is made. The trust includes all commodities, received and accepted but not paid for and will include products derived from the goods. Once the trust comes into being, by operation of law, the suppliers rights are preserved are protected. It is now for the buyer to ensure that payment is made and any omission on the part of the buyer will not deprive the unpaid seller the price of the goods. The goods of the unpaid seller do not come into the ownership of the buyer until payment is made. Hence the goods do not become part of the assets of

the buyer until payment is made. The buyer therefore cannot treat the goods as his own and create a security interest on them or sell them. In the event that the buyer does either of the two the unpaid seller has the right under the retention of title clause to claim the value of the goods as owner of the goods. This is especially so where the nature of the trade is such that the goods are purchased on credit and the seller requires some security before delivering the goods. Sellers of perishable commodities often suffer at the hands of the buyers who immediately utilize the goods but fail to make the payment leaving the unpaid seller with little or no hope of recovering payment. Hence the assumption that parties in a contract of sale for moveable items, agree impliedly on a retention of title structure will help to bridge the gap between the written law and the practical reality.

39. In some cases the original goods to which title belongs to the unpaid seller are no longer identifiable or the goods lose their original identity and the question that arises is the manner in which the retention of title clause is enlarged to cover the resulting products. In the case titled Aluminum Industries Vaassen B.V. v. Romalpa Aluminum Ltd. [1976] 1 WLR 676, the retention of title clause was interpreted to cover ownership rights in the new objects. In this case a Dutch exporter sold aluminum foil to an English company under a sales contract containing a retention of title clause. When it appeared that the English company was about to be placed under receivership, the Dutch company filed a petition to recover both the aluminum foil still in the buyer's possession and the proceeds from the sale of the foil. By virtue of the retention of title clause, the Dutch company succeeded on both counts. The court held that in order to give effect to the retention clause it must be construed as conferring on the English company a power to sell unmixed foil and at the same time imposing on them an obligation to account for proceeds of sale in favour of the Dutch company. The court was of the opinion that even though the English company sold the unmixed foil so far as the Dutch company was concerned, the foil was the Dutch company's property which the English company was selling as agents of the Dutch company, to whom they remain accountable. Consequently the court was of the opinion that the Dutch company was entitled to trace the proceeds of sale of the unmixed foil and recover them in priority to secured and unsecured creditors. The court emphasized upon the relationship between the parties which gave rise to an obligation to pay the Dutch company and held that the business purpose of the retention of title clause was to secure the Dutch company against risk of non-payment after they had parted with possession of the goods and since the price of the goods was verified and certified by the receiver, the value of the foil was ascertained traceable, whether or not those goods retained their identity after delivery. After this landmark judgment the retention of title clause is commonly referred to as the Romalpa clause. Following the Romalpa case a variety of retention of title clauses have developed in international trade. Enforcement of the more complex cases where goods change hands or no longer retain their original composition have led to an expanded understanding of the retention of title clause. The right of the unpaid seller is extended such that retention of title is applicable despite the fact that the goods were no longer identifiable or have lost their original identity to a new item. In the case Re Weldtech Equipment Ltd. (1991 BCC 16

(Eng. Ch. 1990), the enlarged retention of title clause was made applicable to the resale of goods supplied by the company. In the case Tatung (U.K) Ltd. v. Galex Telesure Ltd. (1989 BCC 325 (Eng. Q.B. 1988), the enlarged retention of title clause was made applicable to the sale proceeds even though the goods had lost their identity. In Associated Alloys Pty Limited v. CAN 001 452 106 PTY Limited (in Liquidation) [2000] HCA 25), High Court of Australia held that in the event that the buyer uses the goods of the seller then the buyer shall be liable from the proceeds of the goods to pay the unpaid seller even though the goods are totally converted goods. In all these cases the courts recognized that modern commercial practices required a shift from a basic retention of title clause to a more enlarged or expanded version of the same so as to ensure that the value of the goods are received by the seller.

40. In the cases before the Court the cane growers have delivered the sugarcane to the Brother Sugar Mills but have not received any payment for the sugarcane delivered. In the case of Brothers Sugar Mill delivery was made in 2014 and to date no payment has been made. In the other cases delivery was made in 2016-17 and the cane growers are still waiting for payment. The Sugar Mills on receipt of the sugarcane have utilized it, processed it and have sold bags of sugar. As per the record the Sugar Mills have obtained loans from the Banks to repay the cane growers and as security for these loans they have pledged the sugar bags with the Banks. However despite the same no payment has been made. The Sugar Mills have defaulted in their payment to the cane growers and in some cases with the Banks. It is important to note that the cane grower seeks recovery of the price of the sugarcane as owner of the sugarcane as the cane grower retains title in the sugarcane until payment is made and not as a creditor. Hence for the cane growers the cases before the Court seek enforcement of their right as owners of the sugarcane such that the real owners of the sugarcane assert their right of title against the pledge to the extent that the pledgee cannot take the property of the owners without their consent and knowledge and pledge it with the Banks. The enforcement of this right in no manner prejudices the rights of the secured creditor because the cane growers' sugarcane could not have been pledged with the Banks in the first case. The right of the Banks to recover as a secured creditor remains intact and is enforceable in accordance with law. However the rights of the cane grower as owner of the sugarcane are enforceable under the Act and the Rules which means its right to recover the price of the sugarcane will trump all other rights.

41. All the Sugar Mills before the Court admit and accept payments to the cane growers which have been verified by the Cane Commissioner under the supervision of the Court. The Sugar Mills have failed to pay the cane growers and despite the same expect the cane grower to keep delivering sugarcane in each crushing season. The Sugar Mill also entered into a financial relationship with the bank mortgaging its property and pledging all bags of sugar so that in the event of a default all money will go to the bank and the cane grower is left with nothing. The case of Brother Sugar Mills before the Court amplifies the plight of the cane grower. Sugarcane was

sold in the year 2014 and since then not a penny has been paid to the cane grower. The sugar mill has closed and the Banks are in the process of recovering all its money from the sugar mill through the sale of all its securities which includes sale of the pledged bags of sugar. With respect to the other banks recovery suits have been filed and decreed in some cases against Brother Sugar Mills. Consequently the Banks will take all the money and the cane grower will have no chance of recovering any amounts from the sugar mill or its owners. It is precisely for this reason that Rule 14(2) of the Rules requires payment to be made within fifteen days' time and these fifteen days are to be construed as being an implied retention of title on the sugarcane which means that title will not pass on to the buyer being a condition attached to the sale of the sugarcane. In fact Rule 14(1) of the Rules facilitates Rule 14(2) as it provides that the occupier or purchasing agent shall provide adequate facilities to the satisfaction of the Cane Commissioner for the payment of the price of cane. In terms of this Rule in order to ensure payment the Cane Commissioner can require that the bags of sugar produced by the cane of a specific cane grower be stored separately so as to identify the specific bags of sugar produced by specific cane growers or to mark the bags for identification purposes. The Cane Commissioner can also order for regular inspections to ensure that the cane growers' bags are separate or marked. In this way the connection between the goods, the title and the purchase price remains clear cut. Title is retained by the cane grower and will not transfer until the sugar mill pays its dues. The result is that the cane grower is not left as an unsecured creditor and instead has the necessary security by virtue of the law to ensure payment is made for the sugarcane delivered.

42. Another important aspect of this case which cannot be ignored is the reasons for the creation of the pledge. The reasons clearly go to intent of the parties. In some of the cases before the Court (W.Ps. Nos.25932/16, 19515/16, 63883/17, 64911/17, 64254/17), the sanction letters issued by the Banks to the Sugar Mills clearly stipulate that the loan is being advanced to the Sugar Mills to make payments to the cane grower for the sugarcane purchased. So effectively the Sugar Mill requests for money from the Bank for a stated purpose. However, the cane growers were not paid and instead the Sugar Mills utilized the loan money elsewhere. Although the Banks deny any responsibility towards the manner in which the facilities are utilized, in the very least the sanction letters evidence the obligation of the Sugar Mills to pay the cane grower which obligation is recognized by the Banks and of which they have been put to notice. The Sugar Mills being cognizant of its obligation and borrows finance from the Bank to fulfill its obligation. The Bank approves the facility knowing that there is an obligation to pay the cane grower. Hence the right of the cane grower to receive payment is one which is neither denied nor disputed by the Banks or the Sugar Mills. The only issue for the Banks is with respect to the recovery of unpaid amounts from the pledged bags of sugar.

43. Pledge is defined in Section 172 of the Contract Act to be as follows:-

The bailment of goods as security for payment of debt or performance of a promise is called "pledge". The bailor is in this case called the "pawnor". The bailee is called the "pawnee".

The key ingredients of a pledge are bailment of goods and security for repayment of a debt. Bailment is defined in Section 148 of the Contract Act as follows:-

A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called "bailee".

Bailment requires delivery of goods for a purpose and the right to retain the goods until the purpose is achieved. Section 173 of the Contract Act provides that the pawnee may retain the goods pledged not only for payment of the debt but also for the interest of the debt and all necessary expenses incurred in respect of the possession or preservation of the goods. So the right of the pawnee is the delivery of goods which it can retain in its possession till the debt is paid. If the pawnor makes a default in payment of the debt, the pawnee can file a suit against the pawnor to recover his dues or else he can sell the pledged goods after giving the pawnor reasonable notice under Section 176 of the Contract Act. The right to sell the pledged goods arises only in the event of a default which means that the pawnee requires physical possession of the pledged goods if it is to be sold in the event of default. Reliance is placed on A.M. Burq and another v. Central Exchange Bank Ltd. and others (PLD 1966 Lahore 1). Hence the essential characteristic of the security interest of the pledgee is the right to possession of the goods and the right to sell the goods in case of default.

44. The Cane Commissioner took possession of the bags of sugar which as per the Bank were pledged with the Banks and lying in the control of the muqadum. However even this needs to be seen in the perspective of the Act and the Rules. The Banks have taken bags of white refined sugar as pledged security. The Banks require the Sugar Mills to maintain the stock value of the pledge so as to ensure that the security is intact. As per the regular stock reports filed with the Banks the quantity of the bags of sugar keeps fluctuating meaning that the bags of sugar are sold by the Sugar Mills with an effort to retain as close as possible to the secured amount and the Banks ensures that the value of its pledged stock is retained. Essentially as per market practice, the actual delivery of goods is not entrusted to the Bank and only constructive possession of the pledged goods is handed over. In this way the pledger can utilize the pledged goods in the ordinary course of business. Examples of such forms of pledge include the pledge of raw material and stock in trade where the goods cannot be kept in their original form for long and have to be consumed by the pledger in the normal course of business. Consequently there are fluctuations in the inventory which is constantly replenished by the

pledgee. Hence the character of the pledge is not lost merely because of the fact that actual physical possession is not with the pledger or because the pledgee consumes the pledged goods. Reliance is placed on Messrs World Trans Logistics and others v. Silk Bank Limited and others (2016 SCMR 800). The stock reports filed in the Banks cases, reflect that bags of sugar retained by the Banks under the pledge at the time of the pledge have not stayed in the physical custody of the Banks since. In fact the letters of pledge allow usage of the stock within an 18% margin. The Sugar Mills have been utilizing the bags of sugar while at the same time trying to retain the stock of the pledged bags of sugar. This goes to show that in normal course of business the character of the pledge remains intact at all times even if the stock position with respect to the bags of sugar are not reflective of the actual quantity pledged with the Banks. The relevance of this point is only to emphasize that the security interest of the Banks so far as the pledge is concerned does not diminish or deplete if the stock position is not maintained by the Sugar Mills. It also emphasizes the point that the Bank has the right to recover its debt at the time of default and in order to secure that right it is the objective of the Banks that the pledged security is maintained with the Sugar Mills. Therefore whether or not the Banks have actual physical possession of the pledged bags of sugar will in no manner infringe upon its rights as a secured creditor. Furthermore in the cases where the Sugar Mills are in default of their financial obligations to the Banks, recovery suits have been filed and in one case decreed. In these cases the Banks are before the court of competent jurisdiction which has the power to recover amounts secured by way of the pledge. This means that for the satisfaction of the decree by sale of pledged bags of sugar will be seen by the Court where the cases are pending. In the cases where there is no default the objective of the Bank is simply to retain possession of the bags so as to protect its security interest. In the event that the stock position is depleted the Bank can require the Sugar Mills to replenish the stocks to maintain its security. Hence no prejudice is caused to them.

45. Having found that the cane growers have the right to claim the value of the sugarcane delivered to the Sugar Mills, the right of the cane growers as the owner of the sugarcane is a superior right to all other rights, on the basis of which the cane grower is entitled to recover the value of the sugarcane from the sale of the bags of sugar. The security interests of the Banks remain intact, however the cane growers debt must be paid as provided under the Act and the Sugar Mills cannot shy away from this obligation by seeking protection of the bags of sugar for the benefit of the Bank. The cane growers before the Court have fulfilled their statutory obligations and delivered the sugarcane to the Sugar Mills yet the Sugar Mills have not fulfilled their obligation to pay the price of the sugarcane that was delivered to it. This Court cannot interpret the intent of the Act and the Rules so as to give the Sugar Mills an undue advantage over the cane growers, especially since the Act does not allow the sugar mill to take advantage of the cane grower and mandates the sugar mill to make payment of the sugarcane delivered. Therefore in order to ensure that the purpose of the Act is upheld, it is necessary to ensure that the cane grower is paid the value of the sugarcane. In the event that the Court does not maintain and enforce

the purpose of the law and the cane growers are not paid, the purpose of the law will be defeated.

46. It is important to note that in the case of Brother Sugar Mills (W.P. No.4562/2016), the Court vide order dated 24.6.2016 sealed the premises to secure the bags of sugar from the illegal removal of the bags by the mill owners. On 12.7.2016 the Court ordered that the bags of sugar be sold and the amounts deposited in Court. These orders were made in the presence of the parties with the consent of the Banks, Mill Management and cane growers to secure the value of the bags of sugar, until this case was finally decided. On 27.3.2018 this Court was informed that in the Execution Application No.92313/2017, an application under Order XXI, Rule 52 of the Code of Civil Procedure, 1908 (C.M. No.1/2017) was moved by Al-Baraka Bank (Pakistan) Limited on 6.12.2017 for the attachment of the property in the custody of the Court in W.P. No.4562/2016. The Court vide its order dated 19.3.2018 attached these amounts subject to the question of title or priority arising between the Bank and any other person subject matter of the petitions before the Court. Needless to say that order dated 19.3.2018 passed in banking jurisdiction cannot be made applicable to the proceedings of this Court in constitutional jurisdiction, especially with respect to the amounts in the custody of this Court from the sale of the bags of sugar. However the order of attachment itself reflects that the attachment is subject to decision of this Court with respect to title and priority of the amounts attached.

47. Therefore in view of the aforesaid, this Court holds that:

i) The Cane Commissioner is the competent authority under the Act and the Rules to recover all dues of the cane growers, that is specifically to recover the price of the sugarcane delivered to the Sugar Mills;

ii) The cane growers are entitled to the recovery of the value of the sugarcane delivered to the Sugar Mills under the Act and the Rules by sale of the bags of sugar lying in the Sugar Mills;

iii) In this regard, the rights of the Banks with respect to their pledged security is not prejudiced by the acts of the Cane Commissioner as they have adequate remedy available to them for the recovery of their dues as well as for the recovery of the bags of sugar pledged by the Sugar Mills, from the court of competent jurisdiction;

iv) Consequently all amounts lying with the Deputy Registrar (Judicial) of this Court in W.P. No.4562/2016 is to be released to the Cane Commissioner for disbursement to all the cane growers of Brother Sugar Mill as per the verified CPRs;

v) Furthermore the Cane Commissioner shall immediately exercise powers under Section 6(2) of the Act to recover the dues of the cane growers with respect to Pattoki Sugar Mill and Darya Khan Sugar Mill;

iv) Accordingly the Writ Petitions as detailed in Schedule A, filed by the cane growers are **allowed** and the Writ Petitions as detailed in Schedule B filed by the Banks are **dismissed.**

Schedule-A

Details of Writ Petitions mentioned in judgment

Dated 24.11.2017 passed in W.P. No.4562/2016

Sr. No	W.P. Nos.	Parties Name
1	36257/16	Khuram Rasool v. Cane Commissioner, Punjab etc.
2	36258/16	Muhammad Ijaz v. Cane Commissioner, Punjab etc.
3	36389/16	Sardar Abdul Aziz v. Cane Commissioner, Punjab etc.
4	36390/16	Muhammad Latif v. Cane Commissioner, Punjab etc.
5	36391/16	Intizar Ahmad Khan v. Cane Commissioner, Punjab etc.
6	36392/16	Asghar Ali v. Cane Commissioner, Punjab etc.
7	36946/16	Muhammad Rafique v. Cane Commissioner, Punjab etc.
8	36951/16	Muhammad Aslam v. Cane Commissioner, Punjab etc.
9	36952/16	Abdul Ghafoor Tasleem v. Cane Commissioner, Punjab etc.
10	36953/16	Muhammad Ramzan v. Cane Commissioner, Punjab etc.
11	37131/16	Maqsood Ahmed v. Cane Commissioner, Punjab etc.
12	37132/16	Muhammad Imran v. Cane Commissioner, Punjab etc.
13	37133/16	Muhammad Younas v. Cane Commissioner, Punjab etc.
14	37134/16	Abdul Rauf v. Cane Commissioner, Punjab etc.
15	37135/16	Niaz Ali v. Cane Commissioner, Punjab etc.
16	37136/16	Muhammad Farooq v. Cane Commissioner, Punjab etc.
17	37139/16	Islam Din v. Cane Commissioner, Punjab etc.
18	37140/16	Ghulam Nabi v. Cane Commissioner, Punjab etc.
19	37544/16	Allah Ditta v. Cane Commissioner, Punjab etc.
20	37547/16	Zia ur Rehman v. Cane Commissioner, Punjab etc.
21	37549/16	Abdul Rasheed v. Cane Commissioner, Punjab etc.
22	38924/16	Muhammad Siddique etc. v. Cane Commissioner, Punjab etc.

23	39148/16	Muhammad Anwar etc. v. Cane Commissioner, Punjab etc.
24	2341/17	Muhammad Farooq etc. v. Cane Commissioner, Punjab etc.
25	2342/17	Sardar Muqaddas Ali etc. v. Cane Commissioner, Punjab etc.
26	2319/17	Muhammad Mushtaq etc. v Cane Commissioner, Punjab etc.
27	5657/17	Ali Touqeer Bhangou v Cane Commissioner, Punjab etc.
28	5658/17	Muhammad Sarwar v Cane Commissioner, Punjab etc.
29	9340/16	Fida Hussain v Cane Commissioner, Punjab etc.
30	9342/16	Muhammad Zaid Sultan v Cane Commissioner, Punjab etc.
31	11883/16	Abdul Ghaffar v Cane Commissioner, Punjab etc.
32	15377/16	Muhammad Jamil v Cane Commissioner, Punjab etc.
33	15398/16	Mohsin Nazir Malik v Cane Commissioner, Punjab etc.
34	26480/16	Kashif Amin etc. v Cane Commissioner, Punjab etc.
35	26481/16	Abdul Ghafoor Tahir etc. v Cane Commissioner, Punjab etc.
36	33435/16	Muhammad Afzal v Cane Commissioner, Punjab etc.
37	33437/16	Abdul Jabbar v Cane Commissioner, Punjab etc.
38	25939/16	Muhammad Azam v. Cane Commissioner, Punjab etc.
39	25940/16	Saleem Haider v. Cane Commissioner, Punjab etc.
40	31524/16	Ch. Muhammad Aslam v. Cane Commissioner, Punjab etc.
41	1712/17	Muhammad Yousaf v. Cane Commissioner, Punjab etc.
42	1714/17	Muhammad Imran v. Cane Commissioner, Punjab etc.
43	1716/17	Muhammad Hammad Umer v. Cane Commissioner, Punjab etc.
44	11582/16	Muhammad Arif etc. v. Cane Commissioner, Punjab etc.
45	37975/16	Imran Khan v. Cane Commissioner, Punjab etc.
46	37976/16	Hafiz Manzoor Ali Khan, Advocate v. Cane Commissioner, Punjab etc.
47	39183/16	Abdul Jabbar v. Cane Commissioner, Punjab etc.
48	39190/16	Muhammad Akram v. Cane Commissioner, Punjab etc.
49	39242/16	Asghar Ali Sajid v. Cane Commissioner, Punjab etc.
50	39244/16	Muhammad Aslam v. Cane Commissioner, Punjab etc.
51	25931/16	Sardar Iftikhar Ahmad Dogar v. Cane Commissioner, Punjab etc.
52	25933/16	Allah Ditta v. Cane Commissioner, Punjab etc.
53	25935/16	Bashir Ahmad Khan v. Cane Commissioner, Punjab etc.
54	25937/16	Muhammad Zaman v. Cane Commissioner, Punjab etc.
55	25938/16	Malik Shah Jahan Babar v. Cane Commissioner, Punjab etc.
56	4768/17	Subah Sadiq v. Cane Commissioner, Punjab etc.
57	37194/16	Muhammad Hanif v. Government of Punjab etc.
58	39229/16	Muhammad Tariq Naeem v. Government of Punjab etc.

59	39043/16	Muhammad Iqbal Javed etc. v. Cane Commissioner, Punjab etc.
60	39042/16	Munawar etc. v. Cane Commissioner, Punjab etc.
61	25934/16	Amanat Ali v. Cane Commissioner, Punjab etc.
62	25936/16	Jamil Ahmad v. Cane Commissioner, Punjab etc.
63	27795/16	Sarfraz Umer Khan etc. v. Government of Punjab etc.
64	36724/16	Faiz Ahmad etc. v. Government of Punjab etc.
65	39228/16	Muhammad Arshad v. Government of Punjab etc.
66	40300/16	Muhammad Yahyah v. Government of Punjab etc.
67	38934/16	Akhtar Hussain v. Cane Commissioner, Punjab etc.
68	38936/16	Abbas Ali etc. v. Cane Commissioner, Punjab etc.
69	39533/16	Malik Saif Ullah v. Cane Commissioner, Punjab etc.
70	39534/16	Muhammad Sarwar v. Cane Commissioner, Punjab etc.
71	39039/16	Liaqat Ali etc. v. Cane Commissioner, Punjab etc.
72	39530/16	Rana Mustansar Asif v. Cane Commissioner, Punjab etc.
73	39202/16	Rasheed Ahmad v. Cane Commissioner, Punjab etc.
74	4178/17	Muhammad Tufail etc. v. Cane Commissioner, Punjab etc.
75	4403/16	Muhammad Hanif v. Province of Punjab etc.
76	4656/17	Sardar Iftikhar Ahmad Dogar etc. v. Government of Punjab etc.
77	2824/16	Syed Najam ul Hassan Zaidi v. Cane Commissioner, Punjab etc.
78	1088/16	Munir Ahmad v. Secretary, Government of Punjab, Food Department etc.
79	22015/16	Shoukat Ali v. Cane Commissioner, Punjab etc.
80	22843/16	Sardar Jahanzeb Ali v. Cane Commissioner, Punjab etc.
81	37474/16	Muhammad Yasin v. Cane Commissioner, Punjab etc.
82	77451/17	Sardar Muhammad Ashraf v. Sugarcane Commissioner, Punjab etc.
83	8347/17	Abdul Majeed etc. v. Cane Commissioner, Punjab etc.
84	4608/17	Asghar Ali etc. v. Cane Commissioner, Punjab etc.
85	5040/17	Muhammad Khalid v. Government of Punjab etc.
86	459/17	Muhammad Sabir etc. v. Cane Commissioner, Punjab etc.
87	91863/17	Abdul Majeed etc. v. Cane Commissioner, Punjab etc.
88	28102/16	Liaquat Ali v. Cane Commissioner, Punjab etc.
89	2321/17	Muhammad Javed v. Secretary, Government of Punjab, Food Department etc.
90	26535/16	Sardar Muhammad Farooq, Advocate v. Secretary, Government of Punjab, Food Department etc.
91	103764/17	Muhammad Iqbal v. Cane Commissioner, Punjab etc.
92	8194/17	Tariq Azam Khan v. Government of Punjab etc.

93	50197/17	Ch. Khurshed Ahmad v. Cane Commissioner, Punjab etc.
94	4169/17	Noor Muhammad etc. v. Cane Commissioner, Punjab etc.

Schedule-B

Details of Writ Petitions mentioned in judgment

Dated 24.11.2017 passed in W.P. No.4562/2016

Sr. No	W.P. Nos.	Parties Name
1	4562/16	Al-Baraka Bank (Pakistan) Limited v. Province of Punjab through Secretary Food etc.
2	4650/16	JS Bank Limited v. Province of Punjab through Secretary Food Department etc.
3	10377/16	Bank of Khyber v. Brother Sugar Mills Ltd. etc.
4	19515/16	Summit Bank Limited v. Cane Commissioner, Punjab etc.
5	25932/16	National Bank of Pakistan v. Cane Commissioner, Punjab etc.
6	63883/17	United Bank Limited v. Government of Punjab etc.
7	64254/17	MCB Bank Limited v. Province of Punjab etc.
8	64911/17	MCB Bank Limited v. Province of Punjab etc.
9	67851-17	Meezan Bank Limited v. Government of Punjab etc.

KMZ/A-22/L Order accordingly.

2018 C L C 809
[Lahore]
Before Ayesha A. Malik, J
Syed KALEEM UR REHMAN and others----Petitioners
Versus
SECRETARY COOPERATIVES, GOVERNMENT OF PUNJAB and others----Respondents
W.Ps. Nos.156887, 154849 and 160181 of 2018, heard on 15th February, 2018.

Co-operative Societies Act (VII of 1925)---

----Ss. 17(b) & 64(a)---Bylaws of the Cooperative Model Town Society (1962) Limited, Lahore, Clause 13(i)&(ii)---Election of Co-operative Society---Election Sub-committee, powers of---Termination of membership---Scope---Petitioners were members of Cooperative Model Town Society and their grievance was against Election Sub-Committee of the Society which terminated their membership during scrutiny of voter list prepared for elections of the society---Validity---Election Sub-Committee could not adjudicate upon qualifications of a member and order to terminate his membership---Election Sub-committee could not pass orders on objections filed against voter list stating that petitioners were not qualified to be members of the society in terms of clause 13(ii) of Bylaws of the Cooperative Model Town Society (1962) Limited, Lahore---In order to determine whether petitioners stood terminated from membership consequent to qualification provided by bylaw number 13(ii) of Bylaws of the Cooperative Model Town Society (1962) Limited, Lahore, matter was to be placed before general body/Managing Committee which had to hear the matter and pass an order whereafter, right of appeal was available to such person before Registrar of Cooperatives---In terms of election schedule, last date for filing objections was 23-01-2018 and objections were to be decided within 2 days; in such a situation where an order was passed deleting name of petitioners from voters' list because they were not qualified to be members, had left petitioners remediless as they were unable to appeal against the order of Election Sub-Committee within required time as per election schedule---High Court set aside order passed by Election Sub-Committee and directed that petitioners could proceed with nomination process and participate in election for Managing Committee of the society---Constitutional petition was allowed accordingly.

Muhammad Javaid Iqbal Qureshi for Petitioner (in W.P. No.156887 of 2018).
Saad Rasool for Petitioner (in W.P. 154849 of 2018).
Khalid Ishaq for Petitioner (in W.P. 160181 of 2018).
Iftikhar Ahmad Mian and Ch. M. Ejaz Jamal for Respondent Society.
Kh. Salaman Mahmood, AAG with Muazzam Ali Butt, Assistant Registrar (Housing-III) Lahore and Farrukh Hayat Pannu, Convener Election Sub-Committee in person.

Date of hearing: 15th February, 2018.

JUDGMENT

AYESHA A. MALIK J.--- This single judgment decides upon the issues raised in the instant petition as well as connected WP Nos.154849 and 160181 of 2018 as common questions of law and facts are involved in these petitions.

2. The Petitioners in all the petitioners are members of the Cooperative Model Town Society ("Society") and some have served on the Managing Committee ("M.C.") of the Society. A dispute has arisen between the Petitioners and the Society with reference to the upcoming 2018 elections for the MC of the Society. In the instant case, objection was raised by Respondent No.6 before the Election Sub-Committee ("ESC") with respect to the membership of the Petitioners. The ESC heard the objection and passed order dated 24.01.2018 whereby the names of the Petitioners were directed to be deleted from the voter list. The reason given in the order was that the Petitioners were not the original allottees of the settlement department and are subsequent purchasers, hence, their membership is hit by clause 13 (i) and (ii) of the Bye Laws of the Cooperative Model Town Society (1962) Limited, Lahore ("the Byelaws"), meaning thereby that they cannot be members of the Society and their names were directed to be deleted from the voters list of the Society. The Petitioners filed a revision petition before the Secretary Cooperative, who passed order dated 25.01.2018 suspending the order of ESC dated 24.01.2018. Against the order of 25.01.2018 Respondent No.6, Arif Majeed filed WP No.154849/2018 on the ground that the Secretary Cooperative did not have jurisdiction as an appeal against the order of ESC lies before the Registrar Cooperative and not before the Secretary Cooperative. The order of 25.01.2018 was suspended by this Court vide order dated 29.01.2018 passed in WP No.154849/2018. The Petitioners in the instant petition withdrew the revision petition filed before the Secretary Cooperative and filed a petition under Section 64-A of the Cooperative Societies Act, 1925 ("Act") before the Registrar Cooperative, who vide order dated 30.01.2108 declined to interfere in the matter on account of the pendency of the present petitions before this Court. The said order was impugned before the Secretary Cooperative on the same day who also declined to interfere on the same ground vide order dated 30.01.2018. Both these orders of 24.01.2018 and 30.01.2018 have been impugned in the instant petition along with the order dated 24.01.2018 of ESC.

3. The Petitioner in WP No.154849/2018 is a member of the society, who is aggrieved by the participation of the Petitioners of WP No.156887/2018 in the upcoming election on the ground that they do not qualify as members of the Society and therefore, cannot contest the election. The Petitioner, Arif Majeed filed WP No.154849/2018 challenging the order of 25.01.2018 passed by the Secretary Cooperative, however, subsequently since the revision petition pending before the Secretary Cooperative was withdrawn as such the prayer to the extent of the impugned order has become infructuous. The Petitioner also questions the participation of Respondents Nos.6 and 7 (Petitioners in WP No.156887/2018) in the election.

4. The Petitioners of WP No.160181/2018 are members of the Society, who have actively taken part in the affairs of the Society. They are desirous to contest the upcoming election of the Society. However, their names have also been deleted from the voters list by ESC on the basis of some objections. They are aggrieved by orders dated 24.01.2018 and 30.01.2018 passed by Respondents Nos.1 to 3 whereby the names of the Petitioners were directed to be deleted from the voters list.

5. Counsel for the Petitioners argued that the order of ESC failed to take into consideration the fact that both the Petitioners are members of the Society since long and that they have contested and participated in the previous elections for the Managing Committee. That the ESC does not have jurisdiction to terminate or expel any member of the Society as a member of the Society enjoys substantive rights which cannot be adjudicated upon by the ESC. Further that the election schedule gives no time to a member whose name has been deleted to file an appeal before the Registrar and have decided the matter before the nomination process commences.

6. Counsel for Respondent No.6 argued that ESC has jurisdiction in the matter and in terms of the election rules the ESC hears all objections against the voters list and passes a final order making all additions and corrections to the electoral rolls. Learned counsel has placed on record the election schedule and the notifications appointing the ESC. Against the order of the ESC the right of appeal lies before the Registrar Cooperative which is the proper forum to hear the matter. Both counsel in WP No.160181/2018 and WP No.154849/2018 prayed that the matter be referred to the Registrar Cooperative for a decision on merits.

7. Convener ESC present in Court stated that as per his understanding the ESC passed the orders of deletion as per its jurisdiction and that it was competent to delete the names of members who do not qualify to be members.

8. Heard and record perused. The basic issue in these petitions is the role of the ESC when considering objections against the voters list. The relevant rules are the Election Rules of the Cooperative Model Town Society. In terms of the Election Rules preliminary list of members is prepared blockwise, sixty days before the date on which the election is scheduled to be held. A Sub-Committee consisting of the President and two members is appointed by the Managing Committee who will hear and pass orders on the objections raised on the voting list within ten days of the last date fixed for filing objections. After the objections are filed and finally disposed of by the ESC, the list of additions and corrections of the electoral rolls is published and a final voter list is made available. In terms of the election schedule issued by the ESC, the last date for filing objections against the voter list was 23.01.2018, which were to be decided within two days and the final voters list was displayed on 27.01.2018. In terms of the Election Rules the ESC hears objections on the voters list for the purposes of addition and correction in the voters list. Basically this entails a verification process wherein the ESC has to finalize the voters list on the basis of which the election can take place. The voters list provides for the names of the members and the relevant block number, the membership number, the CNIC

number and a comment as to whether the member is a defaulter. This information on the list has to be verified and confirmed by the ESC and additions and corrections are made to the information provided. Therefore, the scope of work of the ESC so far as hearing objections on the voters list is limited to verification of the contents of the list to ensure that every name on the list is that of a member from the given blocks. The ESC can pass orders to the extent that it can make corrections and additions to the list to remove duplications, correct mistakes in the details given and delete the name of persons who have died. The ESC however cannot pass orders with respect to the qualification and eligibility of a member and cannot pass orders on whether a person is entitled to be a member. Membership and the rights attached thereto are controlled by the Byelaws of the Society as well as by the Act. In terms of the Byelaws of the Society the process to make members is provided under Byelaws Nos.1 to 18. Byelaw No.19 provides for the termination of membership and Byelaw No.20 provides for the expulsion of a member. So far as expulsion of a member is concerned, in terms of Byelaw No.20 (1) a member may be expelled from membership by a vote of not less than two-third of the members present which took place in general meeting of the Society. Therefore, the power of expulsion of any member as per Byelaw No.20 lies with the General Body of the Society. In terms of Section 17 (b) of the Act, the Registrar can expel a member, who is a defaulter of the dues of the Society. Hence to the extent of expulsion of members, all parties before the Court agree that it can only be done through a meeting of the General Body or in terms of Section 17 (b) of the Act.

9. Respondent No.6 and the Chairman of the ESC relied upon Byelaw No.19 (c) to urge the point that ESC can terminate membership in terms of Byelaw No.19. However this argument is misconceived and against the spirit of the Act and Election Rules. A bare reading of Rules (iv), (v) and (vi) of the Election Rules makes it clear that ESC can only make additions and corrections in the voters list. The ESC cannot adjudicate upon the qualifications of a member and order to terminate the membership. In the cases before the Court the ESC passed orders on objections filed against the voters list (WPs Nos.156887 and 160181 of 2018) wherein it was stated that the Petitioners are not qualified to be members of the Society in terms of Byelaw No.13 (2) of the Society. In order to determine whether the Petitioners stand terminated from their membership consequent to the qualification provided in Byelaw No.13(2) of the Society, the matter has to be placed before the General Body/Managing Committee which has to hear the matter and pass an order whereafter right of appeal will be available to such a person before the Registrar Cooperative.

10. It is noted that in terms of the election schedule the last date for filing objections was 23.01.2018 and the objections had to be decided within two days. During this time in a situation such as in the instant petition where an order has been passed deleting the names of the Petitioners from the voter list because they are not qualified to be the members, leaves the Petitioners remediless as they are unable to appeal the order of the ESC within the required time as per the election schedule. Hence the Petitioner came to this Court seeking interference in the matter.

11. In view of what has been stated above, WPs Nos.156877 and 160181 of 2018 are **accepted** and the order dated 24.01.2018 and 30.01.2018 passed by ESC are set aside. The Petitioners may proceed with the nomination process and participate in the election for the Managing Committee of the Society. So far as WP No.154849/2018 is concerned, the same is **dismissed.**

MH/K-4/L Order accordingly.

2018 P L C (C.S.) 532
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
CHIEF SECRETARY TO GOVERNMENT OF PUNJAB through Secretary Finance, Lahore
Versus
Dr. SAJJAD HUSSAIN and others
I.C.A. No.1223 of 2017, decided on 12th December, 2017.

Punjab Government Servants (Medical Attendance) Rules, 1959---

----Rr. 6 & 3---Policy for Treatment Abroad of Punjab Civil Servants dated 07-09-1986---Constitution of Pakistan, Art.25---Treatment abroad of family member of civil servant---Reimbursement of medical expenses---Scope---Employee being retired civil servant applied for reimbursement of medical expenses incurred on the treatment abroad of her daughter but same was declined---Constitutional petition for reimbursement of medical expenses was allowed by Single Judge of the High Court---Validity---Reimbursement of medical expenses was granted to another retired employee which were incurred abroad despite the ban imposed on reimbursement of medical charges---If a patient was suffering from a disease or disability for which no treatment was available in Pakistan then he was entitled to treatment abroad and reimbursement as per Rules---Special Medical Board was constituted to examine the case of daughter of employee---Patient was in dire need of liver transplant which had to be carried out immediately---Liver transplant was not available in Pakistan---Employee followed the process as provided under the Rules, got necessary approval and took his daughter to a hospital in India for treatment---Government could not formulate its own criteria stating that a person of higher rank was more deserving than someone of lower rank---Criteria would be the genuineness of medical assistance required and fulfillment of criteria given in the Rules and the Policy---Punjab Government Servants (Medical Attendance) Rules, 1959 allowed treatment to family members which included son and daughter of a government servant---No illegality had been pointed out in the impugned order passed by the Single Judge---Intra court appeal was dismissed in circumstances.
Muhammad Ijaz, AAG on behalf of the Appellant along with Mrs. Naseem Mushtaq, Law Officer, Finance Department.
Mansoor Usman Awan and Murtaza Hussain, Advocates for Respondent No.1.

ORDER

Chief Secretary, Government of Punjab through this ICA has impugned judgment dated 08.05.2017 passed by the learned Single Judge in W.P. No.11181/2013.

2. The case of the Appellant is that Respondent No.1 was a retired government servant and after his retirement his daughter fell ill and required her liver transplant. A special medical board recommended her treatment abroad and referred the matter to the Appellant for further instructions. Respondent No.1 took his daughter to

Indraprastha Apollo Hospital Delhi, India where she was given a liver transplant and regained her health. Respondent No.1 in terms of the West Pakistan Government Servants (Medical Attendance) Rules, 1959 ("Rules") applied for reimbursement of the medical expenses incurred for the liver transplant. The total expenditures came to Rs.4,744,760/- out of which the Appellant reimbursed Rs.2,000,000/-. Respondent No.1 moved a representation seeking the balance amount of Rs.2,744,760/- which remained outstanding and should be reimbursed to him. The Appellant refused reimbursement of the said claim vide order dated 14.01.2013 stating that Rs.2,000,000/- was granted to Respondent No.1 as financial assistance on compassionate grounds which was otherwise not allowed. Further that reimbursement of medical charges for treatment abroad was not permissible under the Rules. Respondent No.1 challenged the said order in W.P. No.11181/2013 alleging discrimination pointing out that others in similar position, especially Mr. Jahanzeb Burki, a retired Inspector General of Police, Punjab who was reimbursed an amount of Rs.7.140 million for his medical treatment in Texas, USA, hence the Respondent No. 1 claimed entitled to reimbursement. The learned Single Judge decided the case on the grounds of discrimination while holding that several persons were granted reimbursement of medical expenses including Mr. Jahanzeb Burki, hence Respondent No.1 is also entitled to reimbursement of medical expenses for the treatment of his daughter.

3. Learned Law Officer argued that there are ten examples cited in the impugned judgment, however all ten persons were treated in Pakistan, hence their case is distinguishable. So far as the case of Mr. Jahanzeb Burki is concerned he was granted full reimbursement of his medical treatment in the USA as it was for his own treatment being a high ranking officer owing his performance which made it necessary to reimburse him for his treatment.

4. We have heard the learned counsel for the parties at length and find no illegality in the impugned order. Admittedly Mr. Jahanzeb Burki was granted full reimbursement of the medical expenses incurred in the USA despite the ban imposed on reimbursement of medical expenses since 1997. The Rules provide for relaxation in cases of special hardship and in terms of the Policy for Treatment Abroad of Punjab Civil Servants dated 7.9.1986 ("Policy") if a patient is suffering from a disease or disability for which no treatment is available in Pakistan then he is entitled to treatment abroad and reimbursement as per Rules. In this case, a special medical board was constituted to examine the case of the daughter of Respondent No.1. In terms of its report dated 17.3.2010 the patient was in dire need of liver transplant, which had to be carried out immediately and the report categorically stated that the liver transplant was not available anywhere in Pakistan. Therefore, Respondent No.1 followed the process as provided under the Rules, got necessary approval and took his daughter to a hospital in India for immediate treatment.

5. On the ground of discrimination admittedly Mr. Jahanzeb Burki was reimbursed the full amount for treatment abroad. The Appellant cannot formulate its own criteria stating that a person of a higher rank whose performance was considered

good was more deserving than someone of lower rank. The criteria would be the genuineness of the medical assistance required and the fulfillment of the criteria given in the Rules and the policy. The governing Rules are West Pakistan Government Servants (Medical Attendance) Rules, 1959 which allow treatment to family members, which includes son and daughter of a government servant. The treatment was certified as not being available in Pakistan as per the special medical board. We note that in fact the policy specifically prohibits treatment in the USA in view of higher value of the dollar than that of Pakistani Rupee and the expenses that could be incurred in the USA. Notwithstanding the same, Mr. Jahanzeb Burki was treated in USA and was reimbursed the full amount.

6. Under the circumstances, we find the impugned order well reasoned, hence the instant appeal is dismissed and impugned order dated 08.05.2017 passed by the learned Single Judge in W.P. No.11181/2013 is maintained.

ZC/C-28/L Appeal dismissed.

2018 Y L R 1371
[Lahore]
Before Ayesha A. Malik, J
JADEED EDUCATION SERVICES through authorized person and 5 others---Petitioners
Versus
GOVERNMENT OF PUNJAB through Secretary, School Education Department and others---Respondents
W.P. No.28265 of 2017, heard on 13th March, 2018.

Punjab Procurement Regulatory Authority Act (VIII of 2009)---

----S. 2(n)---Punjab Procurement Rules, 2014, R. 3---Public procurement---Scope---Punjab Curriculum and Textbook Board ("the Board")---Printing and publishing of textbooks for private schools---For the purposes of printing and publishing textbooks for government schools, the Board and the authorities invited tenders, whereas for the purposes of private schools the publishing and printing work was allocated among the publishers and printers on the basis of their strength and capacity---Petitioners, who were publishers engaged in the business of publishing and printing textbooks and were duly registered with the Board, contended that for purposes of private schools also the Board and the authorities were obligated to follow the Punjab Procurement Regulatory Authority Act, 2009 ("Act") and the Punjab Procurement Rules, 2014 ("Rules"); held, that the petitioners' relationship with the Board was contractual in nature as the quantum and price (for printing and publishing textbooks for private schools) was negotiated before settling the terms for providing textbooks---For the purposes of government schools, the 'Act' and the 'Rules' were followed as public provision was involved, however in case of private schools, the 'Act' and 'Rules' were not followed because there was no public procurement involved as the services were not financed wholly or partly out of the public fund---In terms of section 2(n) of the 'Act', public procurement meant acquisition of goods, services or rendering of works financed wholly or partly out of the Public Fund, unless excluded by the Government---In the present case, clearly there was a contractual relationship in which the petitioners negotiated the terms and conditions at which they would print and publish the textbooks for the private schools--- Since there was no element of public procurement involved, there was no obligation on the part of the Board and the authorities to call for public procurement for the purposes of private schools textbooks---Constitutional petition was dismissed in circumstances.

Sheraz Zaka for Petitioners.

Anwaar Hussain, Addl. A.G. for the State.

Shaigan Ijaz Chadhar for Respondents Nos. 2 and 3.

Date of hearing: 13th March, 2018.

JUDGMENT

AYESHA A. MALIK, J.---Through this petition, the Petitioners have laid challenge to illegal method of procurement in a non-competitive manner undertaken by the Respondent Punjab Curriculum and Textbook Board, Lahore ("PCTB") by allocation of work order for printing of textbooks.

2. The basic facts of the case are that the Petitioners are all publishers engaged in the business of publishing and printing textbooks and are duly registered with the Respondent PCTB. For the purposes of printing and publishing textbooks for government schools, the Respondents invited tenders. For the purposes of private schools the publishing and printing work is allocated among the publishers and printers on the basis of their strength and capacity. Learned counsel for the Petitioners argued that this is an arbitrary practice and that the Respondents are obligated to follow the Punjab Procurement Regulatory Authority Act, 2009 ("Act") and the Punjab "Procurement Rules, 2014 ("Rules"). Learned counsel further argued that the Respondents are procuring agents who are procuring services from the Petitioners for the purposes of printing and publishing textbooks for private schools, hence they are obligated to follow the procedure laid down in the Act and the Rules. Learned counsel further argued that this is a discriminatory practice which is against the nouns of fairness and transparency and defies the objective of public procurement to bring value for money.

3. Report and para wise comments have been filed by Respondents Nos. 2 and 3. Learned counsel for the stated Respondents submits that the Petitioner are all registered publishers with the stated Respondents. They entered into contracts with the Respondents for the purposes of printing and publishing textbooks for private schools. Learned counsel argued that the price and the quantum of textbooks that are to be printed and published is negotiated with the Petitioners and as such there is no arbitrary practice involved. Learned counsel also explained that all printers and publishers are registered with the Respondents based on their experience and capacity and work is allocated through balloting. The parties negotiate the terms of their contracts. The Petitioners before the Court have entered into contracts with the Respondents over the years including this year. For the purposes of government schools the Act and Rules are followed as the service of printing and publishing has to be procured in order to give free distribution of textbooks. For the purposes of private schools contracts are entered into with the candidates on the basis of negotiated price and negotiated quantum for printing and publication as no public procurement is involved. That the entire method of allocation is done with due care and diligence. Further that the process for the purposes of private schools is not financed from the Provincial Consolidated Fund nor is anything purchased, acquired or retained from the public exchequer on the basis of which the Act and the Rules must be followed.

Learned Law Officer supported the arguments made by learned counsel for Respondents Nos.2 and 3.

5. Heard and record perused.

6. After hearing the parties, it appears that the Petitioners' relationship with the Respondent PCTB is contractual in nature as the quantum and price is negotiated before settling the terms for providing textbooks for private schools. Furthermore as per the arguments made by the counsel for Respondent PCTB and the learned Law Officer for the purposes of government schools, the Act and the Rules are followed as public provision is involved. However, for the purposes of private schools, the Act and the Rules are not followed because there is no public procurement involved as the services are not financed wholly or partly out of the public fund. In terms of Section 2(n) of the Act, public procurement means acquisition of goods, services or rendering of works financed wholly or partly out of the Public Fund, unless excluded by the Government. In this case, clearly there is a contractual relationship in which the Petitioners negotiate the terms and conditions at which they will print and publish the textbooks for the private schools. Since there is no element of public procurement involved, there is no obligation on the part of the Respondents to call for public procurement for the purposes of private schools textbooks.

7. In view of the aforesaid, no case for interference is made out. Petition is dismissed.

MWA/J-1/L Petition dismissed.

2018 P L C (C.S.) 712
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
Dr. ZAHEER IQBAL and others
Versus
PROVINCE OF PUNJAB through Chief Secretary and others
I.C.As. Nos.718, 762, 729, 766, C.M. No.3 and I.C.A. No. 718 of 2013, heard on 23rd January, 2018.

(a) Civil service---

----Dental surgeons appointed on ad-hoc basis---Regularization of service---Recruitment through Public Service Commission---Discrimination---Effect---Employees who were appointed on ad-hoc basis applied for regularization against the seats advertised by Public Service Commission but they were not selected being lower in merit---Constitutional petition filed by the employees was dismissed on the ground that they had no vested right to be regularized and they should compete with other candidates on open merit for regularization against the post---Validity---Employees were appointed on ad-hoc basis as stop gap arrangement until the arrival of regular incumbents---Appointments of employees were extended from time to time and they continued to work as ad-hoc employee with the respondent department without any complaint or disruption---Employees appeared before Public Service Commission after applications were invited for making regular recruitment against the posts in question---Benefit of regularization was to be given to the candidates who fulfilled the minimum criteria of appointment established in test by the Public Service Commission---Cases of ad-hoc employees were not to be tagged with direct recruits and they were to be treated separately by the Public Service Commission---Public Service Commission carried out a simple interview of all the applicants on the basis of which merit list was prepared---Employees were not given any credit or benefit of their experience by the Public Service Commission---Interview process was subjective based on personal opinion of the Interview Committee with no objective criteria---Where test was competitive in nature, with a large number of applicants, the criteria for determining merit must be based on measurable data so as to ensure transparency and fairness---Even interview process marks must be allocated on an objective criteria which could enable the interview committee to evaluate the candidate in a fair and transparent manner---Posts of Hospital Pharmacists, Specialist Doctors and Medical Officers and Registrars among others had been filled up without recourse to Public Service Commission---Petitioners-employees had been discriminated in circumstances---Public functionaries must not discriminate in their decision making process and they were supposed to act fairly, justly and evenly---Impugned order passed by the Single Judge of High Court was set aside---Authorities were directed to regularize the services of employees for the posts of dental surgeons---Intra court appeal was allowed in circumstances.

Ch. Iftikhar Ahmad v. Chief Secretary Punjab and others 2012 PLC (C.S.) 1470; Chief Secretary, Government of Punjab and others v. Ch. Iftikhar Ahmad 2013 SCMR 392; Dr. Anwar Ali Sahto and others v. Federation of Pakistan and others PLD 2002 SC 101; Muhammad Younus Aarin v. Province of Sindh 2007 SCMR 134; Muhammad Bilal Khan v. Azad Government of the State of Jammu and Kashmir 2010 PLC (C.S.) 1060; Ejaz Majeed Bhatti and 5 others v. Punjab Public Service Commission 2011 PLC (C.S. 1049 and Abdul Ghaffar and others v. The President National Bank of Pakistan and others 2018 SCMR 157 ref.
Ameer Solangi and others v. WAPDA and others 2016 SCMR 46; Government of Khyber Pakhtunkhwa v. Ihsan Ullah and others 2017 SCMR 1201 and Dr. Naveeda Tufail and 72 others v. Government of Punjab and others 2003 SCMR 291 rel.

(b) Public functionaries---

----Public functionaries must act within the four corners of law.

Hafiz Tariq Nasim for Appellant (in I.C.A. No.718 of 2013).
Sardar Abdul Jabbar Tibbi for Appellants (in I.C.A. No.762 of 2013).
Malik Muhammad Ali Dadda for Appellants (in I.C.As. Nos.729, 766 and C.M. No.3 of 2013 (in I.C.A. No.718 of 2013).
Muhammad Siraj ul Islam Khan, Additional Advocate General along with Tariq Hanif, Law Officer, Health Department for Respondents.
Date of hearing: 23rd January, 2018.

JUDGMENT

AYESHA A. MALIK, J:--- This judgment decides upon the issues raised in the instant I.C.A. along with connected I.C.As. Nos.729/2013, 762/2013, 730/2013 and 766/2013 as all appeals impugn the same order dated 20.5.2013 passed by the learned Single Judge in W.P. No.902/2013 along with connected petitions.

2. The Appellants before the Court are dental surgeons (BDS) who were appointed on different dates and have been working in different government hospitals since 2009 as ad-hoc appointees. At the time when the writ petitions were filed in 2013 the Appellants applied for regularization against 110 seats for which their cases were considered by the Punjab Public Service Commission ("PPSC"). Although the Appellants qualified, however being lower in merit, they were not selected against the 110 seats. The grievance of the Appellants before the learned Single Judge was that they were entitled to be regularized since they had been working on ad hoc basis for several years as dental surgeons; that they qualified the process undertaken by the PPSC for the purposes of filling up the vacancies against permanent seats and that they were discriminated against. The learned Single Judge dismissed the writ petitions on the ground that there is no vested right of the Petitioners to be regularized and that the appointment letters of the petitioners unequivocally states that they would compete with other candidates on open merit for regularization against the said post.

3. Learned counsel for the Appellants argued that the learned Single Judge failed to consider the decisions of the Superior Courts in identical cases being Ch. Iftikhar Ahmad v. Chief Secretary Punjab and others (2012 PLC (C.S.) 1470) and Chief Secretary, Government of Punjab and others v. Ch. Iftikhar Ahmad (2013 SCMR 392). That the learned Single Judge also did not appreciate that a clear case of discrimination was made out particularly when the Appellants provided Notification dated 17.12.2009 issued by the Health Department whereby ad hoc Hospital Pharmacists (BS-17) were regularized by taking the posts out of the purview of the PPSC under Rule 5 of the Punjab Public Service Commission (Functions) Rules, 1978 and in relaxation of Rules 4, 16, 17 (to the extent of upper age limit) of the Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974. Similarly Notification dated 3.8.2009 issued by the Health Department for the post of Specialist Doctors (BS-18) and Notification dated 6.5.2009 issued by the Health Department for the posts of Medical Officers/Women Medical Officers/Registrars/Assistant Anesthetists/Demonstrators/Blood Transfusion Officers (BS-17) were relied upon amongst other notifications to establish discrimination. Learned counsel argued that the Appellants have been working as dental surgeons for a considerable number of years and that they qualified the selection process but were not regularized as they were lower in merit. Learned counsel further argued that the selection process of the PPSC was simply a short interview in which a few questions were asked hence the marking process was arbitrary with no competitive or qualitative formula for selecting deserving candidates.

4. On behalf of Respondents Nos.1, 2 and 3 learned Law Officer argued that the Appellants were employed on ad hoc basis as a stop gap arrangement until the regular seats were filled up. In terms of the appointment letters the ad hoc appointment will not confer any right for regular appointment to the same post nor will the service count towards seniority. For the purposes of regular appointment, ad hoc employees had to compete with other candidates as per the procedure set out by the PPSC. Learned Law Officer further argued that the Appellants accepted the terms and conditions of their ad hoc appointments and were very well aware of the fact that they had to compete with others for the regular posts, hence their contention that they qualified but were lower in merit is without any justification. Further argued that the Appellants all appeared before the PPSC and failed to come within the ambit of 110 candidates on merit. So far as the allegations of discrimination are concerned, learned Law Officer submitted that no post for dental surgeon has been filled up without recourse to the PPSC. Therefore, the Appellants are not entitled to the relief claimed and the impugned order should be upheld. Learned Law Officer has relied upon Dr. Anwar Ali Sahto and others v. Federation of Pakistan and others (PLD 2002 SC 101), Muhammad Younus Aarin v. Province of Sindh (2007 SCMR 134), Muhammad Bilal Khan v. Azad Government of the State of Jammu and Kashmir (2010 PLC (C.S) 1060), Ejaz Majeed Bhatti and 5 others v. Punjab Public Service Commission (2011 PLC (C.S) 1049), Ameer Solangi and others v. WAPDA and others (2016 SCMR 46), Government of Khyber Pakhtunkhwa v. Ihsan Ullah and others (2017 SCMR 1201) and Abdul Ghaffar and

others v. The President National Bank of Pakistan and others (2018 SCMR 157) in support of his contentions.

5. We have heard the learned counsel for the parties at length and have gone through the record. It is an admitted fact that the Appellants were appointed on ad hoc basis as a stop gap arrangement until the arrival of regular incumbents. It is also an admitted fact that their appointments were extended from time to time and that the Appellants continued to work as ad hoc employees with the Respondent Department without any complaint or disruption. It is also not in dispute that the Appellants appeared before the PPSC after applications were invited for making regular recruitment against 110 posts of dental surgeons. The issue before the Court is that the Appellants did not fall within the selected 110 candidates as their merit was lower. Learned counsel for the Appellants argued the case on the strength of Dr. Naveeda Tufail and 72 others v. Government of Punjab and others (2003 SCMR 291) in which it was held that the benefit of regularization shall be given to candidates who fulfill the minimum criteria of appointment established in the tests administered by the PPSC and that cases of ad hoc employees shall not be tagged with direct recruits and shall be treated separately by the PPSC. In the cases before us the PPSC carried out a simple interview of all Applicants on the basis of which the merit list was prepared. Learned Law Officer admitted that a few questions were asked on the basis of which marks were allocated and a merit list was prepared. However, he could not identify the criteria on which the selection was made. Interestingly while the experience of the Appellants was before the PPSC, given that they had been working on ad hoc basis, they were not given any credit or benefit of the same. In this regard we are of the opinion that the interview process was totally subjective based on the personal opinion of the interview committee with no objective criteria. We further note that where a test is competitive in nature, with a large number of applicants, the criteria for determining merit must be based on measurable data so as to ensure transparency and fairness. In this context even through the interview process marks must be allocated on an objective criteria which enables the interview committee to evaluate the candidate in a fair and transparent manner. In this case a few general questions were asked with no objective criteria whatsoever on the basis of which the ad hoc employees were conveniently made lower in merit.

6. With respect to the Appellants' grievance on discrimination, learned Law Officer did not deny the Notifications relied upon. The only argument raised before us was that no dental surgeon was appointed without recourse to the PPSC. There cannot be two different standards for filling up similar posts. There is no explanation or justification as to why the posts of Hospital Pharmacists (BS-17), Specialist Doctors (BS-18) and Medical Officers/Women Medical Officers/Registrars/ Assistant Anesthetists/ Demonstrators/ Blood Transfusion Officers (BS-17) among others have been filled up without recourse to the PPSC. Yet at the same time, similar posts as of the Appellants required the PPSC to interview the candidates. Hence a clear case of discrimination is made out. In this case the Appellants are not seeking regularization as of right. They followed the process carried out by the PPSC but

were not regularized because they were lower in merit. We note that public functionaries must act within the four corners of law and must not discriminate in their decision making process. They must be consistent in their decisions in similar circumstances and if there is deviation there must be plausible justification for the same. The august Supreme Court of Pakistan has repeatedly held that the government is not supposed to discriminate between the citizens and its functionaries cannot be allowed to exercise discretion at their whims, sweet will or as they please rather they are bound to act fairly justly and evenly. Reliance is placed on Nizamuddin and another v. Civil Aviation Authority and 2 others (1999 SCMR 467).

7. With reference to the question of regularization, the learned Law Officer has relied on several cases to urge that the Appellants cannot be regularized as there is no vested right. In a recent judgment of the august Supreme Court of Pakistan dated 1.3.2017 passed in Civil Petitions Nos.833 to 840 and 858-L of 2013, the regularization of Pharmacists (BS-17) was considered and the august Supreme Court of Pakistan directed for the regularizations of the Pharmacists as they had successfully qualified the process undertaken by the PPSC while taking into consideration the factum of discrimination with other employees of the health department who were regularized by taking the post out of the purview of the PPSC. The facts are similar to the instant appeals before us. In another judgment of the august Supreme Court of Pakistan dated 8.12.2017 passed in Civil Petitions Nos.409-K to 414-K of 2017 the process of regularization was also upheld for similar reasons. We have also gone through the judgments relied upon by the learned Law Officer being 2016 SCMR 46 (supra) and 2017 SCMR 1201 (supra). These cases are distinguishable from the cases before us because in the cases before us the Appellants were appointed on ad hoc basis against permanent seats whereas in the cases relied upon the posts were project posts being temporary in nature and with the completion or abandonment of the project there was no posts against which those candidates could have been regularized. Hence the reliance on the aforementioned two cases does not help the case of the Respondents. During the course of hearing learned Law Officer informed us that the 110 seats were filled up during the pendency of the appeals and currently the process of filling up 320 seats has been advertised for which the interview process is underway. However, he admitted that the direction given in the 2003 SCMR 291 (supra) has not been made applicable to the present recruitment process which is underway. Therefore, we are of the opinion that the Respondents being obligated to follow the clear cut direction given by the august Supreme Court of Pakistan in 2003 SCMR 291 (supra) must separately consider the case of the Appellants for the purposes of recruitment.

8. Under the circumstances, all these appeals are allowed and the impugned order dated 20.5.2013 passed by the learned Single Judge is set aside and the Respondents are directed to regularize the services of the Appellants for the posts of dental surgeons.
ZC/Z-6/L Appeals allowed.

P L D 2018 Lahore 641
Before Ayesha A. Malik, J
HABIB AKRAM---Petitioner
Versus
FEDERATION OF PAKISTAN through Ministry of Parliamentary Affairs, Islamabad and others---Respondents
Writ Petition No.126184 of 2017, heard on 30th May, 2018.

(a) Elections Act (XXXIII of 2017)---

----Ss. 60(2), 110(2) & 137(1)---Constitution of Pakistan, Arts.218, 219 & 222---Nomination forms to be submitted by candidates for the General Election, 2018['Form A' and 'Form B']---Legislative competence of Parliament to draft nomination papers---Scope---Contention of petitioner that Impugned Forms were drafted by Parliament which was not competent to enact the same as the competent authority in such respect was the Election Commission---Validity---Legislative competence of Parliament was clear from reading Art. 222 of the Constitution which provided that Parliament could make all laws with respect to elections and included laws related to the conduct of elections---Nothing in the Constitution specifically provided that the Election Commission shall make the nomination forms---Since Parliament was competent to legislate on all electoral laws including the conduct of elections and since the Elections Act, 2017 was made to amend, consolidate and unify all laws relating to the elections, Parliament was competent to draft the nomination forms---Historically nomination forms had been drafted by the Election Commission, however if Parliament had provided for the nomination forms in the [Election] Act, 2017 it could not be declared to be beyond their legislative competence---At the same time in order to safeguard the rights of the voters and to ensure free and fair elections, the Election Commission was fully empowered to make any additions to the nomination forms, if in its opinion it was necessary for a candidate to disclose information to ensure that elections were conducted honestly, justly and fairly and in accordance with law---Consequently the Election Commission could improve upon the nomination forms as per its constitutional mandate---Constitutional petition was disposed accordingly.

Workers' Party Pakistan through General Secretary and 6 others v. Federation of Pakistan and 2 others PLD 2013 SC 406 ref.

(b) Election Act (XXXIII of 2017)---

----Ss. 60(2), 110(2), 137(1)---Constitution of Pakistan, Arts. 62, 63, 218---Nomination forms to be submitted by candidates for the General Election, 2018---Form A (Nomination form for election to an Assembly or the Senate) and Form B (Statement of assets and liabilities) ['Impugned Forms']---Lack of disclosure and information in Impugned Forms preventing voters from ascertaining necessary information about candidates---Contention of petitioner that Impugned Forms lacked sufficient information and omitted mandatory declarations required under

Arts. 62 & 63 of the Constitution as well as under the law; that the lack of information about candidates in the Impugned Forms with respect to their educational qualification, income tax and agriculture tax payments, dual nationality, pending criminal cases, contribution and expenditures undertaken during the election campaign, would impede the voter from getting an idea about the credibility, bona fides, honesty and truthfulness of the candidate---Validity---

Impugned Forms did not contain certain information and declarations that were a part of the nomination forms for the General Elections, 2013 including educational qualifications of the candidate, current occupation/ job/profession/business of the candidate, dual nationality, National Tax Number/Income tax returns/ and payment of income tax, agriculture tax returns and payment of agriculture tax, criminal record, assets and liabilities of dependents, declaration pertaining to election expenses, declaration pertaining to any default in loan or government dues by dependents, declaration that the candidate would abide by the code of conduct issued by Election Commission---Supreme Court over the years had developed jurisprudence with reference to the qualification and disqualification of members of Parliament and Provincial Assemblies and declared most of said information as mandatory for the purposes of disclosure and declarations in the election nomination forms---Such information and its disclosure were part of the law and required compliance for the purposes of inclusion in the nomination forms---Lack of disclosure and information in the Impugned Forms essentially meant that a voter would not have the required information on the basis of which an informed decision could be made---To make an informed decision voters required basic information about a candidate which included information about educational qualifications, profession and/or business/jobs held, travel abroad---Voters also required information to establish the credibility of a candidate meaning thereby information about dual nationality, income tax paid, agriculture tax paid, loan default, government due defaults, criminal record and information of assets and liabilities---Finally the third set of information required was information which enabled a voter to assess the track record of the candidate, in terms of what he had done, especially if he or she had served as Member Parliament or Senate, hence information such as major contributions made, issues raised, and positions taken by the candidate over the years was relevant for the voter---Furthermore, for the purposes of raising objections and scrutinizing the nomination forms, the lack of information and declaration essentially eroded the constitutional mandate and the whole purpose of scrutiny was diluted---Requirement of Art. 218 of the Constitution, casting a duty on the Election Commission to organize and conduct honest, just and fair elections as per law, included the duty to ensure that all necessary and required information, disclosure and declarations were made by a candidate---Election Commission was responsible to ensure that a voter was able to make an informed decision and that the nomination forms achieved such objective---High Court declared that the Impugned Forms did not provide for mandatory information and declarations as required by the Constitution and the law and, therefore, the Election Commission was directed to ensure that all mandatory information and declarations were

included in the Impugned Forms --- Constitutional petition was disposed accordingly.

Dr. Shaukat Ilahi v. Ch.Mubashar Hussain and another 2008 CLC 341; Muhammad Nasrullah v. Election Commission of Pakistan and 9 others 2009 CLC 1167; Workers' Party Pakistan through General Secretary and 6 others v. Federation of Pakistan and 2 others PLD 2013 SC 406; Muhammad Ahmad Chattha v. Iftikhar Ahmad Cheema and others 2016 SCMR 763; Muhammad Ijaz Ahmad Chaudhry v. Mumtaz Ahmad Tarar and others 2016 SCMR 1; Ms. Shamuna Badshah Qaisarani v. Khawaja Muhammad Dawood and others 2016 SCMR 1420 and Imran Ahmad Khan Niazi v Mian Muhammad Nawaz Sharif, Prime Minister of Pakistn/Member Natinal Assembly, Prime Minister's House, Islamabad and 9 others PLD 2017 SC 265 ref.

(c) Elections Act (XXXIII of 2017)---

----Ss. 60(2), 110(2) & 137(1)---Constitution of Pakistan, Arts. 63(1)(n) & 63(1)(o)---Nomination forms to be submitted by candidates for the General Election, 2018---Form A (Nomination form for election to an Assembly or the Senate) and Form B (Statement of assets and liabilities) ['Impugned Forms']---Contention of petitioner that Constitution specifically stated that the declarations would be made with reference to 'dependent's whereas Ss. 60, 110 & 137 of the Elections Act, 2017 and the Impugned Forms specifically used the term 'dependent children'; that consequently the requirement of the Constitution for declaring liabilities with reference to dependents had been done away with by reducing the declaration to the extent of dependent children---Validity---Articles 63(1)(n) and (o) of the Constitution provided that a person shall be disqualified from being elected or chosen as a member of Majlis-e-Shoora (Parliament) if he, his spouse or dependents were in default of a loan of an amount of two million or more from any bank for more than one year or if he had gotten that loan written off---Constitution provided that the loan could be in his own name or in the name of his spouse or any other of his dependents---In the same way if a person or his spouse or any of his dependents were in default of government dues, utility expenses, telephone, electricity, gas and water charges at the time of filing of the nomination papers, he stood disqualified in terms of Art. 63(1)(o) of the Constitution---In terms of Elections Act, 2017, however, a candidate was to make a declaration with respect to his dependent children---Phrase "dependent children" diminished the scope of the constitutional requirement to make declaration with regard to "dependents" be their children or any other relative which could include parents, siblings or any other dependents---By requiring the statement of assets and liabilities for dependent children, instead of dependents the legislature had in fact ignored the constitutional mandate---High Court held that the term 'dependent children' used in the Elections Act 2017, specifically in Ss. 60, 110 & 137 and in Impugned Forms had to be read down to be construed and interpreted in terms of the Constitutional requirement provided for in Art, 63(1)(n) and (o) of the Constitution --- Constitutional petition was disposed accordingly.

(d) Interpretation of statutes---

----Legislature---Mala fides---Mala fide could not be attributed to the legislature but if a legislature deliberately and repeatedly embarked upon a venture to nullify considered judicial verdict in an unlawful manner, trample the constitutional mandate and violate the law then it was difficult to attribute bona fide to it either.
Contempt Proceedings Against Chief Secretary, Sindh and others: In the matter of 2014 PLC (C.S.) 82 and Messrs Sui Southern Gas Company Ltd. and others v. Federation of Pakistan others 2018 SCMR 802 ref.

Saad Rasool, Hasan Majeed, Aitzaz A. Chaudhary, Shan Saeed Ghumman and M.Ali Salimi for Petitioners (in W.Ps. Nos.126184/17 and 215470/18).
Muhammad Asif for Petitioner (in W.P. No.17713/18).
Muhammad Zikria Sheikh, DAG along with Ameen Ullah, Section Officer, Ministry of Parliamentary Affairs, Islamabad for Respondents.
Chaudhary Umer Hayat, Director Legal, Election Commission of Pakistan along with Hafiz Adeel Ashraf, Assistant Law Officer ECP.
Date of hearing: 30th May, 2018.

JUDGMENT

AYESHA A. MALIK J.---The instant Petition along with W.Ps. Nos.215470/18 and 177513/18 have been filed in public interest to safeguard the constitutional as well as statutory rights of the citizens of Pakistan with reference to general elections.

2. The Petitioners have challenged the vires of Form A and Form B ("Impugned Forms") appended with the Election Act, 2017 ("Act") being the nomination form for participation in the election to an assembly and the statement of assets and liabilities under the Act on the ground that the Impugned Forms were drafted by Parliament who is not competent to enact the same as the competent authority is Respondent No.3, Election Commission of Pakistan ("ECP"). In this regard, reliance is placed on the case cited as Workers' Party Pakistan through Akhtar Hussain, Advocate, General Secretary and 6 others v. Federation of Pakistan and 2 others (PLD 2012 SC 681). Learned counsel for the Petitioners argued that the conduct of elections is governed under Articles 213 to 226 of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution"). The sole responsibility to organize and conduct elections and to make all arrangements as are necessary so as to ensure honest, just and fair elections is of the ECP. Articles 218 and 219 of the Constitution enumerates the duties of the ECP and this Article has been interpreted in the case cited at PLD 2012 SC 681 (supra) such that Parliament cannot abridge the powers of the ECP and that the ECP has exclusive powers to conduct the elections. Learned counsel further argued that in terms of the judgment of the august Supreme Court of Pakistan, drafting of nomination forms falls within the ambit of the ECP and it no longer requires the assent of the President of Pakistan. Learned counsel also argued that historically in all elections carried out in Pakistan,

the ECP has made the nomination forms and this is the first time that Parliament has taken it upon itself to draft the nomination forms. In this regard, Mr. Saad Rasool, Advocate argued that Article 222 of the Constitution provides for the law making power of Parliament with reference to election matters. In terms of the stated Article, Parliament can make laws for the purposes of elections, however the said Article is subject to the Constitution and in terms of the proviso to the Article, no such law shall have the effect of taking away or abridging any power of the ECP. Hence it is his case that the Parliament cannot draft the nomination forms as it falls within the exclusive mandate of the ECP. Reliance is placed on Election Commission of Pakistan through its Secretary v. Javaid Hashmi and others (PLD 1989 SC 396), PLD 2012 SC 681 (supra) and Workers' Party Pakistan through General Secretary and 6 others v. Federation of Pakistan and 2 others (PLD 2013 SC 406). Mr. Muhammad Asif, Advocate argued that the nomination forms must include information and details of income tax paid, citizenship of any other country, criminal record and the assets and liabilities of all dependents of the candidate. He argued that information in the nomination forms should be maximized for the sake of transparency and democracy and to encourage informed decision making by the voter. Hence collectively the Petitioners pray that the Impugned Forms be declared unconstitutional for being in violation of Articles 218, 219 and 222 of the Constitution and for being an infringement on the constitutional authority of the ECP.

3. The second challenge to the Impugned Forms is with respect to the lack of sufficient information and for omitting mandatory declarations required under Articles 62 and 63 of the Constitution as well as under the law and as per the dicta of the superior courts of Pakistan. Learned counsel argued that the Impugned Forms fail to provide for mandatory declarations as provided in Article 63 of the Constitution with specific reference to Articles 63(i)(n) and 63(i)(o) of the Constitution wherein the declaration includes the disclosure of the liabilities of the candidate, his spouse and his dependents. Mr. Saad Rasool argued that the Constitution specifically states that the declarations will be made with reference to dependents whereas under the Act, Sections 60, 110 and 137 and the Impugned Forms specifically uses the term dependent children. Consequently the requirement of the Constitution for declaring liabilities with reference to dependents has been done away with by reducing the declaration to the extent of dependent children. Learned counsel also raised an objection on the lack of information with respect to the educational qualification, income tax and agriculture tax payments, dual nationality and information as to whether any criminal offences are pending against a candidate or were pending against a candidate. He argued that the contribution and expenditures undertaken by the candidate during the election campaign also requires a declaration which is missing in the Impugned Forms. Learned counsel argued that these disclosures and information are crucial for demonstrating the legitimacy and bona fides of a candidate, his credibility, his economic resources and also reflects on the honesty and truthfulness of the candidate. Reliance is placed on Rai Hassan Nawaz v. Haji Muhammad Ayub and others (PLD 2017 SC 70). Learned counsel further argued that family business and resources, payment of

taxes, educational qualifications, dual nationality are all vital and basic information which every voter has a right to obtain in order to enable him to decide how to cast his vote. Furthermore he stated that the declarations in the Impugned Forms are neither testified on oath nor under solemn affirmation, hence it will become difficult to hold any candidate responsible and liable for any mis-declaration. In support of his arguments counsel for the Petitioners has provided a comparative chart showing the difference between the 2008, 2013 and 2018 forms which as per his contentions clearly demonstrates that vital information is missing from the Impugned Forms.

4. In response to the notices issued by this Court, report and parawise comments have been filed on behalf of Respondent ECP. Chaudhary Umer Hayat, Director Legal, Election Commission of Pakistan appeared and stated that historically the ECP has always made the nomination forms and in terms of PLD 2012 SC 681 (supra) and PLD 2013 SC 406 (supra), this falls squarely within the mandate of the ECP. However, without adhering to the mandate of the law, the Parliamentary Committee on Electoral Reforms opted to draft the Impugned Forms. In this regard, the ECP voiced its opinion and complained through letter dated 18.5.2017 wherein it is requested that the ECP, in the very least, be heard by the Parliamentary Committee for Electoral Reforms before any draft is prepared. However, this request was not adhered to. He further argued that the ECP is not satisfied with the disclosure element in the Impugned Forms as mandatory provisions of the law have been ignored and information which is vital and fundamental for just and fair elections have not been provided for in the Impugned Forms. In this regard, he supported the arguments made by the learned counsel for the Petitioners and agreed with the contents of the comparative chart provided by the learned counsel for the Petitioners. He further clarified that the ECP can rectify the disclosure requirements within one week, if required.

5. Report and parawise comments have been filed on behalf of the Federation of Pakistan. Mr. Muhammad Zikria Sheikh, learned DAG argued that no mala fide can be attributed to the legislature. The drafting of the Impugned Forms was a consultative process, with all the political parties over period of three years and ultimately with every one's consensus, Forms A and B were drafted as the nomination forms for the election and statement of assets and liability, as required under the provisions of the Act. He argued that the nomination papers are an integral part of the election process and the current Form A and B ensures that all necessary and relevant information is available for the voter so as to establish the credibility of the candidates in a transparent way. He stated that the same matter was challenged before the Hon'ble Islamabad High Court in W.Ps. Nos.476/2018 and 696/2018, of which the learned counsel before this Court was the counsel in W.P. No.476/2018 and the Hon'ble Islamabad High Court has passed its order dated 25.5.2018 which has not been disclosed before this Court. He argued that due to non-disclosure the mala fide of the Petitioners is apparent and this Court should dismiss their petitions with costs. He further argued that the Petitioners have no vested right and there is nothing wrong with the nomination forms. He stated that every effort should be made to save the law and that the law should not be struck

down by this Court. He placed reliance on Mehr Zulfiqar Ali Babu and others v. Government of Punjab and others (PLD 1997 SC 11), Dr. Tariq Nawaz and another v. Government of Pakistan through the Secretary, Ministry of Health, Government of Pakistan, Islamabad and another (2000 SCMR 1956), Engineer Iqbal Zafar Jhagra and another v. Federation of Pakistan and others (2013 SCMR 1337) and Lahore Development Authority through D.G and others v. Ms. Imrana Tiwana and others (2015 SCMR 1739).

6. There are two questions before the Court; (i) who is competent under the Constitution to draft the nomination forms and whether the Impugned Forms as drafted by the legislature are ultra vires to the Constitution; (ii) whether the Impugned Forms fail to provide for mandatory information and declarations as required under the law and whether there are substantial deficiencies in the Impugned Forms. In this context it is also in issue as to whether there is reduced disclosure in the Impugned Forms such that it violates Articles 62 and 63 of the Constitution.

Constitutional Competence

7. To answer the first question, the relevant constitutional provisions are Articles 218, 219 and 222 of the Constitution which read as follows:--

218. Election Commission.-(1) For the purpose of election to both Houses of Majlis-e-Shoora (Parliament), Provincial Assemblies and for election to such other public offices as may be specified by law, a permanent Election Commission shall be constituted in accordance with this Article.

(2) The Election Commission shall consist of

(a) the Commissioner who shall be the Chairman of the Commission; and

(b) four members, one from each Province, each of whom shall be a person who has been a judge of a High Court or has been a senior civil servant or is a technocrat and is not more than sixty-five years of age, to be appointed by the President in the manner provided for appointment of the Commissioner in clauses (2A) and (2B) of Article 213.

(3) It shall be the duty of the Election Commission to organize and conduct the election and to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against.

219. Duties of Commission.--- The Commission shall be charged with the duty of---

(a) preparing electoral rolls for election to the National Assembly, Provincial Assemblies and local governments, and revising such rolls periodically to keep them up-to-date;}

(b) organizing and conducting election to the Senate or to fill casual vacancies in a House or a Provincial Assembly; and

(c) appointing, Election Tribunals;

(d) the holding of general elections to the National Assembly, Provincial Assemblies and the local governments; and

(e) such other functions as may be specified by an Act of Majlis-e-Shoora (Parliament);
Provided that till such time as the members of the Commission are first appointed in accordance with the provisions of paragraph (b) of clause (2) of Article 218 pursuant to the Constitution (Eighteenth Amendment) Act, 2010, and enter upon their office, the Commissioner shall remain charged with the duties enumerated in paragraphs (a), (b) and (c) of this Article.
222. Electoral laws.---Subject to the Constitution, Majlis-e-Shoora (Parliament) may be law provide for ----
(a) the allocation of seats in the National Assembly as required by clauses (3) and (4) of Article 51;
(b) the delimitation of constituencies by the Election Commission [including delimitation of constituencies of local governments];
(c) the preparation of electoral rolls, the requirements as to residence in a constituency, the determination of objections pertaining to and the commencement of electoral rolls;
(d) the conduct of elections and election petitions; the decision of doubts and disputes arising in connection with elections;
(e) matters relating to corrupt practices and other offences in connection with elections; and
(f) all other matters necessary for the due constitution of the two Houses, the Provincial Assemblies and local governments;
but no such law shall have the effect of taking away or abridging any of the powers of the Commissioner or the Election Commission under this Part.

8. The basic argument is that the drafting of nomination papers falls within the scope and competence of the ECP. In this regard reliance has been placed on PLD 2012 SC 681 (supra) in which it has been held as follows:
38. The Constitution provides a comprehensive mechanism to ensure minimal deviation from these dictates. It identifies and regulates one of the key aspects of democracy, the election process. In Article 218, the Constitution constitutes the Election Commission and empowers it to organize and oversee the election process and to ensure, inter alia, that it is conducted "honestly, justly, fairly and in accordance with law and that corrupt practices are guarded against".
39. The phrase "the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against" as used in Article 218(3) of the Constitution informs the content and scope of powers conferred by it on the Election Commission.
40. A bare reading of Article 218(3) makes it clear that the Election Commission is charged with the duty to 'organize' and 'conduct the election'. The language of the Article implies that the Election Commission is responsible not only for conducting the election itself, but also for making all necessary arrangements for the said purpose, prior to the Election Day. By conferring such responsibility on the Election Commission, the Constitution ensures that all activities both prior, on and subsequent to Election Day, that are carried out in anticipation thereof, adhere to standards of justness and fairness, are honest, in accordance with law and free from

corrupt practices. This Court in Election Commission of Pakistan v. Javid Hashmi and others (PLD 1989 SC 396), observed that "(generally speaking election is a process which starts with the issuance of the election programme and consists of the various links and stages in that behalf, as for example, filing of nomination papers, their scrutiny, the hearing of objections and the holding of actual polls. If any of these links is challenged it really (is) tantamount to challenge the said process of election". It interpreted that the phrase 'conduct the election' as having "wide import" and including all stages involved in the election process. These observations subject all election related activities that take place between the commencement and the end of the election process to the jurisdiction conferred on the Election Commission under Article 218(3). The Election Commission therefore has to test all election related activities that are carried out in the relevant period, both individually and collectively, against the standards enumerated therein.

9. In terms of the dicta of the august Supreme Court of Pakistan, while interpreting Articles 218 and 219 of the Constitution in the Workers' Party Case, the primary function of the ECP is to organize and conduct the election and for the purposes therein, it can make all necessary arrangements so as to ensure that elections are conducted honestly, justly and fairly, in accordance with law and that corrupt practices are guarded against. The ECP is therefore required to ensure that the election process does not suffer from any corrupt or illegal practices and that it is free and fair. In order to achieve this purpose all executive authorities of the Federation and the Provinces are to assist the ECP in the discharge of its function. Consequently the ECP is independent, having exclusive jurisdiction to conduct elections with no interference by any party, government or law enforcing agency. The august Supreme Court of Pakistan also held that the ECP can be directed to fulfill its constitutional and legislative mandate by inter alia bringing all political practices into conformity with the Constitution and the law. On the strength of these findings, the Petitioners have urged that the drafting of nomination papers falls exclusively within the purview of the ECP and that Articles 218 and 219 gives absolute power to the ECP to organize and conduct the elections, which by necessary implication includes drafting the nomination papers. I am of the opinion that the argument raised with respect to interpreting the legislative competence of Parliament on the basis of necessary implication is misconceived. The legislative competence of Parliament is clear from reading Article 222 of the Constitution which provides that Parliament can make all laws with respect to elections and includes laws related to the conduct of elections, but it cannot make law which effectively takes away or abridges any power of the Commissioner or the ECP. There is nothing in the Constitution or the cases cited which specifically provides that the ECP shall make the nomination forms. This is being constructed as being part of the function of organizing and conducting elections. No doubt historically nomination forms have been drafted by the ECP, however if Parliament has provided for the nomination forms in the Act, it cannot be declared to be beyond their legislative competence. Parliament is the supreme law making authority and the only restriction the Constitution places on Parliament, while framing elections laws is that it does not curtail or abridge any power of the ECP. When interpreting

legislative competence, the Court cannot assume that Parliament is not competent to draft the nomination forms because presumption lies in favour of the constitutionality of the Act unless shown specifically that it violates the constitutional mandate. In this case there is no specific power given to the ECP for drafting nomination forms rather it is a role attributed to the ECP in the function of organizing and conducting the elections. Nomination forms are an integral part of the election process, as it is on the basis of the information provided in the forms that a candidate is declared qualified to compete in the election. Since Parliament is competent to legislate on all electoral laws including the conduct of elections and since the Act was made to amend, consolidate and unify all laws relating to the elections, Parliament is competent to draft the nomination forms. In this regard, it is noted that the pith and substance of the constitutional mandate as provided in Article 222 is that Parliament shall make all electoral laws including laws to provide for the conduct of elections which will include making the nomination forms. Where the law fulfills its mandate and is within the legislative competence of the legislature, then such a law cannot be declared ultra vires on the basis of assumptions and implications. Furthermore even if in the past Parliament did not draft the nomination forms, it does not suggest that it lacks legislative competence. At the same time it is important to note that in order to safeguard the rights of the voters and to ensure free and fair elections, the ECP is fully empowered to make any additions to the nomination forms, if in its opinion it is necessary for a candidate to disclose information to ensure that elections are conducted honestly, justly and fairly and in accordance with law. In the case cited as PLD 2013 SC 406 (supra), the august Supreme Court of Pakistan held that the ECP is fully authorized to make additions to the nomination forms and that there is no hard and fast rule to make improvement in a pro forma or nomination paper, particularly when the objective is to enforce Article 218(3) of the Constitution. The Court further held that detailed information about a candidate is essential as the mandate of the Constitution is that the people of Pakistan are governed by chosen representatives. Therefore a candidate must provide complete credentials to enable a voter to cast a vote in favour of such a person who he believes is free from disqualification under Article 63 and qualified under Article 62 of the Constitution. Consequently the ECP can improve upon the nomination forms as per its constitutional mandate. In this regard Chaudhary Umer Hayat, categorically stated that in the opinion of the ECP the Impugned Forms do not meet with the disclosure requirements such that basic information of a candidate is missing, which information is the fundamental right of a voter. In support of his contentions he referred to the disclosure requirements in the 2013 forms, being of a higher standard. To this effect, he stated that if directed by the Court, the ECP will amend Form A and B and include all the required information, disclosures and declarations. Under the circumstances there is no merit in the challenge to the constitutional competence of Parliament.

10. The second ground of challenge is with respect to the lack of disclosure in the Impugned Forms which prohibit and prevent a voter from ascertaining all necessary information about credible candidates who are to participate in the election. There are two basic objections of the Petitioners. The first is that the Impugned Forms do

not contain vital information and specific declarations which are required under the Constitution and the law. The other objection is the challenge to the phrase 'dependent children' as given in Sections 60, 110 and 137 of the Act along with Form A and B.

Challenge to missing information and insufficient declarations

11. The specific objections of the Petitioners are demonstrated through a comparative chart annexed with the petition which is reproduced below:--

FORM A

(Comparison Table)

	2008 Form	2013 Form	2017 Form
1	SAME SAME SAME SAME SAME SAME	Declaration and Oath by the Person Nominated. I, the above mentioned candidate, hereby declare on oath that: (i) I have consented to the nomination and that I fulfill the qualification specified in Article 62 of the Constitution and I am not subject to any of the dis-qualifications specified in Article 63 of the Constitution or any other law for the time being in force for being elected as a member of the National Assembly/Provincial Assembly. (ii) I belong to____and a certificate from (Name of political party) that political party showing that I am a party candidate from the above said constituency is attached OR I do not belong to any political party	SAME SAME SAME SAME SAME SAME
2.	SAME SAME SAME	I, the above mentioned candidate, solemnly swear that:-- **(i) I believe in the absolute and unqualified finality of that Prophethood of Muhammad (Peace be upon him), the last of the prophets and that I am not the follower of any one who claims to be a Prophet in any sense of the word or of any description whatsoever after Prophet Muhammad (Peace be upon him), and that I do not recognize such a claimant to be Prophet or a religious reformer, nor do I belong to the	SAME SAME SAME

			Qadiani group or the Lahori group or call myself an Ahmadi. (ii) I will be faithful to the declaration made by the Founder of Pakistan Quaid-e-Azam Muhammad Ali Jinnah, that Pakistan would be a democrate based on Islamic Principles of social justice. I will bear true faith and allegiance to Pakistan and upheld the sovereignty and integrity of Pakistan and that I will strive to preserve the Islamic Ideology which is the basis for the creation of Pakistan			
3.	SAME SAME SAME SAME		I hereby solemnly declare to the best of my knowledge and belief that,-- (i) no loan for an amount of two million rupees or more obtained from any bank, financial institution, cooperative society or corporate body in my own name or in the name of my spouse or any of my dependents, or any business concern mainly owned by me or the aforesaid, stands unpaid for more than one year from the due date, or has got such loan written off, and (ii) I, my spouse or any of my dependents or a business concern mainly owned by me or the aforesaid, is not in default payment of Government dues or utility charges, including telephone, electricity, gas and water charges of an amount in excess of ten thousand rupees, for over six months, at the time of filing of nomination.	OMITTED OMITTED	OMITTED	
4.	NOT INCLUDED NOT INCLUDED NOT INCLUDED SAME SAME SAME SAME		I, hereby solemnly affirm that,--- (i) The list containing the names of my spouse(s) and depends is correct and no name has been left out, (List attached). (ii) Neither I nor my spouse(s) nor any of my dependents mainly owns any company except the following: Explanation:-- For	OMITTED OMITTED OMITTED OMITTED OMITTED OMITTED OMITTED OMITTED	OMITTED OMITTED OMITTED OMITTED	

	SAME	the purpose of these declaration the expression--- (i) "loan" shall mean any loan, advance, credit or finance obtained or written off on or after the 31st day of December, 1985, but shall not include the loan the recovery of which has been stayed or suspended by any order of a court or tribunal, including the High Court and the Supreme Court. (ii) "mainly owned" shall mean holding or controlling a majority interest in a business concern; (iii) "taxes" include all taxes levied by Federal Government or a Local Government, but shall not include taxes the recovery of which has been stayed or suspended by any order of court or tribunal; (iv) "government dues and utility charges" shall, inter alia, include rent, charges of rest houses or lodges owned by the Federal Government, Provincial Governments, local governments or corporations, established or controlled by such government, but shall not include the government dues and utilities charges the recovery of which has been stayed or suspended by any order of a court or tribunal.	
5.	NOT INCLUDED NOT INCLUDED NOT INCLUDED NOT INCLUDED	I, the above mentioned candidate hereby declare on oath that:-- (i) I have opened Account No._____ with_____(Name and Branch of scheduled bank) and have deposited therein an amount of Rs._____ (amount in words)_____ for the purpose of election expenses. (ii) I shall make all election expenditures out of the money deposited in the aforesaid account. (iii) I shall not make any transaction towards the election	OMITTED I, the above mentioned candidate, declare that I have opened an exclusive account No.____ with (Name and Branch of Scheduled Bank) for the purpose of election expenses OMITTED OMITTED

		expenses through an account other than the above account.		
6.	SAME	SAME	I, hereby declare on oath that no case of criminal offences was pending against me, six months prior to filing of this nomination OR I hereby declare on oath that following cases of criminal offences were pending against me, six months prior to filing of this nomination Number of case Name of the Court	OMITTED OMITTED
7.	SAME		My educational qualification is_____ (attached copies to be annexed)	OMITTED
8.	SAME		My present occupation is_____ (attested copies to be annexed)	OMITTED
9.	SAME		My National Identity Card No. is_____ (attested copies to be annexed)	SAME (mentioned as clause 7 after amendment)
10.	SAME		My National Tax Number, if any is_____ (attested copies to be annexed	OMITTED
11.	SAME		The statement of assets and liabilities of my own, spouse(s), dependents as on 30th June_____is enclosed.	SAME
12.	SAME		The income tax paid by me during the last three years is given hereunder:-- Total Income Source of income Tax year Total income tax Paid	OMITTED
	NOT INCLUDED		Note I, Attach copies of income tax returns of the years mentioned above. **If more than one sources of income attach detail.	OMITTED
13.			How many times traveled abroad during the last three years and cost incurred thereon (Attach copy of the passport and detail of expenditure)	OMITTED
14.	MENTIONED AS land revenue		The agricultural income tax paid by me during the last three years is	OMITTED OMITTED

	paid by me during the last three assessment years NOT INCLUDED	given below:-- **Tax year Land Holding Agricultural income Total Agricul-tural income tax Paid** Note II. Attach copies of agricultural tax returns of the last three years mentioned above.	
15.	NOT INCLUDED	If you have been elected Member of National Assembly/Provincial Assembly what according to you was the single most important contribution you have made for the benefit of your constituency (attach detail, if any).	OMITTED
16,	NOT INCLUDED	Whether you have paid any sum by way of contribution or otherwise to the political party which has awarded you party ticket for this election, and if so how much (attach detail if any).	OMITTED
17,	NOT INCLUDED NOT INCLUDED	Whether you have received any sum from the party which has awarded you ticket, if so how much (attach detail, if any). Note III, I hereby solemnly affirm that the information given at serial Nos.13, 15, 16 and 17 is true and correct and nothing has been concealed.	OMITTED\ OMITTED
18.	SAME	I hereby assure that I shall abide by the Code of Conduct issued by the Election Commission Date____Signature of Candidate_____	OMITTED ADDITION (Solemn affirmation: I s/o w/o_____do hereby solemnly affirm that all the entries in the form filled by me are correct and complete to the best of my knowledge and belief, and nothing has been concealed herewith) OMITTED

FORM B
(Comparison Table)
Statement of Assets and liabilities

2008 Form	**2013 Form**	**2017 Form**
SAME (as 2013)	I_____ a candidate for election to	SAME (except

		general seat from constituency No._____ hereby declare on solemn affirmation that no immovable and moveable property, including bonds, shares, certificate securities, insurance policies and jewelry, other than specified herein below, is held by me, my spouse(s) and dependents on the 30th day of June_____	words 'on solemn declaration' are omitted and word 'dependents' is substituted with 'dependent children')
	Cost of Assets	Assets	**Remarks**
1.	NOT INCLUDED	NET ASSETS AS ON 30TH JUNE OF CURRENT FINANCIAL YEAR	OMITTED
2.	NOT INCLUDED	NET ASSETS AS ON 30TH JUNE OF PREVIOUS FINANCIAL YEAR	OMITTED
3.	NOT INCLUDED	INCREASE/DECREASE [1-2]	OMITTED
4.	SAME Except '(attach location des-cription, built up area and present market value of the house/apartment in which you are presently living' NOT INCLUDED SAME SAME	IMMOVABLE PROPERTY Open plots, houses, apartments, commercial buildings, under construction properties, agricultural Property, etc. (attach location, description, built up area and present market value of the house/apartment in which you are presently living) (a) Held within Pakistan" (i) (ii) (iii) (b) Held outside Pakistan (i) (ii)	SAME Except "(attach location, descrip-tion, built up area and present market value of the house/apartment in which you are presently living)" NOT INCLUDED SAME SAME
5.	SAME SAME	MOVABLE PROPERTY (a) Business capital within Pakistan (i) Name of business (ii) Capital amount (b) Business capital outside Pakistan (i) Name of business (ii) capital amount	SAME SAME
6.	SAME	Assets brought or remitted from outside Pakistan (i) Bank drafts/remittance (ii) Machinery (iii) Other	SAME
7.	SAME except instead of word "brought" "created" was used.	Assets brought out of remittance from abroad.	SAME
8.	SAME SAME	**Investments** (i) Stock and Shares (ii) Debentures (iii) National Investment (Unit) Trust (iv) ICOP Certificate (v)	SAME SAME

		National Savings Schemes Defence Savings Certificate Special Saving Certificate Regular Income Certificate (vi) Unsecured loans (vii) Mortgages (viii) Any other	
9.	SAME	**Motor Vehicles**" Make Model Reg. No (i) _____ (ii)_____	SAME
10.	SAME	**Jewellery etc.** (i) Weight (ii) Description	SAME
11.	SAME	**Cash and Bank Account"** (i) Cash in hand (ii) Cash at Bank Account No. Bank and Branch Current Deposit Savings Other Deposits	SAME
12.	SAME	Furniture, Fittings and articles of personal use	SAME
13.	SAME	Assets transferred to any person- (i) Without adequate consideration or (ii) by revocable transfer	SAME
14.	SAME	Any other assets	SAME
15.	NOT INCLUDED	Cost of total assets (4+4]	OMITTED
16.	NOT INCLUDED	Foreign passport if any (i) No. of passport_____ (ii) Name of countries_____	OMITTED
	AMOUNT	**LIABILITIES**	**REMARKS**
(i)	SAME	Mortgages secured on Property or land	SAME
(ii)	SAME	Unsecured Loans owing	SAME
(iii)	SAME	Bank Overdraft	SAME
(iv)	SAME	Bank Loans	SAME
(v)	SAME	Amounts due under Hire Purchase Agreement	SAME
(vi)	SAME	House Building Loans	SAME
(vii)	SAME	Advances from Provident Funds etc.	STATE
(viii)	SAME	Other debts due"	SAME
(ix)	SAME	Liabilities in the names of minor children (in respect of assets standing in their name).	SAME except word 'Minor' is substituted with "dependent"
(x)	SAME	Personal expenditure Total Expenditure (i) + (x) Increase/Decrease	SAME

SAME	**VERIFICATION** I_____S/o, W/o, D/o ___ do hereby solemnly declare that the above statement of the assets and liabilities of myself, my spouse(s) dependents as on 30th June_____ is correct and complete and nothing has been concealed.	SAME except word "solemnly" is omitted, and word "dependents" is substituted with "dependent children"
NOT INCLUDED	**STATEMENT ON OATH** 1, Mr,/Ms.Mrs._____S/o, W/o, D/o _____ state on oath that I have not ceased to be citizen of Pakistan nor have I acquired or applied for the citizenship of a foreign state	OMITTED
NOT INCLUDED	**NO OBJECTION CERTIFICATE** (a) I, Mr./Ms./Mrs._____S/o, W/o, D/o_____state that I have no objection if information concerning myself in relation to acquisition of citizenship of foreign state or application of such citizenship is provided by any foreign state to the Ministry of Foreign Affairs of Foreign Affairs of the Government of Pakistan	OMITTED
NOT INCLUDED	or Election Commission of Pakistan (b) I, Mr.?Ms./Mrs._____S/o, W/o, D/o_____state that failure to give detail regarding any item of this Form shall render my nomination to contest election invalid or if any information given here in above is found incorrect at any time my election shall stand void ab initio. Date_____Signature_____	OMITTED

12. In order to appreciate the arguments made before the Court it is necessary to consider the general scheme of the Act with reference to nomination and the prescribed process. The Act was passed by the National Assembly on 2.10.2017 and in terms of its preamble the Act aims to amend, consolidate and unify laws relating to the conduct of elections and matters connected therewith or ancillary thereto. In terms of Section 241 of the Act, eight electoral laws were repealed so as to achieve the purpose of consolidation and unification of election laws. Section 60 of the Act prescribes for the procedure for nomination of a candidate and requires that every nomination shall be made by separate nomination paper on Form A, signed by the proposer and the seconder and shall be on solemn affirmation made and signed by the candidate. Section 231 of the Act provides for the qualification and

disqualification of a person elected or chosen as member of the Majlis-e-Shoora (Parliament) to be as provided in Articles 62 and 63 of the Constitution. Consequently Form A contains a general declaration that the candidate fulfills the qualifications specified in Article 62 and is not subject to any of the disqualifications specified in Article 63. Section 110 of the Act provides for similar requirements for nomination for election to the Senate. Section 137 of the Act specifically requires that every member of the Assembly and the Senate submit a copy of his statement of assets and liabilities, which includes the assets and liabilities of his spouse and dependent children in the manner prescribed in Form B. Section 230 of the Act requires the Prime Minister, Chief Minister or the Minister or any other member of a caretaker Government to also submit to the ECP a statement of assets and liabilities including the assets and liabilities of his spouse and dependent children on Form B and that is to be published in the official gazette. Section 232 of the Act provides for the disqualification of a candidate on account of offences, however no declaration to this effect is required in the Impugned Forms. Consequent to the judgment of the august Supreme Court of Pakistan cited as Zulfiqar Ahmed Bhutta and 15 others v. Federation of Pakistan through Secretary Ministry of Law, Justice and Parliamentary Affairs and others (PLD 2018 SC 370), this section has been made subject to Articles 62, 63 and 63(a) of the Constitution. Importantly Section 62(7) of the Act provides that a Returning Officer while scrutinizing the nomination papers of a candidate shall not ask any question which has no nexus with the information supplied in the nomination paper or does not arise from the objections raised by any person or from information received by him under this Section. It also provides that the declaration submitted under Section 60(d) with respect to statement of assets and liabilities can only be questioned if there is tangible material to the contrary available on the record.

13. The working of the Act is such that the nomination process is a two-step process. As a first step the nomination forms are filled by the candidate and the second step is that the information provided in the Forms is subject to scrutiny. The Returning Officer shall scrutinize the Forms in terms of the requirements of Section 62(7) of the Act whereby based on the information provided in the Forms he will question the candidate. Form A provides for a generalized statement by the candidate that the requirements of Articles 62 and 63 are met with, without any specific declarations or information from the candidate with reference to the provisions of Article 63 of the Constitution. Consequently relevant information will not be made available on the nomination forms and the Returning Officer may be constrained to fulfill his statutory requirement of scrutinizing the nomination forms due to the restriction imposed in Section 62(7) of the Act. Hence in terms of Article 63 of the Constitution, a person can be disqualified for being elected or chosen as Member Parliament amongst others, if he ceases to be a citizen of Pakistan or acquires a citizenship of foreign state is in the service of a statutory body owned or controlled by the government has been convicted by a court of competent jurisdiction involving moral turpitude. These disqualifications require information and disclosure from the candidate in order to state with certainty that the disqualification is not attracted. Effectively information pertaining to matters

covered under Article 63 requires detailed information so as to ascertain whether the disqualification is attracted or not. Furthermore there are five declarations in Form A which are solemnly affirmed by the candidate. For the purposes of the election to the National Assembly there is no information regarding education, degrees or diplomas or professional experience or present occupation. This information is found in the additional information for the Senate elections but not in Form A for the National Assembly. Consequently for the purposes of election to the National Assembly the voter will not have the benefit of such basic information so as to be able to make an informed decision and express his or her true choice. For ease of reference Forms A and B are reproduced hereunder:-

FORM-A
[See sections 60(2) and 110(2)
NOMINATION FORM FOR ELECTION TO
AN ASSEMBLY/SENATE
Passport size
Photograph of
The candidate
[Note (1) Please fill in this page in capital letters.
(2) Strike off the words not applicable]
No. and Name of constituency ..National Assemly/Senate/ Provincial Assembly of .. (Name of the Province)
(To be filled in by the proposer of a candidate for an assembly seat)
(1) I . .(name of the proposer)
having National Identity Card No .

- -

Registered as a voter at serial number .in the electoral roll of electoral area .of Tehsil/Taluka ....District/Agency do hereby propose the name of Mr./Mrs./Ms .. whose address is . ..as a candidate for election to the seat from constituency No
(2) I hereby certify that I have not subscribed to any other nomination paper in this election either as proposer or seconder.
Date ..Signature of Proposer ..

(To be filled in by the seconder of a candidate for an assembly seat)
(1) I (name of the seconder)
having National Identity Card No

- -

Registered as a voter at serial number . ..in the electoral roll of electoral area .of Tehsil/Taluka .. District/Agency
do hereby scond the name of Mr./Mrs./Ms .. whose address is . ..as a candidate for election to the seat from constituency No
(2) I hereby certify that I have not subscribed to any other nomination paper in this election either as proposer or seconder.
Date ..Signature of Seconder ..

FOR SENATE ELECTION ONLY

[Note (1) Please fill in this page in capital letters.

(2) Strike off the words not applicable]

(To be filled in by the proposer of a candidate for a Senate seat)

I

(Name of proposer)

a member of *National Assembly/Provincial Assembly from Constituency No do hereby propose the name of Mr./Mrs./Ms ..

(Name of candidate)

son/wife/daughter of resident of .

(Address)

whose name is entered at serial No in the electroral roll of (name of electoral area, tehsil/taluka and district)

as a candidate for election from . .. Province/Federal Capital/ FATA against the following Senate seat ..

(2) I hereby certify that I have not subscribed to any other nomination paper in this election either as proposer or seconder.

Date .Signature or Propoers ..

(To be filled in by the seconder of a candidate for a Senate seat)

I, .

(Name of seconder)

a member of National Assembly/Provincial/Assembly from Constituency No . do hereby seconds the nomination of the above mentioned candidate against the following Senate seat .

(2) I hereby certify that I have not subscribed to any other nomination paper in this election either as proposer or seconder.

Date Signature of Seconder

DECLARATION AND OATH BY THE PERSON NOMINATED

1. I, the above mentioned candidate, hereby declare on oath that:--

(i) I have consented to the above nomination and that I fulfill the qualifications specified in Article 62 of the Constitution and I am not subject to any of the dis-qualifications specified in Article 63 of the Constitution or any other law for the time being in force for being elected as a member of the Senate/National/ Assembly/Provincial Assembly.*

*(ii) I belong to and

(Name of political party)

a certificate from that political party showing that I am a party candidate from the above said constituency is attached.

OR

I do not belong to any political party

2. I, the above mentioned candidate, solemnly swear that:--
**(i) I believe in the absolute and unqualified finality of the Prophethood (peace be upon him), the last of the prophets and that I am not the follower of any one who claims to be a Prophet in any sense of the word or of any description whatsoever after Prophet Muhammad (peace be upon him), and that I do not recognize such a claimant to be Prophet or a religious reformer, nor do I belong to the Qadiani group or the Lahori group or call myself an Ahmadi.
(ii) I will be faithful to the declaration made by the Founder of Pakistan Quaid-e-Azam Muhammad Ali Jinnah, that Pakistan would be a democratic state based on Islamic principles of social justice, I will bear true faith and allegance to Pakistan and uphold the sovereignty and integrity of Pakistan and that I will strive to preserve the Islamic Ideology which is the basis for the creation of Pakistan.
3. I, the above mentioned candidate, declare that I have opened an exclusive Account No with (Name and Branch of Scheduled Bank) for the purpose of election expenses.
4. My NIC No. is
- -
5. My Contract No. is
6. My Email address is .
7. My statement of assets and liabilities including assets and liabilities of my spouse(s) and dependent children as on preceding thirtieth day of June on Form B is attached.
Date Signature of the Candidate ..

---

* Srike Off the words not applicable
** For Muslim candidates only.

SOLEMN AFFIRMATION

I, S/o, W/o, D/o .do hereby solemnly affirm that all the entries in this Form filled by me are correct and complete to the best of my knowledge and belief, and nothing has been concealed.
Signature of the Candidate ..

(ADDITIONAL INFORMATION TO BE ATTACHED BY A CANDIDATE FOR SENATE TECHNOCRAT SEAT)

Note: (1) This additional information is to be attached with the Nomination Form by a candidate for Senate Technocrat seat only.
(2) Each item is to be filled in clearly and completely.
(3) The information should be typed or hand written legibly.
(4) Strike off the words not applicable]

BIODATA

1, Name .
2. Father/Husband's name ..
3. Date of birth ..4. Place of birth .

5, Marital status: Single/Married/Divorced/Widow(er)
6. Present address .
7. Present telephone Nos. Mobile ..Office ..Home .
8. Email address ..
9. Education.

Years attended	**Name and location of Institution of learning**	**Academic degrees and certificate or Diplomas obtained**	**Main Area of study**
From To			

10. Professional experience.
A. From ..to
(the date since employed)
Title of present post and nature of duties.
Employer (Name and address) and type of business.

_____

_____
B. From ..to .
(the date since employed)
Title of present post and nature of duties.
Employer (Name and address and type of business.

_____
C. From ..to .
(the date since employed) (Please use additional sheets if required).
Title of present post and nature of duties.
Employer (Name and address) and type of business.

_____

_
11. Please list your special qualifications and skills

_____

_
12. Please list any significant publications you have written (Publications need not be attached)

_____

__
13. If you have previously held public office (e.g. Minister, Advisor, Senator, Member of Parliament Provincial Assembly or a local government) please give details:

_____

___
14, Please list your present and past memberships, if any, of political parties and/or, civil society organizations:

_____

____
I declare that all the above entries and statements are correct and complete to the best of my knowledge and belief, and nothing has been concealed.

Date Signature of the candidate .

FORM-B

[See sections 60, 110 and 137]

STATEMENT OF ASSETS AND LIABILITIES

I, .Candidate/Member, *National Assembly/ Senate, Provincial Assembly, Punjab/Sindh/Khyber Pakhtunkhwa/Balochistan from constituency ../from the seats reserved for women/non-Muslims hereby declare that no immovable and movanble property, including bonds, shares, certificates, securities, insurance policies and jewellery, other than specified herein below, is held by me, my spouse(s) and dependent children on 30th day of June .

ASSETS

ASSET	**COST OF ASSET**	**REMARKS**
1	**2**	**3**
1. IMMOVABLE PROPERTY Open plots, houses, apartments, commercial buildings, under construction properties, agricultural property, etc. (a) Held within Pakistan* (i)_____ (ii) _____ (iii) _____ (b) Held outside Pakistan* (i) _____ (ii) _____ 2. **MOVABLE ASSETS** (a) **Business capital within Pakistan** (i) Name of business (ii) Capital amount (b) **Business capital outside Pakistan** (i) Name of business (ii) Capital amount (c) **Assets brought or remitted from outside Pakistan*** (i) Bank drafts/Remittances (ii) Machinery (iii) Other (d) **Assets brought out of remittances from abroad*** (e) **Investments** (i) Stock and Shares (ii) debentures. (iii) National Investment (Unit) Trust. (iv) ICP Certificates (v) National Savings Schemes - Defence Savings Certificate - Special Saving Certificate - Regular Income Certificate (vi) Unsecured loans (vii) Mortgages (viii) any other (f) **Motor Vehicles*** Make Model Reg. No (i) _____ _____ _____ (ii) _____ _____ _____ (g) **Jewellery, etc.** (i) Weight .. (ii) Description .. (h) **Cash and Bank Account*** (i) Cash in hand (ii) Cash at Bank **Account No. Bank and Branch** Current . Deposit Savings Other deposits .. .. (i) F**urniture, Fittings and articles of personal use-** (j) **Assets transferred to any person** (i) Without adequate consideration **or, (ii) by revocable transfer (k) Any other assets**		

*** details to be annexted.**

LIABILITIES

LIBILITY	**AMOUNT**	**REMARKS**

(i) Mortgages secured on Property or land. (ii) Unsecured Loans owing (iii) Bank Overdraft (iv) Bank Loans (v) Amounts due under Hire Purchase Agreement (vi) House Building Loans (vii) Advances from Provident Funds etc,' (viii) Other debts due* (ix) Liabilities in the names of dependent children (in respect of assets standing in their names). Total

* Details to be annexed.

VERFIFICATION

I, ..S/o, W/o, D/o . do hereby declare that, to the best of my knowledge and belief, the above statement of the assets and liabilities of myself, my spouse(s) and dependent children is correct and complete as on 30th June . and nothing has been concealed therefrom.

Date Signature of the Candidate/Member

_____

PCPPL-156/PEC-28.04.2018 (23100 Form)

Decision of Returning Officer

Date . Returning Officer

_____

ELECTION COMMISSION OF PAKISTAN

RECEIPT

(To be filled in by the Returning Officer)

[Note: Strike off the words not applicable]

Serial Number of nomination paper ..

The nomination paper of Mr./Ms./Mrs ..

A candidate for election to the seat from National Assembly/Senate/Provincial Assembly of the Punjab/Sindh/Khyber Pakhtunkhwa/ Balochistan was delivered to me in my office at (hours) on (date by (person).

This nomination paper will be taken up for secrutiny at . . (hours) on ..(date) at . (place)

Date Returning Officer

_____

14. In this regard, the august Supreme Court of Pakistan over the years has developed jurisprudence with reference to the qualification and disqualification of members of Parliament and Provincial Assemblies. Issues with reference to fake or bogus degrees, concealment of dual nationality, of assets and liabilities of the candidate, spouse and dependents as well as submission of false declarations have resulted in the development of law with reference to what is considered necessary and mandatory for the purposes of the nomination forms. Consequently the august Supreme Court of Pakistan has declared certain information as mandatory for the purposes of disclosure and declarations in the election nomination forms and time and again has emphasized on full and credible disclosure. In the cases "Dr. Shaukat Ilahi v. Ch. Mubashar Hussain and another" (2008 CLC 341), "Muhammad Nasrullah v. Election Commission of Pakistan and 9 others" (2009 CLC 1167), the Court held that declaration of criminal record is necessary. In PLD 2013 SC 406

(supra), the august Supreme Court of Pakistan requires a candidate to provide his complete credentials for the benefit of the voter. In "Muhammad Ahmad Chattha v. Iftikhar Ahmad Cheema and others" (2016 SCMR 763), the august Supreme Court of Pakistan has held that declaration of banks accounts of candidates and their dependents are mandatory. In the case "Muhammad Ijaz Ahmad Chaudhry v. Mumtaz Ahmad Tarar and others" (2016 SCMR 1) the august Supreme Court of Pakistan requires that correct educational qualification be declared. In the case Ms. Shamuna Badshah Qaisarani v. Khawaja Muhammad Dawood and others (2016 SCMR 1420), the Court held that declaration of property, income and assets is necessary along with information regarding travel abroad and foreign residency or "iqama" which is also necessary. In the case "Imran Ahmad Khan Niazi v. Mian Muhammad Nawaz Sharif, Prime Minister of Pakistan/Member National Assembly, Prime Minister's House, Islamabad and 9 others (PLD 2017 SC 265), the august Supreme Court of Pakistan declared that family business and resources which include assets of a candidate and his family members must be disclosed in the nomination forms. These requirements are now part of the law and require compliance for the purposes of inclusion in the nomination forms. I am cognizant of the fact that these cases pertain to different elections over the time, however the issue is not election specific, rather it relates to necessary information and declaration in order to ensure that the voter is able to take an informed decision and chose the candidate that he or she thinks is most suited for the position.

15. Another aspect that requires attention is with respect to the declarations regarding election expenses. In terms of Section 132 of the Act, election expenses of a candidate shall include all expenses incurred by any person or a political party on behalf of the candidate or incurred by a political party specifically for the candidate. The election expenses includes expenses of stationery, postage, advertisement, transport or any other item deemed to be the election expenses incurred by the candidate for the election purposes. Section 132 of the Act limits election expenses up to one million rupees for the National Assembly and requires a candidate to provide bills, receipts and documents for every payment made in respect of election expenses. If election expenses are disputed, the ECP can conduct an inquiry to resolve the dispute. A candidate in terms of Section 133 of the Act must open an exclusive account with the scheduled bank before the date fixed for scrutiny of nomination papers and maintain a register of receipts and expenditures. A candidate cannot make any transaction towards the election from any other account and a candidate must provide a return of all election expenses on Form C within thirty days from the date of publication of his name as a returned candidate. The co-relating statement is provided for in Form A in the form of a declaration that the candidate has opened an exclusive account for the purpose of election expenses with the name of a scheduled bank. This declaration does not fulfill the mandatory requirements of Sections 132 and 133 of the Act. A candidate must make a declaration that he did not exceed the amount given in Section 132 of the Act with respect to election expenses and also that this is the only account from which all election expenses have been made. Without these declarations the purpose of

providing the bank account information is of no use as it does not bind the candidate to the declarations specifically provided for in Sections 132 and 133 of the Act.

16. The lack of disclosure and information in the Impugned Forms essentially means that a voter will not have the required information on the basis of which an informed decision can be made. To make an informed decision voters require basic information about a candidate which includes information about educational qualifications, profession and/or business/jobs held, travel abroad. Voters also require information to establish the credibility of a candidate meaning thereby information about dual nationality, income tax paid, agriculture tax paid, loan default, government due defaults, criminal record and information of assets and liabilities. Finally the third set of information required is information which enables a voter to assess the track record of the candidate, in terms of what he has done, especially if he or she has served as Member Parliament or Senate. Hence information such as major contributions made, issues raised, and positions taken by the candidate over the years is relevant for the voter. There are two important aspects to this issue. First that a voter must be well informed about all the credentials of a candidate on the basis of which he or she can decide how to cast their vote. Decisions should not be based on campaign slogans and posters. Second is that when candidates present themselves for the National Assembly it is incumbent upon them to declare vital and relevant information which establishes their credibility and remains the barometer against which it can be determined whether the candidate is honest and fulfills the qualification requirements of Article 62 of the Constitution.

17. Furthermore while drafting nomination forms the lack of accessible and objective information in the public domain must be considered. In this regard it is also noted that it is not necessary that every member of the public or every voter is aware of the qualifications and disqualifications specifically enumerated in Articles 62 and 63 of the Constitution. Hence by generalizing the declaration for the purposes of Articles 62 and 63 of the Constitution a voter is deprived of essential information and required disclosure on the basis of which an informed decision can be made. Additionally for the purposes of raising objections and scrutinizing the nomination forms, the lack of information and declaration essentially erodes the constitutional mandate and the whole purpose of scrutiny is diluted. Parliament consists of political actors who have a keen interest in the quantity and quality of information available in the public domain. They are also interested in the nature of the disclosure and quantity of information that is required to be made in the nomination forms. It is for this reason that the Constitution protects the rights of the voters through the ECP, to ensure that at the time of election an informed decision is made. The requirement of Article 218, casting a duty on the ECP to organize and conduct honest, just and fair elections as per law, includes the duty to ensure that all necessary and required information, disclosure and declarations are made by a candidate. While Parliament can make the laws to regulate the conduct of elections, the ultimate authority and responsibility to ensure free and fair elections is of the

ECP. Hence ECP is responsible to ensure that a voter is able to make an informed decision and that the nomination forms achieve this objective.

18. In the book titled International Principles for Domestic Elections, published in June 2008, Chapter 2 by Patrick Merlone on Human Rights-The basis for inclusiveness, transparency, accountability and public confidence in elections, the author states that for elections to be genuinely democratic, the right to freedom of political expression, includes the freedom to seek, receive and impart information and ideas in order to develop informed choices. In support thereof the author explains that transparency is the byword of democratic elections and the basis for the requirement of transparency is the freedom to receive and impart information. The right to vote and to be elected cannot be exercised without the right to receive information. In the electoral process where those who seek to be elected do not impart necessary information to the electoral or where the voters go to the polls without receiving necessary information it cannot be called a democratically held free and fair election. The voter has the right to know basic information about the candidate along with relevant information to establish the credibility and honesty of a candidate.

19. Therefore based on the aforesaid the Impugned Forms do not provide for the following mandatory information and declarations which should be made on integral part of Form A and Form B. In this regard, it is noted that the stated information and declarations were available in the 2013 Forms:
(i) Educational qualifications of the candidate
(ii) Current occupation/job/profession/business of the candidate
(iii) Dual nationality, if any
(iv) National Tax Number/Income tax returns/ and payment of income tax
(v) Agriculture tax returns and payment of agriculture tax
(vi) Criminal record, if any
(vii) Assets and liabilities of dependents
(viii) Declaration pertaining to election expenses
(ix) Declaration pertaining to any default in loan or government dues by dependents
(x) Declaration that the candidate will abide by the code of conduct issued by the Election Commission

Challenge to the phrase 'dependent children'

20. The basic challenge is that the Constitutional requirement is for information to be provided with respect to assets and liabilities of all dependents whereas the Act only calls for declarations with respect to the assets and liabilities of dependent children. For ease of reference the relevant constitutional provisions and provisions of the Act are reproduced hereunder:
Article 63 Disqualifications for membership of Majlis-e-Shoora (Parliament).- (1) A person shall be disqualified from Majlis-e-Shoora (Parliament), if -
(n) he has obtained a loan for an amount of two million rupees or more, from any bank, financial institution, cooperative society or cooperative body in his own name

or in the name of his spouse or any of his dependents, which remains unpaid for more than one year from the due date, or has got such loan written off; or
(o) he or his spouse or any of his dependents has defaulted in payment of government dues and utility expenses, including telephone, electricity, gas and water charges in excess of ten thousand rupees, for over six months, at the time of filing his nomination papers;

Sections 60, 110 and 137 of the Act are also reproduced below:
60 Nomination for election (1) Any voter of a constituency, may propose or second the name of any qualified person to be a candidate for Member for that constituency;
Provided that no voter shall subscribe to more than one nomination papers either as proposer or seconder.
(2) Every nomination shall be made by a separate nomination paper on Form A signed both by the proposer and the seconder and shall, on solemn affirmation made and signed by the candidate, be accompanied by
(a) a declaration that he has consented to the nomination and that he fulfills the qualifications specified in Article 62 and is not subject to any of the disqualifications specified in Article 63 for being elected as a Member;
(b) a declaration that he has opened an exclusive account with the scheduled bank for the purpose of election expenses;
(c) an attested copy of his National Identity Card; and
(d) a statement of his assets and liabilities and of his spouse and dependent children as on the preceding thirtieth day of June on Form B.

110 Nomination for election.---(1) A voter may propose or second the name of any person qualified for election to the Senate from a Province, Islamabad Capital Territory or the Federally Administered Tribal Areas, as the case may be.
(2) Every nomination shall be made by a separate nomination paper on Form A signed both by the proposer and the seconder and shall, on solemn affirmation, be made and signed by the candidate and shall be accompanied by---
(a) a declaration that he has consented to the nomination and that he fulfills the qualifications specified in Article 62 and is not subject to any of the disqualifications specified in Article 63 for being elected as a Member of the Senate;
(b) a declaration that he is a technocrat or aalim, if the nomination papers are filed for a seat reserved for technocrat or aalim;
(c) a declaration that he has opened an exclusive account with a scheduled bank for the purpose of election expenses;
(d) an attested copy of his National Identity Card; and
(e) a statement of his assets and liabilities and of his spouse and dependent children as on the preceding thirtieth day of June on Form B.

137 Submission of statement of assets and liabilities.__(1) Every Member of an Assembly and Senate shall submit to the Commission, on or before 31st December each year, a copy of his statement of assets and liabilities including assets and

liabilities of his spouse and dependent children as on the preceding thirtieth day of June on Form B.

21. As per the constitutional mandate a person shall be disqualified from being elected or chosen as a member of Majlis-e-Shoora (Parliament) if he, his spouse or dependents are in default of a loan of an amount of two million or more from any bank for more than one year or if he has gotten that loan written off. The Constitution provides that the loan can be in his own name or in the name of his spouse or any other of his dependents. In the same way if a person or his spouse or any of his dependents are in default of government dues, utility expenses, telephone, electricity, gas and water charges at the time of filing of the nomination papers, he stands disqualified in terms of Article 63(1)(o) of the Constitution. However as per the Act, a candidate is to make declaration with respect to his dependent children. Affectively the phrase 'dependent children' has diminished the scope of the constitutional requirement to make declaration with regard to 'dependents' be they children or any other relative which can include parents, siblings or any other dependents. A bare reading of the Constitution shows that the requirement for declaration is of spouse or any dependent. There can be no cavil with the legal sanctity of the constitutional mandate and the fact that all laws must be in consonance with the Constitution. By requiring the statement of assets and liabilities for dependent children, the legislature has in fact ignored the constitutional mandate. The learned DAG with reference to this omission argued that no mala fide can be imputed to the legislature while considering the vires of law. However, in this regard, I am reminded of the findings of the august Supreme Court of Pakistan in the case cited at "Contempt Proceedings Against Chief Secretary, Sindh and others: In the matter of (2014 PLC (C.S) 82) wherein it has fairly commented that while it is true that judicial precedent available thus far declares that mala fide cannot be attributed to the legislature but if a legislature deliberately and repeatedly embarks upon a venture to nullify considered judicial verdict in an unlawful manner, trample the constitutional mandate and violate the law in the manner it was done in the present case then it is difficult to attribute bona fide to it either. In a recent judgment cited as Messrs Sui Southern Gas Company Ltd. and others v. Federation of Pakistan and others (2018 SCMR 802), the august Supreme Court of Pakistan held that:

It is well established by this Court, while considering the vires of a legislative enactment under its powers of judicial review, can consider not only the substance of the law but also the competence of the legislature. Further, though it is an accepted principle that no mala fide can be attributed to the legislature, however, the bona fides of the legislature as also the purpose and object of a statute may also be considered in the determination of the vires of a statute. The vires of a statue can also be determined on the ground that the legislation is colourable. In the instant case, the only issue involved in the legislative competence of the Parliament vis- - vis the legislative authority of the provincial legislature. In this regard it is to be noted that there is always a presumption in favour of the constitutionality of a legislative enactment unless ex facie it appears to be violative of any of the constitutional provisions and in a case where two opinion with regard to the

constitutionality of an enactment are possible, the one in favour of the validity of the enactment is to be adopted. Meaning thereby that when a law is enacted by the Parliament, the presumption lies that Parliament has competently enacted it (law), and if the vires of the same (law) are challenged, the burden always lies upon the person making such challenge to show that the same (law) is violative of any of the fundamental rights or the provisions of the constitution. It is also a cardinal principle of interpretation that law should be interpreted in such a manner that it should be saved rather than destroyed. The Courts should lean in favour of upholding the constitutionality of a legislation and it is thus incumbent upon the Courts to be extremely reluctant to strike down laws as unconstitutional. This power should be exercised only when absolutely necessary for injudicious exercise of this power might well result in grave and serious consequences.

22. Therefore with respect to the challenge of the use of the phrase 'dependent children' instead of 'dependent' in Sections 60, 110 and 137 of the Act, there is merit as the said Sections are in clear derogation of the constitutional mandate. Under the circumstances the words dependent children shall be read down such that it will be read to be in conformity with the constitutional requirement of Articles 63(1)(n) and (o) of the Constitution.

23. One of the objections raised by the learned DAG is with respect to the disclosure of filing a similar petition before the Hon'ble Islamabad High Court by the same Petitioner, in which his petition along with connected petitions were decided through a short order passed on 25.5.2018. There appears to be no merit in this objection as the instant Petition has been pending since 2017 and in fact, it took more than six months for the Federation to file its reply. Furthermore the counsel for the Petitioner did disclose the pendency of several petitions before the Hon'ble Islamabad High Court with similar prayers, however at that time there was no order in the said petitions. In terms of the short order of the Hon'ble Islamabad High Court the vires of Form A and Form B were challenged and the Court through a short order, while relying on the Workers' Party Case held that the ECP was empowered to add any information or improve Form A and Form B.
24. In view of the aforesaid, these petitions are partially allowed in the following terms:
(a) The challenge to the drafting of the Impugned Forms by Parliament so as to become a part of the Act, is dismissed having no merit;
(b) The term 'dependent children' used in the Act, specifically in Sections 60, 110 and 137 and in Form A and Form B is held to be read down to be construed and interpreted in terms of the constitutional requirement provided for in Articles 63(1)(n) and (o) of the Constitution;
(c) The Impugned Forms do not provide for mandatory information and declarations as required by the Constitution and the law and the ECP is directed to ensure that all mandatory information and declarations are included in the Impugned Forms;
(d) The ECP is empowered to add or improve Form A and Form B of the Act so as to fulfill its constitutional mandate of ensuring honest, just and fair elections
MWA/H-10/L Order accordingly.

2018 C L D 1086
[Lahore]
Before Ayesha A. Malik and Shahid Bilal Hassan, JJ
ALLIED BANK LIMITED through Authorized persons---Petitioner
Versus
JUDGE BANKING COURT NO.VII, LAHORE and 6 others---Respondents
W.P. No. 110755 of 2017, heard on 12th March, 2018.

Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----S. 16---Attachment before judgment---Principle---Bank, in suit for recovery of finance, filed application seeking attachment before judgment and the same was dismissed by Banking Court---Validity---Banking Court rightly dismissed application of Bank being premature---No reasons were provided in application as to why Bank wanted to secure its finance facility and how it claimed that it had insufficient security to secure its finance facility provided to defendants---Suit was pending and at such stage it could not be said that the suit would be decreed in favour of Bank---Banking Court had rightly dismissed application on the ground that there was no prima facie case made out nor there was any apprehension or probability expressed in application for alienation of the property or that defendants would remove themselves from the jurisdiction of the Court--- Constitutional petition was dismissed in circumstances.

Ashar Elahi for Appellant.
Furqan Naveed for Respondents Nos. 2 to 6.
Barrister Hassan Nawaz for Respondent No.7.
Date of hearing: 12th March, 2018.

JUDGMENT

AYESHA A. MALIK, J.---Through this petition, the Petitioner Bank has impugned order dated 01.11.2017 passed by Respondent No.1, Judge Banking Court No.VII, Lahore.

2. The basic grievance of the Petitioner is that it moved an application under section 16 of the Financial Institutions (Recovery of Finances), Ordinance 2001 ("F.I.O.") for attachment of the property of Respondent No.4, Irshad Butt which was dismissed by Respondent No.1 vide order dated 01.11.2017, impugned before us.

3. Learned counsel for the Petitioner stated that the Petitioner Bank has filed a recovery suit, in the amount of Rs.52,118,209.44 in which PLA has been filed by the defendants and the case is now pending at the stage of arguments on the PLA. In the meanwhile, the Bank has also moved an application under section 16 of the F.I.O. on the ground that its securities were insufficient to secure the facilities and in order to ensure that the Petitioner Bank will be able to recover the amounts due to it, the Petitioner traced property of Respondent No.4 for which it sought attachment.

4. The Respondents Nos.2 to 6 filed their reply to the application. Subsequently Respondent No.1 dismissed the application on the ground that the property cannot be attached as the judgment and decree has not yet been passed. As such there is no material available on the record to suggest that there is any real danger that the Respondent will remove himself from the jurisdiction of the court. The court also found that there was no reason to accept that the mortgaged property is insufficient to secure the finance facility and in the event of judgment and decree in favour of the Bank, it will not be able to recover the decretal amount from the mortgaged property. Learned counsel for the Petitioner argued that section 16 of the F.I.O. permits the court to pass order for attachment before passing its judgment, grant injunction and appoint receiver. He stated that in this case the Petitioner moved an application seeking attachment before judgment in order to ensure that the Petitioner will be able to recover the amount due to it.

5. On behalf of Respondent No.7 it is argued that the subject property is mortgaged with Respondent No.7 Bank by way of mortgage deposit of title document, therefore the Petitioner is not entitled to the relief sought in the application.

6. On behalf of Respondents Nos.2 to 6 it is argued that the application filed by the Petitioner is vague, without any details. Also there is no proof of any shortfall or insufficient security. There is also no apprehension that the Respondent will run away or will alienate any property. Learned counsel further submitted that the application was rightly dismissed for being premature as the suit is still pending and as such at this stage the Respondents being guarantors/owe no liability which can be presumed against them.

7. We have heard the learned counsel at length and have gone through the record.

8. We note that the learned Judge Banking Court has rightly dismissed the application of the Petitioner Bank being premature. A bare review of the application itself shows that no reasons have been provided whatsoever in the application as to why the Petitioner Bank wants to secure its finance facility and how it claims that it has insufficient security to secure the facilities provided to the Respondents. Furthermore, the suit is still pending and at this stage it cannot be said that the suit will be decreed in favour of the Petitioner Bank. The impugned order considered the arguments of the Petitioner and dismissed the application on the ground that there is no prima facie case made out nor is there any apprehension or probability expressed in the application for alienation of the property or that the Respondent will remove himself from the jurisdiction of the court.

9. Under the circumstances no illegality is made out in the impugned order. The instant petition is **dismissed.**

MH/A-33/L Petition dismissed.

2018 C L D 1181
[Lahore]
Before Ayesha A. Malik and Jawad Hassan, JJ
Messrs AL-SHEIKH INTERNATIONAL KINO FACTORY---Appellant
Versus
NATIONAL BANK OF PAKISTAN and another---Respondents
E.F.A. No. 214570 of 2018, decided on 24th May, 2018.

Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----S. 19---Civil Procedure Code (V of 1908), O. XXI, R. 66---Execution of decree---Sale/auction of property---Application for re-evaluation of the property as per market price for the current year---Contention of applicant/judgment-debtor inter alia was that respondent (Financial Institution) itself had assessed the value of the property; market value of the property assessed by Patwari was the latest and liable to be considered for auction of the property---Validity---Valuation of property was assessed by engineering consultants---Judgment-debtor had not raised objection regarding the said evaluation at the time of its filing---Patwari was not the competent authority to assess the market value of the property consisting of land, machinery, building and boundary wall owing to lack of expertise---Application of judgment-debtor was rightly dismissed by the Banking Court---Appeal was dismissed, in circumstances.

Iftikhar Ahmad Qureshi for Appellant.

ORDER

Through the instant Appeal, filed under section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (the "Ordinance"), the Appellant seeks setting aside of order dated 21.05.2018, passed by the Banking Court, Sargodha (the "Banking Court") whereby his application for reevaluation of the property as per market price for the year 2018, was dismissed.

2. Learned counsel for the Appellant inter alia submitted that the Banking Court has not taken into consideration the true facts and circumstances of the case while dismissing the application of the Appellant; that the impugned order is against law and facts; that the Banking Court while allowing the auction schedule has ignored the present market value of the mortgaged property which is Rs.2,50,00,000/- and the Respondent No.1 itself assessed the value of the property which is against the law.

3. We have heard the arguments and perused the record.

4. The perusal of record reveals that the valuation of the property was assessed by the 'Premier Engineering Consultants (Regd.) and in this regard its evaluation report is on file which is dated 12.12.2013. The record does not show that at the time of

filing this report, the Appellant has ever filed an objection regarding the said evaluation report. The Appellant's contention is that as per the report of the Patwari the market value of the property is Rs.2,50,00,000/- which is latest and liable to be considered for auction of the property. The bare reading of the report of Patwari depicts that it assessed the value of the property without any detail of each and every item rather mentioned that the total market value of the land, machinery, building, boundary wall is Rs.2,50,00,000/-. As such, the Banking Court has rightly observed that the reserve price was properly fixed on the report of evaluator whereas the report of Patwari does not give any detail regarding price of property, building and machinery separately, hence the report of Patwari does not appear to be reliable. Furthermore, the Appellant himself filed application dated 12.05.2018 to the Tehsildar concerned for market value of the property and in pursuance of which the Patwari submitted his report on the same day i.e. 12.05.2018. Whereas the application to the Banking Court for reevaluation of the property as per market price was filed on 14.05.2018 after obtaining the report of Patwari; meaning thereby that he himself resorted to the revenue hierarchy for obtaining present market value of the property rather than through process of law i.e. Banking Court. Therefore, this report can also not be given any weight. Moreover, the Patwari is not the competent authority to assess the market value of the property consisting of land, machinery, building and boundary wall owing to lack of expertise in this regard.

5. We, therefore, fully agree with the findings of the Banking Court which rightly dismissed the application of the Appellant and do not see any illegality or perversity in the impugned order which has been passed strictly in accordance with law, as such does not warrant any interference by us. Consequently, the Appeal in hand, being devoid of any merit, is hereby dismissed in limine.

SA/A-53/L Appeal dismissed.

P L D 2018 Lahore 762
Before Ayesha A. Malik, J
PUNJAB HEALTHCARE COMMISSION---Petitioner
Versus
MUSHTAQ AHMAD CHAUDHARY and others---Respondents
Writ Petition No.32150 of 2015, heard on 6th July, 2018.

(a) Punjab Healthcare Commission Act (XVI of 2010)---

----Ss. 3, 1 & Preamble---Constitution of Pakistan, Art.142 & Fourth Sched., Part II, Entry 11---Vires of Punjab Healthcare Commission Act, 2010---Distribution of legislative powers---Federal Legislative List---Legal, medical and other professions to fall under the domain of Federal Legislative competence---Establishment of the Punjab Healthcare Commission---Public Health/healthcare distinct from medical profession---Scope---Question before the High Court was whether the Punjab Healthcare Commission Act, 2010 was ultra vires the Constitution on ground that it sought to regulate the medical profession, which fell within the domain of the Federal legislative power, under the Federal Legislative List of the Constitution---Held, that the Punjab Healthcare Commission Act, 2010 did not regulate the medical profession as the provision of healthcare services, establishment and service providers were to be regulated by the Punjab Healthcare Commission and such subjects did not fall under the subject of medical profession and rather fell within the ambit of public health or healthcare---Registration and licensing in any regulatory regime was fundamental for the authority to fulfil its objective and mandate, thus Punjab Healthcare Commission was required to create system of clinical governance and healthcare---Such function was distinct and separate from registering the profession of medical practitioner, therefore the Punjab Healthcare Commission Act, 2010 was not ultra vires the Constitution and the mandate of the Punjab Healthcare Commission Act, 2010 fell squarely within the Provincial domain---Constitutional petition was dismissed, in circumstances.
Inamur Rehman v. Federation of Pakistan and others 1992 SCMR 563; Messrs Elahi Cotton Mills Ltd. and others v. Federation of Pakistan through Secretary M/o Finance, Islamabad and 6 others PLD 1997 SC 582 and Syed Aizad Hussain and others v. Motor Registration Authority and others PLD 2010 SC 983 ref.

(b) Punjab Healthcare Commission Act (XVI of 2010)---

----Ss. 4 & 40---Punjab Healthcare Commission Regulations for Banning Quackery in all its Forms and Manifestations and for Dealing with Quacks, 2016, Reglns. 5 & 7---Functions and powers of the Punjab Healthcare Commission---Necessary steps to ban quackery---Inherent power of the Punjab Healthcare Commission to seal healthcare establishment(s)---Application of the "Precautionary Principle"---Scope---Question before the High Court was whether Punjab Healthcare Commission was empowered under the law to seal healthcare establishment---Held, that concept of precaution and prevention lay at the heart of public health practice, and dealing in public health meant identifying and avoiding risks to life and health of a person as

well as ensure to that protected measures were taken to prevent any harm to persons who would require healthcare---Precautionary Principle addressed uncertain risk and enabled action to take place before any harm was caused and enabled an authority to take preventive measures---Said principle required the system to ensure that its decisions were safe and efficient with public safety and health as its primary concern---Words "necessary steps" used in S.4 of the Punjab Healthcare Commission Act, 2010 included an inherent power to sealing an establishment as a preventive measure---Regulations issued under S.40(1) of the Punjab Healthcare Commission Act, 2010 prescribed procedure to be adopted when the Healthcare Commission was to seal a healthcare establishment---Such power of sealing exercised by the Commission was in furtherance of the mandate of the Punjab Healthcare Commission Act, 2010---Power exercised prior to the framing of the said regulations fell within the inherent power to seal healthcare establishment and hence no illegality existed---Constitutional petitions were dismissed, in circumstances.

Human Rights Case No.19921-P/2018 and Civil Misc. Applications Nos.1140-L, 1142-L, 1265-L, 1512-L and 4389/2018 and Suo Motu Case No.1 of 2010 ref.
Lung Fung Chinese Restaurant through Atiq Ahmed and 2 others v. Punjab Food Authority through Secretary and 6 others PLD 2017 Lah. 545 rel.
Khawaja Issam Bin Haris for Petitioner (in W.P. No.32150/15 and for Punjab Healthcare Commission (in W.Ps. Nos. 79690/17, 2427/17 and 31831/15 along with Dr. Muhammad Ajmal Khan, Chief Operating Officer, Punjab Healthcare Commission and Khurram Mushtaq, Additional Director (Legal), Punjab Healthcare Commission.
Mohammad Ahmad Qayyum, Shumail Arif, Omar Ashfaq and Ghualm Mustafa Umair, for Petitioners (in W.Ps. Nos.79690/17, 2427/17, 31831/15 and for Respondent No. (in W.P. No.32150/15).
Nawab Saeed Ullah, for Petitioners (in W.P. No.19597/15).
Malik Zia ur Rehman for Petitioner (in W.P. No.38582/15).
Waheed Ahmad for Petitioner (in W.P. No. 28593/15).
Imtiaz Hussain Khan Baloch for Petitioner (in W.P. No.11158/16).
Muazzam Iqbal Gill, for Petitioner (in W.P.30210/16).
Mian Subah Sadiq Klasson and Muhammad Hayat Klasson for Petitioner (in W.P. No.28517/16).
Nemo for Petitioner (in W.P.No.21753/15).

Nasar Ahmad, DAG and Muhammad Zikria Sheikh, DAG for Respondents.
Anwaar Hussain, Addl. A.G. Punjab along with Barrister Haris Ramzan, Legal Advisor, Aleem Akhtar Cheema, Senior Law Officer, Muhammad Khursheed, Law Officer on behalf of the Secretary Health, Lahore.
Ch. Muhammad Umar and Mufti Ahtsham-Uddin-Haider for Punjab Healthcare Commission (in W.Ps. Nos. 19597/15, 28593/15, 38582/15, 21753/15, 11158/16 and 28517/16).
Date of hearing: 6th July, 2018.

JUDGMENT

AYESHA A. MALIK, J.---The instant petition filed by the Punjab Healthcare Commission challenges order dated 16.10.2015 issued by Respondent No.2, District and Sessions Judge, Toba Tek Singh whereby the sealing order against the clinic of Respondent No.1, Mushtaq Ahmad Chaudhary was set aside and it was held therein that the Punjab Healthcare Commission ("Commission") did not have any power under the Punjab Healthcare Commission Act, 2010 ("Health Act") to seal a healthcare establishment. In the first round the case was heard on 20.11.2015 and a judgment was rendered by a learned Single Judge of this Court holding therein that the action of sealing a healthcare establishment is without any backing of law, hence without lawful authority. Accordingly the order passed by the District and Sessions Judge, Toba Tek Singh dated 16.10.2015 was upheld. This judgment was challenged before the august Supreme Court of Pakistan in C.A 213/2016 and C.M.A 816/2016, C.A. 214/2016 and C.M.A. 818/2016 and C.Ps 768, 997 and 998 of 2016 wherein with the consent of the parties the following order was passed on 14.2.2017:

Both the Appeals are allowed and the cases are remanded to the learned High Court to be tagged and heard along with Writ Petition No.2427/2017, filed by the Respondents challenging the vires of the Punjab Health Care Commission Act, 2010. The learned High Court will hear the parties and decide the matter in accordance with law.

2. The instant petition was being heard along with two other petitions. Firstly W.P. No.31831/2015 filed by the Punjab Dental Practitioners Association wherein it is prayed that the Commission should not illegally harass the members of the Association and it seeks a declaration that all persons registered under the Unani Ayurvedic and Homoeopathic Practitioner Act, 1965 ("Unani Act") be authorized to practice as dental technicians and dental hygienists, if they possess the appropriate diploma by the Skill Development Council. The second petition being W.P. No.2427/2017 is also filed by the Punjab Dental Practitioners Association and Mushtaq Ahmad Chaudhary. In this petition, the vires of the Health Act have been challenged essentially on the ground that the Provincial Government is not competent to legislate on the subject of healthcare. The aforementioned three petitions are being heard as per the remand order, along with connected matters being W.Ps. Nos.28593/15, 21753/15, 19597/15, 38582/15, 79690/17, 11158/16 and 30210/16 (Details given in Schedule "A"). Essentially all these petitions either challenge the vires of the Health Act or challenge the act of sealing healthcare establishments by the Commission. In some petitions a declaration is sought against the Respondents from stopping the Petitioners from practicing as Hakeem or Homoeopathic doctors or in terms of their registration under the Unani Act.

3. In terms of the above, there are two main issues before this Court; (i) vires of the Health Act and (ii) whether the Commission has the power to seal healthcare establishments under the Health Act.

Vires of the law

The arguments

4. Mr. Mohammad Ahmad Qayyum, Advocate for the Dental Association and Mushtaq Ahmed Chaudhary explained that the Petitioners are qualified and registered under the Unani Act. That they are carrying out their lawful business in the field of traditional medicine, essentially as tibbs and homoeopaths, yet are being unlawfully harassed by the Commission. He argued that the Petitioners are regulated under the Unani Act, which essentially falls within the subject of medical profession. He argued that the Provincial Government is not competent to legislate on matters related to medical profession. He argued that in terms of Entry 11, Part 2 of the Federal Legislative List ("FLL"), the subject of legal, medical and other professions falls within the domain of the Federal Government, meaning thereby that only the Federal Government can legislate and regulate the medical profession. He further argued that the Health Act attempts to regulate the medical profession, hence it is ultra vires to the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution"). Further that it requires all medical practitioners to register with the Commission which is against the law as the Petitioners as with other medical practitioners are registered under a federal law, hence are not liable to register under a provincial law. The learned counsel contended that the Petitioners are also dental technicians and dental hygienists duly qualified from Skill Development Council and therefore competent to practice as dental hygienists or technicians. However, the Commission is creating hurdles in the way of the Petitioners from practicing as dental hygienists or technicians and as tibbs and homoeopaths. In this regard the Commission requires registration of the Petitioners under the Health Act irrespective of the registration under the Unani Act. Learned counsel stated that in the event that a practitioner is not registered with the Commission, it can at best impose a penalty, yet in these cases the Respondents have resorted to illegally sealing the establishments of the Petitioners. Learned counsel argued that the Respondents have initiated a crackdown on quackery and have included the clinics of the Petitioners who are not quacks, rather they are qualified dental technicians and dental hygienists as well as homoeopaths and tibb. Learned counsel further argued that the Respondents have failed to take into consideration that the Petitioners are qualified and duly registered with their respective Councils under the Unani Act, meaning thereby that they are not quacks. He argued that non-registration under the Health Act does not qualify as being a quack and that the Respondents have no authority to interfere in the lawful business of the Petitioners. Consequently, the Petitioners seek a declaration that they be allowed to practice if they are registered under the Unani Act and have the appropriate diploma by the Skill Development Council, as additional qualification.

5. On behalf of the Commission, Khawaja Issam Bin Haris, Advocate argued that the Health Act was promulgated with the mandate to improve healthcare services and ban quackery. This subject, he argued falls squarely within the competence of the Provincial Government as healthcare services do not fall within the federal subject of medical profession. Learned counsel argued that the Petitioners' case is based on the false assumption that the medical profession is wide enough to cover and regulate healthcare services or healthcare establishments. He argued that the

falsity of this assumption is apparent from the constitutional history on the subject of medical profession which has been a distinct subject from public health, sanitation, hospitals and dispensary which was always within the provincial domain. The former regulates the individual while the latter regulates the health care environment. Further that even with the widest of definitions the phrase medical profession cannot include healthcare services, the service provider or the establishment. Learned counsel explained that the Health Act regulates healthcare services, healthcare service providers and healthcare establishments and therefore calls for registration and licensing by the same. In such a situation, it may be that a healthcare service provider or establishment is a qualified doctor or as in the cases before the Court a homoeopath or tibb. However, since the doctor, homeopath or tibb is running a clinic or hospital or a diagnostic centre, as the case may be, then such an establishment will fall under the definition of a healthcare establishment and healthcare service provider which requires registration and licensing under the Health Act. He argued that such an overlap if any with the Unani Act does not render the law unconstitutional. Therefore it is his case that the Health Act is in accordance with the Constitution as the Provincial Government is competent to legislate on the subject matter. Reliance is placed on Inamur Rehman v. Federation of Pakistan and others (1992 SCMR 563), Messrs Elahi Cotton Mills Ltd. and others v. Federation of Pakistan through Secretary M/o Finance, Islamabad and 6 others (PLD 1997 SC 582) and Syed Aizad Hussain and others v. Motor Registration Authority and others (PLD 2010 SC 983) in furtherance of the point that the Court shall interpret in favour of the constitutionality of a statute.

6. On behalf of the Provincial Government, Mr. Anwaar Hussain, Additional Advocate General argued that there is always a presumption in favour of the constitutionality of a statute unless the statute is not declared to be unconstitutional, which situation only arises if there is no way of reconciling or harmonizing the statute with the Constitution. In the instant cases, the subject of healthcare falls within the domain of the Provincial Government and requires the Provincial Government to legislate. Learned Law Officer further argued that historically the matter has always been with the Provincial Government and he agreed that the subject medical profession does not include healthcare services, service provider or establishment. He argued that if a medical professional or in this case a homoeopath or tibb is in the business of providing healthcare services then the services provided along with the establishment where the services are provided all fall within the domain of Provincial legislation. He explained that the intent of the Constitution is clear, such that the profession is regulated at the federal level, to maintain uniformity in education, training and standards throughout the country but the service provider and the establishment is regulated through Provincial legislation in order to ensure that the federal standards are maintained and public health is protected. He argued that in pith and substance the Health Act aims to improve performance and quality of healthcare and consequently prevents quackery. Consequently all service providers and establishment have to be regulated at a Provincial level and cannot be regulated at a federal level.

7. On behalf of the Federal Government, Mr. Nasar Ahmad, Deputy Attorney General argued that the primary function of the Health Act is to improve the quality of healthcare services, clinical governance and to ban quackery in the Punjab. The Commission is empowered to take all necessary steps to fulfill the mandate of the law. He argued that a bare reading of the Health Act shows that the objective of the law is to regulate healthcare services and not the profession. He further argued that Federal legislature regulates the profession, meaning thereby that it regulates the practitioner or the education and not hospitals, clinics, dispensaries, allied staff, essentially the entire ambit of the healthcare environment. He further argued that the requirement of registration under the Health Act is not violative of the Constitution as the Federal Government seeks registration of medical professionals whereas the Commission seeks registration and licensing of the healthcare service provider and the healthcare establishment. Hence there is no overlap or conflict. He also argued that the healthcare is a broader subject whereas the medical profession is a more concise subject and does not include healthcare.

The law

8. The law under challenge is the Health Act. In terms of the preamble of the Health Act, the mandate of the law is to improve the quality of healthcare services and to ban quackery in all its forms and manifestation and to provide for ancillary matters. Section 4 of the Health Act provides for the functions and powers of the Commission, which includes the function to improve the quality of healthcare services and clinical governance and to ban quackery. Subsection (2) of Section 4 of the Health Act provides that the Commission has all the powers it requires in furtherance of this function. Section 2 (xv) defines healthcare establishment to mean a hospital, diagnostic centre, medical clinics, nursing home, maternity home, dental clinic, homeopathy clinic, tibb clinic, acupuncture, physiotherapy clinic or any other premises or conveyance. Section 2 (xvi) defines healthcare services to mean services provided for diagnosis, treatment or care of persons suffering from any physical or mental disease, injury or disability including procedures that are similar to forms of medical, dental or surgical care but are not provided in connection with a medical condition and includes any other service notified by the Government. Section 2 (xvii) provides for healthcare service provider to mean an owner, manager or incharge of a healthcare establishment and includes a person registered by the Pakistan Medical and Dental Council ("PMDC"), Council for Tibb, Council for Homeopathy or Nursing Council. Section 13 of the Health Act calls for registration of the healthcare service provider and Section 14 calls for licensing of a healthcare establishment. Section 19 of the Health Act provides that a healthcare service provider can be guilty of medical negligence if it does not have the required human resource and equipment, which it professes to have or if its employees do not have reasonable competency or skill that they possess. Section 20 of the Health Act requires the Commission to set standards for healthcare services and under Chapter-V, the Commission can inspect any healthcare establishment as per the procedure laid down.

9. In terms of the provision of the Health Act and its preamble, the Health Act regulates healthcare which essentially is the provision of services related to treatment, diagnosis and care including procedures, processes involved in the diagnosis, treatment and care. Consequently, the Health Act regulates the healthcare service provider being the person who is responsible for the provision of the services and the healthcare establishment being the space within which such services are provided such as a hospital, diagnostic centre, medical clinic, nursing home, maternity home, dental clinic, homeopathy clinic, tibb clinic and so on. Therefore the question that arises is what is healthcare and clinical governance and whether healthcare falls within the subject of medical profession.

Opinion

10. The Health Act regulates the healthcare environment which includes regulating the service provider, the establishment and the services. The Commission is mandated to ensure that all those in the business of providing healthcare are following the prescribed standards and are working towards improving the health of the people. Section 4 of the Health Act provides that the Commission shall improve the quality of healthcare and clinical governance. Neither healthcare nor clinical governance are defined under the Health Act as they are evolving concepts which cover the entire spectrum of the healthcare environment. Healthcare in its simplest of understanding is the maintenance or improvement of health through diagnosis, treatment, testing and will include all procedures and manner of care undertaken for the treatment or care of persons suffering from any physical, mental or emotional injury or disability. Clinical governance is the creation of a system to ensure that optimum quality of healthcare is given to everyone. The term was used for the first time by the World Health Organization ("WHO") in 1983 to encapsulate the provision of high quality healthcare on four important dimensions; professional performance, risk allocation, risk management and patient satisfaction. Over time this concept evolved to mean a system which is responsible, accountable and provides qualitative services and establishments, providing the highest standards of care to people. It essentially puts the principles of good governance in healthcare so as to ensure that all those involved in healthcare, the service provider, the establishment and those providing services are efficient, effective, responsive and accountable. Consequently the Commission addresses complaints, undertakes inspections and investigations to check poor performance, negligence and compromise in standard. Hence the primary function of the Commission under the Health Act is to govern the healthcare environment to maintain quality, safety and ensure that optimum level of care is experienced by the people.

11. In this context healthcare services cover a broad spectrum, involving the process and procedures, the medicine and staff involved in diagnosis, treatment and care. It is therefore not limited to just the practitioner, but instead covers the entire establishment which includes the staff, the equipment, the establishments and all the services provided there. It also takes into its fold persons who own, manage or run the establishment where the services are provided. This is necessary to ensure that persons who are in the business of healthcare take full responsibility of their

involvement in the provision of healthcare. Therefore healthcare covers a broad spectrum of services and people, all of whom have a role to play in delivering quality healthcare. This includes amongst others administrators, technicians, nurses, pharmacists, therapist, assistances Lab technicians, sonographers, radiologists, dental technician, dental hygienists. A wide range of regulatory bodies and system will therefore regulate the healthcare environment, at all levels, federal, provincial and even local. Essentially the regulatory framework is geared to protecting public well being and health. Therefore, the argument that healthcare regulations are limited to the federal legislature is totally misconceived.

12. When seen in the context of the constitutional history of Pakistan, medical profession and public health, sanitation, hospitals and dispensaries have been two separate and distinct legislative subjects. Under the 1956 Constitution the subject of medical profession was included in Entry 1 of the Concurrent Legislative List ("CLL") and public health, sanitation, hospitals and dispensaries was Entry 26 of the Provincial Legislative List ("PLL"). Under the 1962 Constitution, neither the subject of medical profession nor public health figured in the Third Schedule to the Constitution which provided for matters falling in the executive domain of the Federation and enumerated the powers of the Federal legislature. Therefore, the subject of medical profession and public health fell within the domain of Provincial legislature under the 1962 Constitution. Under the interim Constitution of 1972 medical profession was again included in the CLL thereby empowering the Federal as well as Provincial legislatures to make laws regarding the same whereas public health, sanitation, hospitals and dispensary figured in Entry 30 of the PLL giving exclusive powers to the Provinces. So far as the 1973 Constitution, prior to the 18th Amendment medical profession was Item 43 in the CLL and the subject of public health was neither in the FLL nor in the CLL, hence fell within the domain of the Provincial Government. After the 18th Amendment, medical and legal profession is found in Entry 11, Part 2 of the FLL being a federal subject and since the subject of public health, sanitation, hospitals and dispensary is not included in the FLL it means that this subject falls within the domain of Provincial government. Therefore, in terms of constitutional history, medical profession and public health, sanitation, hospitals and dispensary are two different and distinct subjects. Furthermore, it shows that the constitutional mandate requires the medical profession be governed by the Federal law and matters related to public health, sanitation, hospitals and dispensary be regulated by the Provinces.

13. When seen in the context of its meaning there is sound logic in the fact that the subject of legal and medical profession is a federal subject. The subject regulates educational qualifications and requires uniformity of standards in training and qualification for the purposes of education and for the purposes of entry into the profession. In this regard, the Punjab Medical and Dental Council Ordinance, 1962 ("1962 Ordinance") regulates the minimum standards of higher educational qualification in medicine and dentistry. The law as amended from time to time essentially recognizes medical institutions as well as medical and dental qualifications. It recognizes hospitals or institutions for house jobs internship or

foundation courses. It recognizes all medical and dental qualifications whether obtained in Pakistan or outside of Pakistan. It calls for the registration and licensing of medical and dental practitioners and all matters related to the establishment and running of medical and dental institutions including its recognition are regulated by the PMDC. Hence any person professing to be a medical or dental practitioner must be recognized, registered and licensed with the PMDC under the 1962 Ordinance. Various different regulations have been issued under the 1962 Ordinance including the Regulations titled Pakistan Registration of Medical and Dental Practitioners Regulations, 2008 ("Regulations"). In terms of these Regulations, compilation, maintenance and publication of registers which contain the registration of medical and dental practitioners are maintained as well as processes for removal of names from the registers. It provides for the procedure of filing a complaint against a medical or dental practitioner and provides for the procedure to be followed in such complaints. The 1962 Ordinance therefore, governs the medical and dental profession meaning thereby that it governs the individual who is qualified to practice as a doctor or dentist in Pakistan. It also regulates the institution from which the professional degree for qualifying as a doctor or dentist is obtained. The 1962 Ordinance does not regulate any of the healthcare services or establishments which will be used by the medical or dental practitioners during the process of providing medical or dental services. Hence the 1962 Ordinance clearly does not regulate clinics, dispensaries and diagnostic centres or testing procedures or any other related area which forms part of the ambit of healthcare services as defined under the Health Act.

14. The practice of Unani, Ayurvedic and Homoeopathic system of medicine are essentially traditional or alternate medicine which are popular within the country and play a significant role in providing healthcare to a large part of the population. Each system of medicine has its own unique characteristics and basis on which it provides cure and promotes good health. The argument of the Petitioners is that they are governed by the Unani Act which essentially means that their services along with their qualifications are regulated under the said Act. In order to appreciate this argument, it is necessary to examine the objective and mandate of the Unani Act. In terms of its preamble, it is an Act to regulate the qualifications and to provide for the registration of practitioners of Unani, Ayurvedic and Homoeopathic system of medicine. The Unani Act provides for a National Council for Tibb and National Council for Homoeopathy. The function of the Council as per Section 14 is to consider applications for recognition made by the institutions imparting or desiring to impart instruction in the system of medicine with which the Council is concerned. The Council also maintains adequate standards of education in recognized institutions and call for the registration of duly qualified persons. Teaching institutions and examinations are regulated under Chapter-II of the Unani Act and the registration of practitioners is provided for under Chapter-III. In terms of Section 24, every person who passes the qualified examination in the Unani, Ayurvedic or Homoeopathic system of medicine from a recognized institution must be registered in the respective register. Essentially there is a separate register for each system of medicine being Unani, Ayurvedic or Homoeopathic, hence

practitioners of each system of medicine are required to be registered accordingly. Section 33 of the Unani Act provides for the privileges of a registered practitioner which entitles them to hold any appointment as physician or medical officer in any Unani, Ayurvedic, Homoeopathic dispensary, hospital, infirmary or as the case may be. It also allows them to vote for the election of members of the Council and to recover fees from the courts. In terms of this Section, such practitioners cannot use, sale or stock any drugs or medicine except for those which are stipulated by the Council for the purposes of Unani, Ayurvedic or Homoeopathic system of medicine or pharmacopoeia as approved by the Federal Government. In terms of Section 37 of the Unani Act, no person other than a person registered or listed as a practitioner shall practice or hold himself out to be practicing Unani, Ayurvedic and Homoeopathic system of medicine. The said Section also clearly prohibits Homeopaths from practicing surgery. Therefore the mandate of the Unani Act is to regulate and maintain quality in the field of education and practitioners of Unani, Ayurvedic and Homoeopathic system of medicine, similar to the manner in which the 1962 Ordinance regulates medical and dental practitioners. It regulates individual practitioners through registration under the Unani Act so as to ensure that their qualifications are from recognized institutions and that they are duly qualified to practice in their given field. The Unani Act does not regulate healthcare services or establishments where these traditional system of medicine are practised. Nor does it hold the service provider responsible in any manner. It is important to note that healthcare is not limited to the work of the practitioner. It is the entire environment within which diagnosis treatment and care are provided. The Unani Act governs the licensing and registration of individuals who practice in the field of Unani, Ayurvedic and Homoeopathic system of medicine but does not regulate healthcare services, service providers or establishments. It is important to note that the profession along with healthcare environment both need to be regulated because a person who requires any kind of healthcare will be subjected to the practitioner along with others such as the support staff, technicians, procedures, equipment, hospitals and clinics. The term medical profession does not cover the entire healthcare environment. It only regulates the profession. The federal laws being the PMDC Ordinance and the Unani Act provide for the system of licensing and registration of individuals and is totally different from the licensing and registration called for under the Health Act. Sections 13 and 14 of the Health Act calls for registration of the service provider and licensing of the healthcare establishments. This is separate and distinct from the registration called for of the practitioners under Section 24 of the Unani Act. Therefore the Unani Act does not regulate healthcare services, service provider or healthcare establishments, rather it regulates the individual practitioner.

15. In this regard, even Section 19 of the Health Act which provides for medical negligence, confines its application to the healthcare service provider and not the practitioner. However, if in a given case, the healthcare provider or his employee did not exercise reasonable competence or skill which they claim to have, they can be made liable for medical negligence. There may be situation where the service provider and practitioner are the same individual as a doctor or dentist or

homoeopath or tibb is running the clinic or diagnostic centre or hospital, however in such a situation each law will operate within its given sphere and the registration under one law will not mean that registration under the other law is not required. Hence the practitioner can be made liable under the federal law as well as under the provincial law not only in the capacity of practitioner but also for being a healthcare service provider or establishment. It is important to note that a practitioner is registered and licensed to practice in his or her individual capacity and registration or licensing which regulates the profession will not include regulating all healthcare services as it includes those services that are not provided by the practitioner himself. The general scheme of healthcare law and clinical governance requires efficiency, responsibility and accountability at every level where healthcare is provided. Hence the practitioner, the services, the establishment and the service provider are all regulated to ensure that healthcare works at its optimum for the benefit of the people.

16. To conclude it is clear that the Health Act does not regulate the medical profession as the provision of healthcare services, establishment and service providers are to be regulated by the Commission. These subjects do not fall under the subject of medical profession rather falls within the ambit of public health or healthcare which requires the sector to be regulated. Standardized and accountable. In any regulatory regime registration and licensing is fundamental for the authority to fulfill its objective and mandate. In these cases the Commission is required to create system of clinical governance and healthcare so that it can effectively monitor the work of all services, service provider and establishment in healthcare. This is distinct and separate from registering the profession of the practitioner, therefore the Health Act is not ultra vires the Constitution and the mandate of the Health Act falls squarely within the provincial domain.

Sealing Power

17. When the instant petition along with connected petitions were filed pursuant to the anti-quackery drive, the question of whether or not the Commission has the power to seal healthcare establishments arose. At the time it was decided in terms of the judgment delivered by the learned Single Judge that the Commission did not have the power to seal healthcare establishments as there were no rules or regulations on the basis of which the act of sealing derived legal sanctity. The Commission exercised this power on the basis of the Standing Orders of the Commission for banning quackery in all its forms and manifestations for dealing with quacks which were duly approved by the Board of the Commission. However, the Court held that the Standing Orders were administrative directions of the Commission which are not enforceable against an individual or third party. Further that they deal with internal governance and at best regulate the internal working of the Commission. The Court concluded that there was no subordinate or delegated legislation as authorized by the parent legislation which empowers the Commission to exercise the power of sealing. Hence it was declared that the Commission did not have the power to seal a healthcare establishment. After the judgment was passed, the Commission framed regulations being the Punjab Healthcare Commission

Regulations for Banning Quackery in all its Forms and Manifestations for Dealing with Quacks, 2016 which were duly published in the official gazette on 26.10.2016 and thereafter amended in the official gazette on 9.3.2017 ("Regulations"). Accordingly the Commission now acts under the Regulations which provide for the mode and manner in which the power of sealing is to be exercised.

18. The Petitioners have questioned the authority of the Commission to seal clinics and to take action against quacks on two grounds. The first ground for challenge is that the power of sealing is not provided for in the parent statute being the Health Act, hence the Commission can at best levy a fine but does not have the power to seal any healthcare establishment. The second ground is that the Commission could not have taken any action against the Petitioners since they are not quacks.

19. Learned counsel for the Commission argued that the mandate of the Health Act is to ban quackery in all forms and manifestations and in terms of Section 2(xxix) of the Health Act, a quack is a person who pretends to provide healthcare services without the required registration of the PMDC, Council for Tibb, Council for Homoeopathy and Nursing Council. These are the relevant federal authorities which register and license a practitioner in the respective field. Without this registration and licensing a person cannot practice in that field and if he or she does then they fall under the definition of a quack. In terms of the functions and powers of the Commission as provided under Section 4 of the Health Act, the Commission has the power to take all necessary steps to ban quackery. The Respondents counsel argued that the power of sealing is inherent in the statutory requirement to take necessary step as sealing is a necessary step in the prevention and eradication of quacks and quackery. Notwithstanding the same, the Commission has framed the Regulations which clearly provide for the power of visit, seizure and sealing. It also provides for the power to deal with complaints and prescribes for the steps that may be taken thereafter. Learned counsel for the Respondents explained to the Court that in each case pending before the Court the individuals were served with notices and were given ample opportunity to appear before the Commission to provide their registration and licenses to operate as healthcare service providers and to run healthcare establishments. However, they failed to do so, hence necessary action was taken by the Commission after following due process which included visits to the clinics before sealing the clinics of some of the Petitioners for want of registration and licenses.

20. Learned counsel for the Respondents also brought the attention of the Court to the orders passed by the august Supreme Court of Pakistan in Human Rights Case No.19921-P/2018 and Civil Misc. Applications Nos.1140-L, 1142-L, 1265-L, 1512-L and 4389/2018, where the august Supreme Court of Pakistan vide order dated 3.6.2018 has directed the Commission to ensure that all healthcare service providers and healthcare establishments are registered in terms of the requirement of the Health Act and that no person can operate an establishment or act as a service provider without registration and licensing under the Health Act. Learned counsel stated that in terms of the case pending before the august Supreme Court of

Pakistan, homoeopaths, tibb, rehabilitation centre, diagnostic centres, dispensaries, all have been directed to register with the Commission. Furthermore in terms of Suo Motu Case No.1 of 2010 and H.R.C. No.27813-Petitioner of 2017, the august Supreme Court of Pakistan vide order dated 14.4.2018 directed the Commission to take immediate steps to ban all such businesses including sealing of premises where quackery is being practised. Consequently the Commission has been actively pursuing the directions of the august Supreme Court of Pakistan and has taken necessary action in the event of non-compliance of the requirements of registration and licensing.

21. Notwithstanding the directions of the august Supreme Court of Pakistan, since the question of the authority of the Commission to seal clinics is before this Court consequent to the remand order dated 14.2.2017 by the august Supreme Court of Pakistan, the cases before this Court require consideration on the question of whether or not the Commission has the power to seal healthcare establishment.

Opinion

22. As already stated the mandate of the Health Act is to ban quacks and quackery. It goes without saying that any person who is not registered or licensed under the federal law is not entitled to practice or hold themselves out to be practitioners as they are not recognized or authorized under the relevant law to practice in that profession. Therefore any person holding himself or herself out to be a practitioner, who is not duly licensed and registered under the relevant law is a quack and has to be stopped from practising. The Commission has also as part of its anti-quackery drive, initiated action against healthcare service providers and healthcare establishments which are not registered or licensed under the Health Act. It is their contention that without registration and licensing the Commission is unable to enforce its standards and will not be able to investigate and inspect the service providers and establishments. It also means that people are practicing in the health sector without any regulatory influence and are not answerable to any quality checks. This puts the public at risk as they can be treated by establishment which are not answerable in the quality of services they provide. Hence the requirement of registration and licensing of the service providers and establishments is mandatory under the Health Act and any person providing healthcare services or running healthcare establishment, without registration or licensing can be deemed to be indulging in quackery as they are not in compliance with the Health Act and are avoiding making themselves liable to the standards and the Code of Conduct issued by the Commission. This is a manifestation of quackery as the service provider or establishment is not authorized to provide healthcare. In this regard the preamble of the Health Act mandates that the Commission shall improve the quality of healthcare services and ban quackery in all its forms and manifestations. Therefore the meaning of all forms and manifestations will include persons providing healthcare services or running a healthcare establishment without being duly registered or licensed. Such a person is also a pretender who is providing services without permission from the required authority. Such persons may not necessarily fall within the definition of a quack as per Section 2(xxix) of the Health Act, but the

power to seal that establishment or service provider is exercised to ensure compliance of the law.

23. The Petitioners have argued that the only power that the Commission has is to impose a fine and that sealing is not authorized under the Health Act. The primary objective of the Commission while regulating healthcare and clinical governance is public safety and public health. Any matter which puts the public health at risk or which compromises the health and care of a person, must be protected through preventive action. This Court has already held that the precautionary principle is applicable to the Punjab Food Authority while regulating food safety laws in the case cited as Lung Fung Chinese Restaurant through Atiq Ahmed and 2 others v. Punjab Food Authority through Secretary and 6 others (PLD 2017 Lahore 545) as the precautionary principle enables public authorities to legitimately impose precautionary measures in response to situations that may lead to imminent harm and danger. In the same way the concept of precaution and prevention lies at the heart of public health practice, Dealing in public health means identifying and avoiding risks to the life and health of a person as well as ensure that protected measures are taken to prevent any harm to persons who will require healthcare. The precautionary principle addresses uncertain risks and enables action to take place before any harm is caused, so as to prevent irreversible harm to the health of a person. The precautionary principle therefore enables an authority to take preventive measures to prevent the damage and the irreparable harm that can be caused. The WHO has published several reports on this issue starting from 2003 when the report of "Dealing with uncertainty: How the precautionary principle can help protecting the future of our children". In continuation thereof the WHO has successively published reports on the use of the precautionary principle as a means to promote protection to public health. The power of seizing and sealing is one of the preventive measures that is recognized as being essential to prevent continuous harm and has been given priority and preference so as to allow an authority to act immediately. It is seen that the precautionary principle and the preventive powers exercised thereunder essentially enable the authority to shift its response from re-action to precaution. It requires taking preventive action in the face of uncertainty and shifting the burden of proof to the proponents of the activity. It requires the system to ensure that its decisions are safe and efficient with public safety and health as its primary concern. By allowing the wrong to continue not only is public health at risk but the safety of persons who are being treated by pretenders is totally compromised. Therefore necessary steps as per Section 4 of the Health Act includes the inherent power of sealing as a preventive measure. The Regulations issued under Section 40(1) of the Health Act in 2016 prescribe the procedure to be adopted when the Commission is to seal a healthcare establishment. Hence the power of sealing exercised by the Commission is in furtherance of the mandate of the Health At and the powers given to it under the law. In this regard the power exercised prior to the framing of the Regulations falls within the inherent power to seal healthcare establishment to prevent any further risk or harm to persons under treatment or care by a healthcare establishment or healthcare service provider. Hence no illegality is made out against the act of sealing.

On the merits of the cases against sealing clinics

24. With respect to the merits of the individual cases before the Court, so far as due process is concerned, the record shows that due process in each case was duly followed. Notices were issued to the Petitioners calling for their registration or license under the Health Act. Since they did not produce either license or registration, their clinics were sealed. As per the arguments made and the record produced, sufficient time and opportunity was granted to the Petitioners to appear before the Commission to show their licences or registration, however they failed to do so. It is noted that in all these cases the Petitioners who essentially practice homoeopathy or tibb are also dental hygienists and dental technicians who believe that they do not require any kind of registration or licensing under the Health Act. It is their contention that since they are licensed and registered under the Unani Act, no further license or registration is required to run the clinic or to do the work of dental hygienists and dental technicians. In this regard, it has already been stated while discussing the vires of the Health Act that public health is regulated at different levels which will mean regulating the individual as well as regulating the services, the service provider as well as the healthcare establishment. Since the requirement of registration and licensing under the Health Act is mandatory, its compliance is necessary and any person who fails to comply with the law will face the consequences as described under the Health Act.

25. The Petitioners have also raised issues with respect to their qualifications and ability to practice as dental practitioners. Writ Petition No.79690/17 is filed by Zameer Ali Shah who states that he is a homoeopath as well as tibb practicing at Gojra for the last two decades; that he obtained a diploma as dental hygienists from Skill Development Council and therefore provides the services of a dental hygienists at his clinic. Initially his clinic was sealed, however after the orders of the Additional District Judge, the clinic was de-sealed. His grievance is that since he is registered under the Unani Act, the Respondents are illegally harassing him and stopping him from providing services of dentistry and surgery. Learned counsel for the stated Petitioner relied upon the diploma issued by the Skill Development Council and the registration under the Unani Act to argue the point that the Petitioner is qualified to practice dentistry. He further argued that the sealing power exercised by the Respondents was totally illegal; that the sealing report issued on 16.8.2017 shows that the Petitioner was not carrying out any invasive procedure and that it falls within the permitted functions of a homoeopath and tibb. He further argued that the Petitioner is allowed to use dental equipment even under the tibb and homoeopathic procedure, hence as such no illegality is made out against the Petitioners.

26. Writ Petition No.28593/2015 is filed by Naghma Ashraf who claims to be homoeopath duly registered under the Unani Act and challenges the sealing of her clinic. Learned counsel in this case stated that in terms of the letter issued by Hakeem Nazeer Ahmed Asad who is Assistant Director (Homeo and Unani), homeopaths and Tibb are allowed to use instruments for diagnosis such as

thermometer, blood pressure apparatuses and stethoscope in their clinics, hence on account of usage of the same the premises should not be sealed.

27. Writ Petition No.2427/2017 is filed by the Punjab Dental Practitioners Association as well as Mushtaq Ahmad who is a homoeopath and tibb and has a diploma from Skill Development Council as a dental hygienists and dental technician. His clinic was sealed on 4.9.2015 which was ultimately de-sealed on 16.10.2015 by the District and Sessions Judge, Toba Tek Singh. In this case also the Respondents stated that due process was followed, several notices were issued, however, the Petitioner Mushtaq Ahmad did not respond, hence the healthcare establishment was sealed. Learned counsel for the Respondents stated that the Petitioner was running an establishment under the name of "Teeth Hospital" and during the visit to the establishment it was noticed that he was practicing dentistry; that he was unable to produce any registration under the 1962 Ordinance nor a license under the Health Act.

28. Writ Petition Nos.19597/2015, 38582/2015 and 21753/15 are filed by some homoeopaths and tibbs. In Writ Petition Nos.19597/2015, 38582/2015, the Petitioners have only challenged the vires of the Health Act. They hold diplomas from the Skill Development Council and they seek a direction that the Respondents should not interfere in the lawful business. Writ Petition No.31831/2015 is filed by the Punjab Dental Practitioners Association wherein it is prayed that the Commission should not illegally harass the members of the Association. It also seeks a declaration that all persons registered under the Unani Act be authorized to practice as dental technicians and dental hygienists, if they possess the appropriate diploma by the Skill Development Council.

29. The case of the aforementioned Petitioners is that they are qualified and permitted to act as dental hygienists and dental technician and that this falls within the scope of their practice as registered and licensed under the Unani Act. Chaudhary Muhammad Umar, Advocate for the Commission during the course of arguments highlighted the nature and issues with reference to the diploma issued by the Skill Development Council. He argued that while the Petitioners have placed reliance on the diploma issued by the Skill Development Council, the Respondents have taken strong exception to the same. He explained that the Skill Development Council is not authorized under the National Training Ordinance, 1980 as amended by the National Training (Amendment) Ordinance, 2002 ("Training Ordinance") to provide training in paramedical courses or courses for allied health professionals which includes dental hygienists and dental technician. He further submitted that a dental hygienists and dental technician falls within the definition of allied health professionals and such persons are not authorized to practice independently without the supervision of a qualified dentist. Learned counsel further argued that the Punjab Medical Faculty is the examining body which conducts various examinations of paramedics and allied health professionals including dental hygienists and dental technician. On the basis of the certificates issued by the Punjab Medical Faculty, it is clearly provided that the holder of such certificate is

not permitted to practice independently or to open a private clinic. They can only work under the supervision of qualified dentists. This is not disputed by the Petitioners, yet they argued that their respective Councils under the Unani Act permit them to use dental equipment and as part of traditional medicine working on the gums and teeth falls within their prescribed areas of practice.

30. The Unani Act provides for the constitution and function of a Council for Homoeopathy and a Council for Tibb. The function of the Councils are prescribed in Section 14 of the Unani Act as follows:

14. Functions of the Council.- The following shall be the functions of the Council, namely:-
(a) To consider applications for recognition under this Act made by institutions imparting or desiring to impart instruction in the system of medicine with which the Council is concerned;
(b) To secure the maintenance of an adequate standard of education in recognized institutions;
(c) to make arrangements for the registration of duly qualified persons in accordance with the provisions of this Act;
(cc) to appoint committees or sub-committees, each having due representation of all the Provinces, for a specific period, to perform any specified function concerned with the functions of the Council;
(d) to provide for research in the system of medicine with which the Council is concerned; and
(e) to do such other acts and things as it may be empowered or required to do by this Act or the rules.
Whilst the Councils are regulating the practice of the practitioners, the Councils cannot authorize or recognize any training in scientific medical practice as it tantamounts to encroachment in the jurisdiction of the authorities regulating the scientific medical practice. In these cases the issue is specifically related to the practice of dental hygienists or dental technicians. The individual practitioners and the Dental Associations before the Court want to practice as dental hygienists and dental technicians on the basis of their diplomas from Skill Development Council. This permission or recognition cannot be granted by the Council as it falls under the scope of the Training Ordinance and the Punjab Medical Faculty who are duly authorized to train dental hygienists or technicians. The Councils are bound by the directives prescribed by the Punjab Medical Faulty and cannot prescribe anything to the contrary. So if a homoeopath or tibb, as the case may be, want to practice as dental hygienists and dental technician they will have to follow the directives issued under the Training Ordinance and by the Punjab Medical Faculty. They will have to be trained by the recognized institution and are bound by the restrictions prescribed by the competent authority, in this case being the Punjab Medical Faculty. Consequently the Petitioners cannot practice as dental hygienists or dental technician based on their diplomas issued by the Skill Development Council because these programs are not recognized programs nor is the Skill Development Council permitted to train allied health professionals. In this regard, it is necessary

to note that only authorized programs and trainers can offer such professional training and if additional training is taken then all regulatory requirements attached to the professional training must be followed.

31. As is apparent from reading the prescribed function, the Council regulates education standards, qualifications and the institutions which provide training in homeopathy and tibb. Section 18 of the Unani Act provides for the maintenance of standard of efficiency of recognized institutions, authorizing the Councils to inspect the institutions and to provide necessary information. Section 21 of the Unani Act allows the Councils to regulate admission to the recognized institutions and Section 24 calls for registration of practitioners. So essentially the Unani Act regulates professional education, the institutions and the practitioner. In doing so they form opinions on the practice of homoeopathic and tibb system of medicine by practitioners registered under the Unani Act. The Council considers matters related to the practice and issues directives accordingly. In these cases, the Petitioners are all specifically reliant on their Skill Development Council diplomas as dental hygienists and dental technicians and on the basis thereof want to provide these services in their clinics. The risk in these cases are that the Petitioners being trained and licensed under the Unani Act, are seeking to use scientific or modern methods of healthcare without any regulatory compliance. This cannot be permitted as it puts public health at risk and compromises public safety. The field of dental hygienists and technicians is regulated under the Bye-laws of the Punjab Medical Faculty as these fields fall under the definition of Allied Health Professionals and are registered accordingly. The Council therefore is not competent to permit or recognize Allied Health Professionals practice nor can they allow practitioners registration under the Unani Act to indulge in such practices.

32. Therefore in view of what has been discussed, W.Ps. Nos.79690/17, 2427/17, 31831/15, 19597/15, 38582/15, 28593/15, 11158/16 and 21753/15 are dismissed and W.P. No.32150/2015 is allowed and the impugned order dated 16.10.2015 is set aside.

33. Writ Petition No.30210/2016 is filed by seven Petitioners who are not registered under the Unani Act. The Petitioners have passed the examination of professional education two years Diploma course in Dental Hygienist from Skill Development Council and on the basis of which they are allowed to practice dentistry. In this petition, the Petitioners seek a direction that the Respondents should not interfere in the lawful business of the Petitioners and should not harass or humiliate them.

34. At the very outset, it is noted that these Petitioners are not registered under the Unani Act. The only question is that they have diplomas from Skill Development Council as dental hygienist. So far as these Petitioners are concerned they clearly fall under the definition of quack under the Health Act and any action taken by the Respondents with respect to their establishment is on the basis of the fact that they are not registered under the Unani Act and are not qualified to practice dentistry. Hence this petition is **dismissed**.

35. WP No.28517/2016 is filed by Mian Abdul Majeed who seeks a direction to Respondent No.1 for the issuance of license. This relief as such cannot be granted by this Court in its constitutional jurisdiction. The Petitioner may apply for the required license and registration, if so advised which will be duly considered by the competent authority in accordance with law. Hence this petition is also **dismissed.**

SCHEDULE-A

Details of Writ Petitions mentioned in judgment dated 6-7-2018 passed in W.P. No.32150/2015

Sr. No.	W.P. Nos.	Parties Name
1	W.P. No.32150/15	Punjab Healthcare Commission v. Mushtaq Ahmad Chaudhary etc.
2.	W.P. No.79690/17	Zameer Ali Shah v. Punjab Healthcare Commission etc.
3.	W.P.No.2427/17	Punjab Dental Practitioners Association etc. v. Punjab Healthcare Commission etc.
4.	W.P. No.31831/15	Punjab Dental Practitioners Association v. Secretary Health, Government of Punjab Lahore etc.
5.	W.P. No.19597/15	Tabib Ghulam Murtaza Mujahid v. Federation of Pakistan etc.
6.	W.P.38582/15	Homeopathic Doctor Adil Hussain v. Federation of Pakistan etc.
7.	W.P. No.28593/15	Naghma Ashraf v. Federation of Pakistan etc.
8.	W.P. No.11158/16	Hakeem Mumtaz Hussain Qureshi v. Province of Punjab etc.
9.	W.P. No.30210/16	Mohammad Nawaz etc. v. Federation of Pakistan etc.
10.	W.P.21753/15	Muhammad Abdul Waheed Attari v. Secretary Health etc.
11.	W.P. No.28517/16	Mian Abdul Majeed v. Chairman Helathcare Commission etc.

KMZ/P-11/L Order accordingly.

2018 C L D 1253
[Lahore]
Before Ayesha A. Malik and Jawad Hassan, JJ
AYESHA JAVID alias AISHA ALTAF---Appellant
Versus
ASKARI BANK LIMITED---Respondent
E.F.A. No. 195939 of 2018, decided on 12th April, 2018.

Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----S. 12---Civil Procedure Code (V of 1908), S. 12(2)---Ex parte judgment and decree, setting aside of---Fraud and misrepresentation---Principle---Defendant raised plea of fraud and misrepresentation and denied having executed any power of attorney in favour of advocate who appeared in the Court on her behalf---Banking Court declined to set aside ex parte judgment and decree passed against defendant---Validity---Grounds for filing application for setting aside ex parte judgment and decree were that the same was obtained on the basis of fraud and misrepresentation---If fraud was alleged in application for setting aside ex parte judgment and decree, its necessary ingredients must be pleaded, so as to subsequently prove the same---Mere general and bald allegations of fraud and misrepresentation could not form basis to upset a decree otherwise validly passed by Court of competent jurisdiction---Defendant failed to prove fraud and misrepresentation by plaintiff bank for obtaining judgment and decree in question against her, as the same was passed on the basis of banking documents appended with plaint including finance agreement etc.---High Court declined to interfere in ex parte judgment and decree, and Banking Court had rightly dismissed application for setting aside ex parte judgment and decree filed by defendant and there was no illegality or perversity in the order and the same was passed in accordance with law---Appeal was dismissed in circumstances.

Ireno Wahab v. Lahore Diocesan Trust 2016 CLC Note 85; Mst. Nasir Khatoon's case 2003 SCMR 1050; Dadabhay Cement's case PLD 2002 SC 500 and Riaz Ahmed v. Bank of Punjab 2016 CLD 596 ref.
Khawaja Mujahid Hussain for Appellant.

ORDER

Through the instant Appeal, filed under section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (the "Ordinance"), the Appellant seeks setting aside of order dated 14.03.2018, passed by the Banking Court, Sargodha (the "Banking Court") whereby his application for setting aside ex parte judgment and decree was dismissed.

2. Learned counsel for the Appellant inter alia submitted that the Banking Court has not taken into consideration the true facts and circumstances of the case while

dismissing the application of the Appellant; that the impugned order is against law and facts; that the Appellant has never signed on the Wakalatnama of Mr. Khaliq Dad, Advocate who pleaded the case on her behalf without any authorization; that there is much difference between the signatures of the Appellant on the power of attorney as well as on the petition for leave to Appeal; that the Banking Court has not taken into consideration the fact that no proper service of summons was ever made upon the Appellant; that the Appellant remained unheard and a decree of heavy amount, which otherwise is not proved, has been passed against her, as such the ex parte judgment and decree is against the principle of natural justice; that if the impugned order is not set aside the Appellant shall suffer an irreparable loss.

3. We have heard the arguments and perused the record.

4. The perusal of record reveals that the judgment and decree was passed against the Appellant on 20.02.2017. It was clearly mentioned in the judgment and decree that the Appellant moved application for leave to defend the suit raising certain objections on legal as well as factual side. The said application is also part of the record. The main contention of the Appellant is that neither she was properly served upon personally nor the application for leave to defend was ever filed by her and that too the signatures on the power of attorney allegedly filed by Ch. Khalid Dad Warraich, Advocate on her behalf are also fake and fabricated. The whole record does not show that the Appellant has ever filed any complaint against the said lawyer (Ch. Khalid Dad Warraich, Advocate) i. for submission of power of attorney on her behalf ii. for fake signatures and iii. for filing of application for leave to defend without her permission despite the fact that a decree of heavy amount has been passed against her. Moreover, the Appellant's contention regarding service of summons also does not have any weight because the Banking Court has observed in the impugned order that infact two separate suits were filed by the Respondent i.e. one against her and the other against her husband and the said lawyer contested both the said suits on their behalf. Nothing is on the record which could show that at the time of service of summons there is separation between the husband and wife.

5. The grounds for filing application for setting aside the said ex parte judgment and decree were that the ex parte judgment and decree has been obtained on the basis of fraud and misrepresentation. It is well settled principle that if fraud is alleged in an application for setting aside ex parte judgment and decree, its necessary ingredients must be pleaded, so as to subsequently prove the same. Mere general and bald allegations of fraud and misrepresentation, could not form basis to upset a decree, otherwise validly passed by a Court of competent jurisdiction. From the material made available with this file, no case for interference in the impugned order is made out. The Appellant has failed to prove the fraud and misrepresentation by the Respondent Bank for obtaining impugned judgment and decree against her. It is evident from the record that the judgment and decree was passed on the basis of banking documents appended with the plaint including the finance agreement etc. In Ireno Wahab v. Lahore Diocesan Trust, (2016 CLC Note 85) this Court held that Applicant was required to prove that fraud and misrepresentation was procured

during proceedings in the court; that alleged fraud was due to false statement and concealment of facts and that judgment was obtained on the basis of forged documents and decree was collusively obtained. The Applicant had not proved the ingredients of fraud and misrepresentation. Reliance is placed on Mst. Nasir Khatoon's case (2003 SCMR 1050) and Dadabhay Cement's case (PLD 2002 SC 500). Reliance in this regard can also be placed on the case titled Riaz Ahmed v. Bank of Punjab (2016 C L D 596) in which the Division Bench of this Court held that the application filed under section 12(2), C.P.C. did not mention any particulars constituting fraud and misrepresentation on the part of respondent bank in obtaining the judgment and decree from the Banking Court. The fact that the respondent bank had applied to the insurance company for realization of the insurance claim had no bearing on the recovery suit filed by it against the appellants which was only concerned with the determination of liability against the appellants. It is also not necessary for a Court to always prove issues on an application filed under section 12(2), C.P.C. more so when the particulars of fraud and misrepresentation are missing.

6. We agree with the findings of the Banking Court which rightly dismissed the application for setting aside of ex parte judgment and decree filed by the Appellant and do not see any illegality or perversity in the impugned order which has been passed strictly in accordance with law, as such does not warrant any interference by us. Consequently, the Appeal in hand, being devoid of any merit, is hereby dismissed in limine.

MH/A-38/L Appeal dismissed.

2018 C L D 1311
[Lahore]
Before Ayesha A. Malik and Jawad Hassan, JJ
MUHAMMAD NAWAZ and others---Appellants
Versus
ROYAL BANK OF SCOTLAND LIMITED and others---Respondents
F.A.O. No. 112716 of 2017, decided on 10th April, 2018.

Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----S. 9---Suit for recovery of loan---Auction of mortgaged property by the Banking Court---Objection petition---Fraud---Proof---Banking Court granted interim relief (suspension of auction) on 23-05-2017 subject to deposit of 50% cash of decretal amount and next date of hearing was fixed as 30-05-2017 but auction of property was completed on 25-05-2017---Contention of petitioners was that objection petition was dismissed without affording proper hearing and Banking Court had failed to appreciate the facts properly---Validity---Petitioners were not afforded time till 30-05-2017 for deposit of 50% cash of decretal amount---Subsequently conducting auction proceedings on 25-05-2017 were not in defiance with the court's order---Applicants had failed to point out any irregularity or fraud in publication or conducting auction of mortgaged property---If fraud was alleged in an objection petition then its necessary ingredients must be pleaded so as to prove the same---General and bald allegations of fraud could not form basis to upset the proceedings otherwise validly conducted by a Court of competent jurisdiction---Petitioners had failed to prove fraud by the Bank---Banking Court had rightly dismissed the objection petition filed by the petitioners---No illegality or perversity was pointed out in the impugned order passed by the Banking Court---Appeal was dismissed in circumstances.

Abid Iqbal Butt for Appellants.
Haseeb Raza for Respondent No. 1.
Nadeem Irshad for Respondents Nos. 4 and 5.

ORDER

Through the instant First Appeal Against Order, filed under section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (the "Ordinance"), the Appellants seek setting aside of the order dated 28.10.2017, passed by the Banking Court-II, Lahore (the "Banking Court") whereby their objection petition was dismissed.

2. Learned counsel for the Appellants inter alia submitted that the Banking Court has not taken into consideration the true facts and circumstances of the case while dismissing the objection petition of the Appellants; that the interim relief was granted by the Banking Court on 23.05.2017 and the next date of hearing was fixed as 30.05.2017 but the auction was completed on 25.05.2017 which is totally in

contravention of order dated 23.05.2017; that the impugned order is against law and facts; the objection petition was dismissed without affording proper hearing to the Appellants; that the Banking Court has failed to appreciate the fact that the Appellants are in possession of the disputed property and if they are ousted without proper adjudication of the lis, they would suffer an irreparable loss; that the judgment and decree was obtained on the basis of misrepresentation and fraud.

3. On the other hand, learned counsel appearing on behalf of the Respondents Nos.1, 4 and 5, vehemently controverted the arguments advanced by the learned counsel for the Appellants and prayed for dismissal of the Appeal on the ground that impugned order has been passed strictly in accordance with law and as such does not call for any interference by this Division Bench.

4. We have heard the arguments of both the sides and perused the record.

5. The record reveals that the Appellants have laid much stress on the point that the Banking Court vide order dated 23.05.2017 granted interim relief to the Appellants that subject to deposit of 50% cash of the decretal amount in the Court account or Bank surety, the auction proceeds shall remain suspended. He further contended that as the next date of hearing was fixed as 30.05.2017, therefore, the Appellants were to deposit the 50% till 30.05.2017 but the Banking Court dismissed the objection petition against the law and facts. The bare examination of the order dated 23.05.2017 reflects that it has two parts. In the first part although the Banking Court fixed the next date of hearing as 30.05.2017 yet the same was for submission of reply to the application and arguments but not for the deposit of 50% of the decretal amount. Whereas in the second portion conditional interim relief was granted that if the Appellants deposit 50% cash of the decretal amount in the Court account or Bank surety, the auction proceeds shall remain suspended otherwise it will continue. Meaning thereby, that no time till 30.05.2017 was afforded to the Appellants for deposit of 50% cash of decretal amount or Bank surety, therefore, subsequently conducting auction proceedings i.e. on 25.05.2017 are not in defiance with the Court's order. Furthermore, the Banking Court has also observed in the impugned order that the Appellants have failed to point out any irregularity or fraud in publication or conducting the auction of mortgaged property. If fraud is alleged in an objection application, its necessary ingredients must be pleaded, so as to subsequently prove the same. Accordingly, general and bald allegations of fraud etc. could not form basis to upset the proceedings otherwise validly conducted by a Court of competent jurisdiction. From the material made available with this file, no case for interference in the impugned order is made out. The Appellants have failed to prove the fraud by the Respondent Bank.

6. Moreover, after the dismissal of application under section 12(2), Code of Civil Procedure, 1908 (C.P.C.), the Appeal (F.A.O. No.46/2017) filed by the Appellants before the Hon'ble Division Bench of this Court was withdrawn in order to file objection petition before the Banking Court, as such the judgment and decree had attained finality and cannot be now agitated. The contention of the Appellants to this extent has badly failed.

7. We, therefore, agree with the findings of the Banking Court which rightly dismissed the objection petition filed by the Appellants and do not see any illegality or perversity in the impugned order which has been passed strictly in accordance with law, as such does not warrant any interference by us. Consequently, the Appeal in hand, being devoid of any merit, is hereby dismissed.

ZC/M-84/L Appeal dismissed.

2018 P L C Note 4
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
Malik ABDUL REHMAN AWAN
Versus
BOARD OF DIRECTORS and 3 others
I.C.A. No.73419 of 2017, decided on 19th September, 2017.

Constitution of Pakistan---

----Art. 199---Contract employment---Appellant was contract employee of a Cattle Market Management Company who was informed that period of his contract would not be extended---Opportunity of hearing---Single Judge of High Court declined to interfere in decision of the Company in constitutional jurisdiction---Reply to the letter was filed by appellant and he was provided opportunity to put across his point of view which he did, however, his explanation was not found satisfactory---Appellant, in circumstances, could not say that he had not been afforded opportunity of hearing---Division Bench of High Court declined to interfere in the judgment passed by Single Judge of High Court as same had no illegality or legal infirmity and was in consonance with the spirit of law---Intra court appeal was dismissed in circumstances. [Paras. 8 & 9 of the judgment]

Lt. Col. Rtd. Aamir Raul v. Federation of Pakistan through Secretary M/o Defence and 3 others 2011 PLC (C.S.) 654 and Nadeem Ahmed v. Pakistan State Oil Company Limited and another 2005 PLC (C.S.) 1447 rel.
Malik Muhammad Awais Khalid for Appellant.

ORDER

Through the instant Intra Court Appeal the Appellant has called in question the legality of impugned order dated 09.08.2017 passed in Writ Petition No.58785/2017 by the learned Single Judge whereby his petition was dismissed in limine.

2. The main grievance of the Appellant is that he was employed in Sargodha Cattle Market Management Company on contract basis for one year w.e.f. 13.04.2016 and his contract was extended till 30.06.2017 but in subsequent Board Meeting held on 22.07.2017, it was decided that the contract period of the Appellant shall not be further extended. The Appellant was informed about this decision vide letter dated 24.07.2017. Feeling aggrieved thereby the Appellant filed writ petition which was dismissed in limine by the learned Single Judge vide the impugned order. Hence, the instant Appeal.

3. Learned counsel for the Appellant contended that the contract period of the Appellant has not been extended further on the basis of his alleged poor performance, as such a stigma has been made on his character; that the Appellant should have been provided opportunity of persona hearing which has not been

afforded to him; that the learned Single Judge in the impugned order has not appreciated the fact of discrimination as the contract period of the other colleagues of the Appellant has been extended while the Appellant has been deprived of the same. Learned counsel also argued that the Appellant has not been afforded opportunity of fair trial, as such he has been condemned unheard on the basis of mala fide.

4. We have heard the arguments of the learned counsel for the Appellant and examined the record available with this Appeal.

5. The main grievance of the Appellant is that his contract period be extended and his case be considered for regularization of his services. The Appellant was appointed on purely contract basis in the Respondents/Department vide appointment letter dated 13.04.2016. The Appellant after accepting the terms and conditions of his contract employment submitted his joining report. Specific terms in the employment contract, containing certain terms and conditions, are inserted which explicitly reveal that initially this offer of appointment is only for a period of One Year which will be extended further as per government policy and on watching your output as General Manager Operation and in case of poor performance the services of the Petitioner can be terminated at any time without assigning any reason. Moreover, allegedly the behavior of the Appellant remained unsatisfactory toward his superiors which resulted into not extension of his contract.

6. It is an established principle that where employment is on contract, there is a relationship of master and servant and in such like cases the Constitutional petition under Article 199 of the Constitution is not maintainable. Reliance in this regard can be placed on Lt. Col. Rtd. Aamir Rauf v. Federation of Pakistan through Secretary M/o Defence and 3 others (2011 PLC (C.S.) 654) and Nadeem Ahmed v. Pakistan State Oil Company Limited and another (2005 PLC (C.S.) 1447). In view of the settled principle, the learned Single Judge has rightly held that the Appellant has no vested right on the basis of which he was entitled to relief in a Constitutional petition by holding that the Petitioner has failed to pinpoint any statutory Rules and Regulations which have been violated by the Respondents in issuing letter dated 24.07.2017 for not extending his employment contract.

7. So far as the contention of the learned counsel for the Appellant that he was terminated on the basis of stigma of poor performance and no opportunity of fair trial has been afforded to the Appellant is concerned, in this regard the impugned letter shows that the Appellant was not terminated rather his contract has not been extended further after the expiry of cutoff date. The Hon'ble Division Bench of this Court in case titled Dr. Abid Ali v. Chief Secretary, Government of Punjab and 3 others (2017 PLC (C.S.) 488) has held that the employee, after accepting terms and conditions of his contract employment had submitted his joining report. Service of such employee could be terminated without assigning any reason. Employee had no right to claim extension in his contract period as a vested right. Behaviour of employee remained unsatisfactory towards his superior which resulted into his

termination. In Case titled Mubashar Majeed v. Province of Punjab and 3 others (2017 PLC (C.S.) 940) the Hon'ble Division Bench of this Court has also held that employee could not claim extension of the contract as a matter of right rather it was the prerogative of the competent authority either to dispense with services of such employee or continue with the same by tending the contract.

8. Furthermore, learned Single Judge has rightly observed in paragraph 4 of the impugned order that the reply to displeasure letter was filed by the Appellant and that too the Appellant was provided opportunity to put across his point of view which he did on 21.07.2017 however, his explanation was not found satisfactory. As such, the Appellant cannot say that he has not been afforded opportunity of hearing.

9. In view of above, we see no illegality or legal infirmity in the impugned order which has been passed by the learned Single Judge in consonance with the spirit of law, as such does not warrant any interference by us. Consequently, the instant Appeal is devoid of any merit and is accordingly dismissed in limine.

MH/A-92/L Appeal dismissed.

P L D 2018 Lahore 895
Before Ayesha A. Malik and Masud Abid Naqvi, JJ
FOZIA KHALID---Petitioner
Versus
ELECTION APPELLATE TRIBUNAL and others---Respondents
Writ Petition No. 235025 of 2018, heard on 14th September, 2018.

(a) Punjab Local Government Act (XVIII of 2013)---

----S. 28(1)---Bar against dual membership---Time frame within which a resignation should be tendered by the Mayor, Deputy Mayor, Chairman or Vice Chairman in order to contest elections for any other political office, in terms of the bar contained in S.28 (1) of the Punjab Local Government Act, 2013---Bye-elections for seat of Provincial Assembly---Nomination papers, rejection of---Sitting Chairperson of District Council/petitioner filed nomination papers for bye-election of a Provincial Assembly seat, without tendering resignation from post of Chairperson---Election Tribunal rejected the nomination papers of the petitioner in terms of the bar contained under S.28(1) of the Punjab Local Government Act, 2013 ("the 2013 Act")---Plea of petitioner that S.28(1) of the Act, was not a precondition to the filing of nomination papers and that the petitioner was not required to tender her resignation from post of Chairperson until the last date for withdrawal of candidature and publication of revised list of contesting candidates for Provincial Assembly seat---Validity---Spirit behind the bar imposed on dual membership in terms of S.28(1) of the Act was that the holders of specific positions being Mayor, Deputy Mayor, Chairman and Vice Chairman should not be allowed to contest for any other political office due to the nature of their post---Said officials sat at the highest level in the local government and were in a position to use the resources from their offices, including their staff for campaigning purposes and could influence the election process---Mandate of S.28(1) of the Act was to prevent a single person from holding office whilst contesting for another political office as it was necessary to ensure that an office holder should dedicate his or her time to their official duties and not towards personal advancement---Such bar ensured that office holders did not unfairly leverage their present position against other candidates or that they maintained public offices as a fall back---Bar contained in S.28(1) of the Act became applicable when a Mayor, Deputy Mayor, Chairman and Vice Chairman decided to contest another political office, in the present case being the bye-election, at the stage of filing the nomination papers---Impugned order of Election Tribunal rejecting nomination papers of the petitioner contained no illegality---Constitutional petition was dismissed accordingly.
Syed Sarfraz Hussain Shah v. Additional District and Sessions Judge/Returning Officer and 16 others PLD 2008 Kar. 64 ref.

(b) Punjab Local Government Act (XVIII of 2013)---

----S. 28(1)---Bar against dual membership---"Resign to run", principle of---Scope---Pre-requisite for a Mayor, Deputy Mayor, Chairman or a Vice Chairman to resign

from his/her office before contesting election for any other political office---"Resign to run" principle was premised on encouragement to run for public office and to make the process of election more competitive---Said principle created a level playing field and ensured that a person holding public office did not divert its resources for personal advancement, and it was also a check on those holding public office and ensured that they did their jobs and could account for the time spent in office---Public resources and functions were safeguarded and the sanctity of the election process was maintained.

Muhammad Shahzad Shaukat, Tahir Munir Malik and Taha Asif and Rana Imran for Petitioner.

Mian Sultan Tanvir Ahmad and Hafiz Mubshar Ullah for Respondent No.3.

Nasar Ahmad and M. Javaid Kasuri,DAGs for Respondents.

Date of hearing: 14th September, 2018.

JUDGMENT

AYESHA A. MALIK, J.---Through this petition, the Petitioner has challenged order dated 12.9.2018 passed in Election Appeal No.354-A of 2018. It may be noted that the instant petition is fixed as urgent, for today. Counsel for Respondent No.3, Mian Sulan Tanvir Ahmad is present before the Court as are Mr. Nasar Ahmad and Mr. M. Javaid Kasuri, DAGs. Since the parties present before the Court have no objection to the request of the Petitioner to the case to be heard in its entirety, given the urgency in the matter, we proceed to decide the issues raised in this Petition.

2. The basic facts are that the Petitioner is the sitting Chairperson of District Council, Toba Tek Singh. While holding the office of Chairperson, she filed nomination papers for the Bye-Election of the Provincial Assembly in PP-I18, Toba Tek Singh-I. Objections were filed by Respondent No.3 against the nomination papers on the ground that she is barred under Section 28 (1) of the Punjab Local Government Act, 2013 ("PLGA") to contest the Bye-Election as she has not tendered her resignation from the post of Chairperson, District Council, Toba Tek Singh. The Returning Officer rejected the objections vide order dated 3.9.2018 on the ground that the matter has been decided in Election Appeal No.6 of 2018 titled "Al-Haaj Azhar Iqbal Satti v. Returning Officers and others" and since scrutiny has to be conducted in terms of Articles 62 and 63 of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitutions") and Section 231 of the Elections Act, 2017 ("Elections Act"), the Petitioner is qualified and allowed to contest the Bye-Election. Against this order, Respondent No.3 filed an Election Appeal before the Election Tribunal which was allowed and the order of 3.9.2018 was set aside. Consequently, the nomination papers filed by the Petitioner were rejected. Being aggrieved by the order dated 12.9.2018, the Petitioner is now before this Court essentially on the ground that Section 28 of the PLGA is not a precondition to the filing of nomination papers and that the Petitioner is not required to tender her resignation until the last date for withdrawal of candidature and publication of revised list of contesting candidates. As per the schedule provided for the Bye-

Election, the last date of withdrawal of candidature is 15.9.2018, hence the urgency in the matter.

3. Mr. Muhammad Shahzad Shaukat, counsel for the Petitioner argued that the impugned order has treated Section 28(1) of the PLGA as a precondition to the filing of the nomination papers. Learned counsel argued that in terms of Section 2 of the Elections Act a candidate is a person whose name is proposed and seconded for election to the Assembly or the Senate and a validly nominated candidate is a candidate whose nomination papers have been accepted. A contesting candidate is a validly nominated candidate who has not withdrawn his candidature. Learned counsel argued that in terms of these definitions, the Petitioner was a validly nominated candidate as her nomination papers were accepted and since she was not a contesting candidate, she had the right to withdraw her candidature on 15.9.2018 or tender her resignation as the case may be. Learned counsel argued that Section 28 (1) of the PLGA, allows a Mayor, Deputy Mayor, Chairman or Vice Chairman to contest the election for any political office after resignation from the aforesaid office. The option of may contest means that the Petitioner has the right to contest elections once she becomes a contesting candidate. Therefore, in terms of Section 28(1) of the PLGA she must tender her resignation before becoming a contesting candidate. It is the case of the Petitioner that she had the option to tender her resignation by or before 15.9.2018 being the last date for withdrawal of candidature meaning thereby that the order of the Returning Officer was in accordance with law and the Appellate Tribunal failed to appreciate this point. Learned counsel placed reliance on the judgment dated 25.6.2018 passed in Election Appeal No.6/2018 titled "Al-Haaj Azhar Iqbal Satti v. Returning Officer - and another", judgment dated 12.9.2018 passed in W.P. No.231135/2018 titled "Muhammad Riaz v. Appellate Authority" and "Rana Salman Mahmood Khan v. Returning Officer and another" (2008 CLC 316).

4. On behalf of Respondent No.3, it is argued that the bar contained in Section 28 (1) of the PLGA is applicable at the time of filing nomination papers as the purpose of the bar is to prevent a person holding office of Chairman or Vice Chairman, Mayor or Deputy Mayor from participating in the election and influencing the election on the basis of their being office holders of the local government. Learned counsel further argued that in such cases the office holder as mentioned in Section 28 (1) of the PLGA can exert influence over the electoral process, which will defeat the entire election process. He also argued that in this case, the Petitioner is travelling on official duty and the instant Petition has been filed by her husband and that she has not tendered her resignation to date whilst she seeks the opportunity to tender her resignation by 15.9.2018 without being present in person. Learned counsel argued that once the scrutiny process is over and the Petitioner being the Chairperson of District Council, Toba Tek Singh is declared fit to contest the election, there is no further mechanism under the Elections Act on the basis of which it can be determined whether or not the Petitioner tendered her resignation before publication of the list of contesting candidates. Consequently if the relief claimed by the Petitioner is allowed those who are barred under Section 28 of the

PLGA may very easily contest the elections rendering the purpose of Section 28(1) of the PLGA as redundant.

5. In rebuttal, learned counsel for the Petitioner explained that the Petitioner is out of the country on official duty and has issued a special power of attorney in favour of her husband to file the instant petition. The original special power of attorney was produced before the Court. He also showed a copy of the resignation prepared by the Petitioner, which he stated is being presented to the Court to show the bona fides of the Petitioner that in the event she is allowed to contest the election she will tender her resignation immediately. Learned counsel stated that he can also provide an undertaking before this Court that the Petitioner will tender her resignation, if the Court allows the instant petition.

6. Mr. Nasar Ahmad, DAG supports the contentions raised by the learned counsel for the Petitioner. He argued that the right to participate in elections is a fundamental right and the PLGA cannot curtail this right by reading the bar in Section 28 (1) of the PLGA as a precondition for filing nomination papers.

7. We have heard the learned counsel for the parties at length. The basic issue before the Court is the time frame within which a resignation should be tendered by the Mayor, Deputy Mayor, Chairman and Vicc Chairman in order to contest elections for any other political office, in terms of the bar contained in Section 28 (1) of the PLGA. For ease of reference Section 28 of the PLGA is reproduced below:-

28. Bar against dual membership. (1) A Mayor, a Deputy Mayor, a Chairman or a Vice Chairman may contest election for any other political office after resigning from the office of the Mayor, Deputy Mayor, Chairman or Vice Chairman.

(2) A member of a local government, other than the Chairman of a Union Council, may contest election for any other political office without resigning from the membership of the local government but any such member shall not simultaneously hold more than one office.

(3) If a member of a local government is elected to any other political office, on the notification of election of that political office, his seat as member of the local government shall become vacant.

(4) If a Chairman of a Union Council is elected as the Mayor or a Deputy Mayor, or as the Chairman or a Vice Chairman of the District Council, he shall cease to be the Chairman of the Union Council and the seat of the Chairman of the Union Council shall stand vacated.

(5) Nothing in this section shall apply to bar a member of a local government to contest the election of Mayor, Deputy Mayor, Chairman or Vice Chairman of a local government or a member of an Authority.

The Section calls for resignation by the names of the office in the local government scheme in the event that the holder of such office opts to contest elections of any other political office. The spirit behind the bar imposed on dual membership is that the holders of specific positions being Mayor, Deputy Mayor, Chairman and Vice Chairman should not be allowed to contest for any other political office due to the

nature of their post. They sit at the highest level in the local government and are in a position to use the resources from the mentioned offices, including their staff for campaigning purposes and can influence the election process. The mandate of Section 28(1) of the PLGA is to prevent a single person from holding office whilst contesting for another political office as it is necessary to ensure that an office holder should dedicate his or her time to their official duties and not towards personal advancement. The bar ensures that office holders do not unfairly leverage their present position against other candidates or that they maintain public offices as a fall back.

8. In terms of the judgments relied upon by the learned counsel for the Petitioner, two of the judgments are by the Election Tribunal in which it is stated that the use of the expression 'may contest election' does not include the stage of filing of nomination papers and a person is considered to be contesting the election once they become a contesting candidate as defined under the law. In another case in W.P. No.231135/2018, the Court considered the bar contained in Section 28 of the PLGA and while relying on 2008 CLC 316 (supra) the Court finds that mere filing of nomination paper is not sufficient for the purpose of being qualified to contest the election and it is only after the nomination papers are accepted that a validly nominated candidate, who has not withdrawn his candidature, is ready to contest the election. There is no cavil to the fact that every person has a right to contest elections and that this being a fundamental right can only be reasonably curtailed. The legislature was mindful of the fact that the named office holders in Section 28 of the PLGA exert power and influence at the local government level and have a large amount of resources available to them. Therefore, in order to prevent any influence over the electoral process it is required that they resign from their office prior to contesting the election. We find that the word contest is not a defined term in the PLGA and should therefore be given its plain meaning, which is to compete and engage in competition. In this case, the competition is the election process and to contest the election means to participate in the election process. The election schedule for the Bye-Election dated 17.8.2018 reveals that the election process started when public notice was issued by the Returning Officer on 27.8.2018 and ends on the polling day being 14.10.2018. The entire process as per the schedule is a step by step procedure towards the holding of the Bye-Election. For the purposes of a candidate the schedule reflects the stages at which the candidate will participate in order to contest the election. The august Supreme Court of Pakistan in "Muhammad Khan v. Obaidullah Jan Babat and others" (PLD 2016 SC 492) has already declared that elections stand for a step by step process towards a certain result and is a continued process consisting of a series of steps which are to be taken at different stages as per the schedule contained in the notification published in the official gazette. Hence as per the plain meaning a candidate who 'may contest' in the elections means that a candidate takes part in the step by step process leading up to the polling date.

9. The Petitioner before the Court seeks interpretation of the word 'may contest' to be read in conjunction with the defined term contesting candidate under Section 2

(xiii) of the Elections Act. The meaning given to contesting candidate in the Elections Act is specifically for the purposes of giving meaning to the provisions of the Elections Act contained in Sections 64, 65, 66, 67 and 68 which set out the process where a validly nominated candidate can withdraw its candidature prior to his or her name being published in the list of contesting candidates. A contesting candidate for the purpose of Elections Act is one who has not withdrawn his or her candidature, who is allotted an election symbol under Section 67 of the Elections Act and is named in the list of contesting candidates. Therefore, the fact that a validly nominated candidate can withdraw its candidature under Section 65 of the Elections Act does not create a right in favour of the Petitioner to contest the election whilst holding office of Chairperson, District Council, Toba Tek Singh simply because she has the right to withdraw her candidature under Section 65 of the Elections Act. The Petitioner is required to file her nomination papers with all necessary declarations which will include her decision to resign from Chairperson, District Council, Toba Tek Singh. The Returning Officer at the stage of scrutiny must consider the bar contained in Section 28 of the PLGA because a Mayor, Deputy Mayor, Chairman and Vice Chairman cannot participate in the election process while retaining the named office. The entire process of participating and contesting election is for the benefit of the voter and the intent of Section 28 of the PLGA is to create a level playing field to all candidates who participate in the election. In this regard, we are fortified by the view given in "Syed Sarfraz Hussain Shah v. Additional District and Sessions Judge/Returning Officer and 16 others" (PLD 2008 Karachi 64).

10. We are of the opinion that the bar contained in Section 28(1) of the PLGA becomes applicable when a Mayor, Deputy Mayor, Chairman and Vice Chairman decides to contest a political office, in this case being the Bye-Election, at the stage of filing the nomination papers. In terms of Section 60 of the Elections Act, a candidate shall file its nomination papers with a declaration that he fulfills the qualifications specified in Article 62 and is not disqualified under Article 63 of the Constitution for being elected as a member. Every nomination paper is delivered to the Returning Officer who shall make the nomination along with annexures open to inspection by the public. In terms of Section 62 of the Elections Act any voter of the constituency may file objections to the candidature at the time of scrutiny. The Returning Officer shall decide upon the objections raised and may either of his own motion or upon any such objection conduct a summary enquiry and reject the nomination papers if he is satisfied that a candidate is not qualified to be elected as a member. The purpose of the scrutiny process and the right of filing an objection is to give the voter the chance to participate and ensure that all candidates who participate in the election are qualified and have made full disclosure under the law. It ensures that the voter is informed at the time when the vote is cast and that all relevant information is available to help the voter make an informed decision. After the scrutiny process if a candidate's nominations papers are accepted, there is no further scrutiny of the candidates as the name of the candidate is published in the list of contesting candidates, provided that the candidate has not withdrawn his or her nomination papers. Thereafter a candidate will be able to contest the election as

the process is completed by allocation of electier symbol and polling takes place on the polling date. If a candidate holding dual office is not required to resign at the time of filing nomination papers and it is left to choice that he or she may tender resignation once they become a contesting candidate, there is a very strong risk that such a candidate may contest the election without resigning. In such a scenario the candidate who happens to be Mayor, Deputy Mayor, Chairman or Vice Chairman will effectively contest the election whilst holding office, which goes against the spirit of Section 28 of the PLGA. It also means that the factum of dual membership is left unchecked since a candidate will of its own vocation either tender resignation or not. The outcome is that not only does this complicate the election process and subject it to disputes and challenge but it also means that the purpose of the bar contained in Section 28 of the PLGA is totally defeated.

11. We also find that if the issue of dual membership is left unchecked prior to the elections and it is questioned after the elections it will render the candidate disqualified under the Elections Act. When confronted with this question, learned counsel for the Petitioner informed the Court that if, at all, such a situation arises then the objection can be taken post-election and the matter can be looked into at that point. However, we are not satisfied with this response as it means that a person, who could not have contested the election in the first case, contested the election without fulfilling the requirements of Section 28 of the PLGA. It also means that if any objection is made post-election on this issue, the candidate stands to be disqualified for holding dual membership. If dual membership is a disqualification in the post-election scenario it stands to reason that it is a disqualification in the pre-election scenario.

12. Another aspect of this issue is the burden placed on the election process and the voter, simply because the holder of the offices mentioned in Section 28 of the PLGA has to make a choice and where the decision involves the risk of loosing the present office. If the holders of the barred offices do not resign before filing nomination papers, they can be declared successful in the elections for the other political office. This means that the candidate is able to exercise his or her choice after going through the entire election process. If the candidate is successful they resign from the present office and if unsuccessful they go back to their present office. In all situations the issue is one of personal choice and the risk attached with such choices. A candidate cannot use the offices named in Section 28(1) of the PLGA as a fall back position in the event that he or she is not successful in the run for some other public office, in this case the Provincial Assembly. We are of the opinion that the Petitioner has the right to choose between either offices and cannot require the entire process to bear the burden of her 'risk'. Time and again we have been informed by her counsel that she will resign if she can contest the Bye-Elections. In this regard, we are of the opinion that a wrong precedent cannot be set to comply with the wishes of one candidate.

13. The 'resign to run' principle is premised on encouragement to run for public office and to make the process of election more competitive. It creates a level

playing field and ensures that a person holding public office does not, divert its resources for personal advancement. It is also a check on those holding public office and ensures that they do their jobs and can account for the time spent in office. Public resources and functions are safeguarded and the sanctity of the election process is maintained.

14. In view of the aforesaid, we find no illegality in the impugned order. Petition stands **dismissed in limine.**

MWA/F-12/L Petition dismissed

P L D 2018 Lahore 916
Before Ayesha A. Malik, J
NAZIA BIBI and others---Petitioners
Versus
ADDITIONAL DISTRICT JUDGE, FEROZEWALA and others---Respondents
Writ Petitions Nos.154537 and 194641 of 2018, heard on 11th September, 2018.

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

---S. 5, Sched.---Decree passed by Family Court fixing monthly maintenance allowance for minors---Mother filing application for enhancement of maintenance allowance subsequent to the decree---Maintainability---Application for enhancement of minor's maintenance allowance may be filed subsequent to a judgment and decree.
Muhammad Iqbal v. Mst. Nasreen Akhtar 2012 CLC 1407 ref.

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

----S. 5, Sched.---Maintenance allowance for minors, enhancement of---Financial standing of father---Family Court decreed the suit filed by the mother and ordered the father to pay Rs.7000/- per month as maintenance for each minor along with 10% yearly increase---Appellate Court enhanced the monthly maintenance allowance for each minor from Rs.7000/- to Rs.12,000/- per month with 10% yearly increase---Contention of mother that father of the minors was capable of paying far more than Rs.12,000/- per month per child which was reflected from his tax returns and property documents---Validity---Appellate Court enhanced the maintenance from Rs.7000/- to Rs.12,000/- per month per child, with 10% annual increase on the basis of the financial status of the father and the daily growing requirements of the minors---However Appellate Court made no discussion about the enhanced requirements of the minors nor was there any discussion on the earning capacity of the father---Appellate Court assumed that Rs.12000/- per child was sufficient, but there was no discussion on the ages of the minors, on the needs of the minors nor any finding on the earning capacity/income of the father---In such circumstances impugned judgment of Appellate Court to the extent of quantum of maintenance allowance for minors was set aside and the matter was remanded to the Appellate Court to consider all relevant facts and documents and make a proper determination with respect to fixation of the maintenance of the minors, after hearing both the parties and pass a speaking order in accordance with law---Constitutional petitions were allowed accordingly.

(c) Administration of justice ---

----Judicial order---Such order must be a speaking order where the reasons were clearly stated by the court.

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

----Ss. 5, Sched. & 17A(4)---Maintenance allowance for minors, quantum of---Financial status of father, determination of---Factors to be taken into account by the court when determining monthly maintenance allowance for minors---Court while considering the quantum of maintenance should take into consideration the minors education, status and general expenses---Court must also take into consideration the ability to take care of the minors in a stable, safe and healthy environment---Without due consideration of all said factors, the court cannot conclude positively the quantum of maintenance---No hard and fast formula was available for determining quantum of maintenance and the main consideration for the Court was the ability of the father to maintain the minors---Father was obligated under the law to take care of his minor children and the quantum had to be determined as per his earning, financial and social status and the ability that he may have to take care of the minors---Merely stating that the father was jobless would not discharge him of his obligation---Basic objective for determining maintenance was to ensure that in all probability the minors were maintained by the father in a dignified manner with reasonable comfort and that the mother was not left to bear the burden of taking care of the minors---Important for the court to first determine the expenses incurred or likely to be incurred on the minors---For such purpose the court must look into the living conditions of the minor and the manner and means by which the mother was maintaining the minors which would include factors like where they resided, whether the mother was dependent upon her family, if so what was the income on the basis of which the minor was being cared for, whether the mother had a job and whether she had any source of independent income---Special needs of the minor which would include medical or physical needs or special educational needs should also be taken into account---For the purpose of maintenance it was the obligation of the father to fulfill any special needs---In the case of enhancement of maintenance allowance, the court must also determine as to what extent the maintenance already fixed met the requirement and expenses of the minor and for what purpose, further enhancement was required---At the same time the court must determine the income of the father either through proper documentary evidence or on the basis of his social status and earning capacity---In order to ensure that proper information was before the court, it may require the father to produce documents such as his salary slips or any Bank statement or property document on the basis of which he was able to show his monthly income or earning or his financial status---Court, therefore, was not dependent on documents or information provided by the father and could call for relevant documents or information be it from the relevant department or organization or as the case required, in order to determine the income of the father---In such regard, the assets owned by the father were relevant as it contributed towards establishing the financial status of the father that had to be probed into by the court and based on attending circumstances the court could conclusively establish the means through which the father would be able to maintain the minors---Also important to take into consideration any liability of the father, whether he was paying any Bank loan or debt, whether he had remarried or had other children or whether his parents were dependent on him---In this way the court could determine

the manner in which the income of the father was spent and balance the income and capacity with the reasonable requirements of the minors seeking maintenance.

Humayun Hassan v. Arslan Humayun and another PLD 2013 SC 557 ref.
Chaudhary Aurangzeb Gujjar for Petitioners (in W.P. No.154537/2018) and for Respondent Nos. 2 to 5 (in W.P.No.194641/2018).
Imran Muhammad Sarwar for Respondent No.3 in W.P.No.154537/18 and for Petitioner (in W.P.No.194641/2018).
Date of hearing: 11th September, 2018.

JUDGMENT

AYESHA A. MALIK, J.---This judgment decides upon the issues raised in W.Ps. Nos.154537/2018 and 194641/2018 as both the petitions raise common questions of law and facts arise out of the same impugned judgment dated 11.1.2018 passed by Respondent No.1, Additional District Judge, Ferozewala.

2. Facts of the case are that Petitioner No.1 filed a suit for recovery of maintenance allowance for herself as well as for three minors. The suit was decreed on 21.5.2014 such that each minor was given Rs.7000/- per month as maintenance along with 10% yearly increase. Subsequently, the Petitioner No.1 filed an application for enhancement of maintenance of the minors on 14.6.2016 which was rejected vide order dated 17.3.2017 for the reason that it is not open to the applicant, decree holder now to contend that maintenance allowance has not been correctly assessed or determined. If it were permissible, there will be no end or finality to the judgment and decree dated 21.5.2014 which had become final. The Petitioner No.1 then filed a second application seeking enhancement of maintenance allowance from Rs.7000/- to Rs.300,000/- per child per month, which was dismissed vide order dated 26.7.2017 for the reason that neither the petitioners assailed the judgment passed by learned trial court nor challenged their earlier filed petition dismissed by learned transferor court and now again despite availing efficacious, proper remedy filed the petition in hand which in no sense maintainable. On 25.9.2017 the Petitioner No.1 filed an appeal before Respondent No.1 against order dated 26.7.2017 who vide judgment dated 11.1.2018 partially accepted the appeal and enhanced the monthly maintenance of the minors from Rs.7000/- to Rs.12,000/- per head per month plus 10% yearly increase. The Petitioners are aggrieved by the fixation of maintenance of Rs.12000/- per month per minor. Hence this petition.

3. The case of the Petitioners is that Respondent No.3 was capable of paying far more than Rs.12,000/- per month per child which is reflected from the documentary evidence produced with the application which included Respondent No.3's tax returns and property documents. It is their case that the court should have given proper consideration to the evidence while fixing maintenance.

4. Respondent No.3 who is the Petitioner in W.P. No.194641/2018 is aggrieved by the impugned judgment on account of the fact that the same has been passed in a

time barred appeal, which as per the contention of the learned counsel, Respondent No.1 could not have condoned the delay. Learned counsel also argued that the conduct of the Petitioners by repeatedly filing enhancement applications shows that she did not have a genuine requirement of enhancement but only wants to harass Respondent No.3. With respect to the amount fixed by the court at Rs.12,000/- per child per month, learned counsel submitted that this amount is arbitrary, without due consideration of the relevant facts or record; that the court did not take into consideration the monthly income of Respondent No.3 nor did it take into consideration the fact that Respondent No.3 is married and has six children, hence he is not able to pay Rs.12,000/- per month per child.

5. In terms of the impugned judgment dated 11.1.2018 passed by Respondent No.1 on the question of condonation for delay, the court accepted the contention of the Petitioner No.1 that she was not aware that the District and Sessions Court was open in August, hence she did not file the appeal . The court also found that since the real issue is with reference to the welfare of the minors and Respondent No.3 is responsible to provide for the upbringing of his children. The court condoned the delay and proceeded to hear the appeal against order dated 26.7.2017. In this regard, since the ultimate consideration is the welfare of the minors, there appears to be no reason to interfere with the discretion exercised by the court while condoning the delay as the same was done with due consideration of the facts and the law.

6. The real issue in this case is the manner in which maintenance allowance to be paid by the father is fixed by the court. The Petitioners prayed for enhancement of maintenance at the rate of Rs.300,000/- per month per child on account of the financial status of Respondent No.3. In the reply, Respondent No.3 explained that he was unable to pay the amount sought by the Petitioners as the demand is not justifiable. The Judge Family Court considered the application for enhancement of maintenance and dismissed the same on the ground that the suit was decreed on 21.5.2014 and it was never challenged by the Petitioners before any forum, hence the minors are not entitled to enhancement of maintenance. It is noted that this decision of the Judge Family Court is flawed and totally contrary to the law. It is settled law that an application for enhancement of minor's maintenance allowance may be filed subsequent to a judgment and decree. Reliance is placed upon the case cited at Muhammad lqbal v. Mst. Nasreen Akhtar (2012 CLC 1407) wherein the Court held that:
On the issue whether a suit for enhancement of maintenance is maintainable under the Schedule, the answer is that the same is maintainable. The Schedule provides for the matter over which the family court should have jurisdiction. Maintenance is provided at serial No.3. As such there is no bar on filing a suit for enhancement of maintenance. There are bound to be changes in the circumstances and changes in the requirements of the children. Naturally, as the children will grow their needs will also grow. Reliance is placed on a case titled Arab Mir Muhammad v. Mst. Iram Iltimas and 4 others (1999 CLC 1668). It is noted that this is an unrealistic approach that the maintenance allowance should remain fixed throughout the growing period of the minor or that the 5% increase should be considered sufficient.

A father is legally bound to maintain the minor in terms of the requirement of the minor and the cost of living.

Hence the Petitioners could claim enhancement of the decreed maintenance allowance. Notwithstanding the same, the Appellate Court while considering the appeal of the Petitioners enhanced the maintenance from Rs.7000/- to Rs.12,000/- per month per child, with 10% annual increase. The reason given was the financial status of Respondent No.3 and the daily growing requirements of the minors. However there is no discussion on their enhanced requirements of the minors nor is there any discussion on the earning capacity of Respondent No.3. A bare reading of the order shows that the court assumed that Rs.12000/- per child was sufficient. There is no discussion on the ages of the minors, on the needs of the minors nor any finding on the enhanced claim for the minors.

7. As per settled law, maintenance with respect to the muslim children shall be governed by the injunctions of Islam and in other cases as per applicable personal law. The august Supreme Court of Pakistan has considered this issue in "Humavun Hassan v. ArsIan Humayun and another" (PLD 2013 SC 557) and held as follows:
4. There can be no cavil with the proposition that the maintenance issue(s), in relation to Muslim relatives shall be governed and regulated by the principles/injunctions of Islam i.e. as per the personal law of the parties. In this context, according to section 369 of the Muhammadan Law by D.F. Mullah, maintenance means and includes food, raiment and lodging. However, it may be observed that from the very language of the above section, such definition is neither conclusive nor exhaustive, and in our view it undoubtedly has a wider connotation and should be given an extended meaning, for the purposes of meeting and catering for the present days social, physical, mental growth, upbringing and well being of the minor, keeping in mind the status of the family, the norms of the society and his educational requirement, which has now attained utmost importance; but obviously corresponding to and commensurating with the means and the capacity of the father to pay. Anyhow, the same jurist in section 370 of the book has elucidated the liability of the father to pay the maintenance to his children as follows:-

"370. Maintenance of children and grandchildren.---(1) A father is bound to maintain his sons until they have attained the age of puberty. He is also bound to maintain his daughters until they are married. But he is not bound to maintain his adult sons unless they are disabled by infirmity or disease. The fact that the children are in the custody of their mother during their infancy (section 352) does not relieve the father from the obligation of maintaining them. But the father is not bound to maintain a child who is capable of being maintained out of his or her own property.

(2) If the father is poor, and in capable of earning by his own labour, the mother, if she is in easy circumstances, is bound to maintain her children as the father would be.

(3) If the father is poor and infirm, and the mother also is poor, the obligation to maintain the children lies on the grandfather, provided he is in easy circumstances." Again in interpreting the word "maintenance" some reasonable standard must be adopted. Whilst it is not confined merely to food, clothing and lodging, it cannot, by any stretch of imagination, be extended to incorporate within it education at higher levels ad infinitum. What is necessary to decide in this connection is to find out as to what amount of education has to be attained by the child concerned, having regard to the status and other circumstances of his family, to enable it to earn a complete livelihood by honest and decent means. Thus it may not be sufficient to say that the child of a tradesman can maintain itself by working as coolly or by thieving. What is required is that the child must be maintained until it is in a position to earn its own livelihood, in an honest ad decent manner in keeping with its family status.

Hence a father is obligated to maintain his children and a reasonable standard must be assumed for determining quantum. It is seen that more often than not family courts and appellate courts while exercising jurisdiction in cases requiring determination of maintenance tend to fix the quantum of maintenance without discussing the factors considered or the reasons for concluding so. Hence one has to wonder on what basis did the court formulate its opinion whilst fixing maintenance. It goes without saying that a judicial order must be a speaking order where the reasons are clearly stated by the court. In this case the Appellate Court has not discussed the earning capacity of Respondent No.3 nor the requirements of the minors, yet enhanced the maintenance from Rs.7000/- to Rs.12000/- per month.

8. It goes without saying that the court while considering the quantum of maintenance will take into consideration the fundamentals being the minors education, status, general expenses as has been clearly set out in PLD 2013 SC 557 (supra). The court must also take into consideration reasonable probability of obtaining education and the ability to take care of the minors in a stable, safe and healthy environment. Without due consideration of all these factors, the court cannot conclude positively the quantum of maintenance. There is no hard and fast formula for determining quantum of maintenance and the main consideration for the Court is the ability of the father to maintain the minors. A father is obligated under the law to take care of his minor children and the quantum has to be determined as per his earning, financial and social status and the ability that he may have to take care of the minors. This way merely stating that he is jobless will not discharge him of his obligation. The basic objective for determining maintenance is to ensure that in all probability the minors are maintained by the father in dignified manner with reasonable comfort and that the mother of the child is not left to bear the burden of taking care of the minors.

9. Quantum of maintenance requires due consideration of all factors on the basis of which the court can determine the actual need of the minor. In this regard, it is important for the court to first determine the expenses incurred or likely to be incurred on the minors. For this purpose the court must look into the living

conditions of the minor and the manner and means by which the mother is maintaining the minors which will include factors like where they reside, whether the mother is dependent upon her family, if so what is the income on the basis of which the minor is also being cared whether she has a job and whether she has any source of independent income. Special needs of the minor which will include medical or physical needs or special educational needs should also be seen. Special needs will vary from case to case, if relevant, as it is unique to the situation and individual. Yet for the purpose of maintenance it is the obligation of the father to fulfill these special needs. In the case of enhancement, the court must also determine as to what extent the maintenance already fixed meets the requirement and expenses of the minor and for what purpose, further enhancement is required. At the same time the court must determine the income of the father either through proper documentary evidence or on the basis of the social status and earning capacity of the father. In order to ensure that proper information is before the court, it may always require the father to produce documents such as his salary slips or any bank statement or property document on the basis of which he is able to show his monthly income or earning or his financial status. In this regard, the assets owned by the father are relevant as it contributes towards establishing the financial status of the father that has to be probed into by the court and based on attending circumstances the court can conclusively establish the means through which the father will be able to maintain the minors. It is also important to take into consideration any liability of the father, that is whether he is paying any bank loan or debt, whether he has remarried or has other children or whether his parents are dependent on him. In this way the court can determine the manner in which the income of the father is spent and balance the income and capacity with the reasonable requirements of the minors seeking maintenance.

10. In this regard, it is noted that Section 17(A) of the West Pakistan Family Courts Act, 1964 specifically provides in subsection (4) that for the purposes of fixing maintenance, the court may summon the relevant documentary evidence from any organization, body or authority to determine the estate and resources of the defendant. The purpose of this provision is to facilitate the court to determine the financial position of the father. The court therefore is not dependent on documents or information provided by the father and can call for relevant documents or information be it from the relevant department or organization or as the case requires, in order to determine the income of the father. In "Khadeeja Bibi and others v. Abdul Raheem and others" (2012 SCMR 671) the august Supreme Court of Pakistan held that even on the question of determining the annual increase in maintenance in the absence of any evidence on the point of annual increase the court should refrain from imposing such annual increase in the payment of maintenance to the minor, which is not in co-relation to the income of the father and the capacity of the father with respect to income. Therefore where the court is required to look into the future need of the minor that too must be done on the basis of reasonable and likely increase that can be made based on age, needs and on the maintenance that is being fixed for the present day.

11. The judgment under challenge has failed to make any determination on the requirement and need of the minors and also on the income of the father. Under the circumstances, impugned judgment dated 11.1.2018 passed by Respondent No.1 has not considered the evidence properly nor has any determination been made on the income of the father. Under the circumstance, both the petitions are accepted, the impugned judgment dated 11.1.2018 to the extent of quantum of maintenance is set aside and the matter is remanded to the Appellate Court to consider all relevant facts and documents as prescribed in this judgment and make a proper determination with respect to fixation of the maintenance of the minors, after hearing both the parties and pass a speaking order in accordance with law.

MWA/N-16/L Case remanded.

P L D 2019 Lahore 17

Before Ayesha A. Malik and Muzamil Akhtar Shabir, JJ

IMRAN MAQBOOL, PRESIDENT MCB BANK LTD.---Petitioner

versus

FEDERATION OF PAKISTAN through Secretary Law, Justice and Human Rights Division, Islamabad and others---Respondents

Writ Petitions Nos.71556, 54146 and 60723 of 2017, heard on 6th September, 2018.

(a) Protection Against Harassment of Women at the Workplace Act (IV of 2010)

----S. 7(1)---Punjab Protection Against Harassment of Women at the Workplace (Amendment) Act 2012 (III of 2013), S. 6---Penal Code (XLV of 1860), S.509---Harassment at workplace---Subject of harassment at the workplace, being a crime under the Penal Code, 1860, meant that Parliament and the Provinces both were competent to make laws with respect to the crime, procedure or evidence---Subject of protection of women from harassment fell under the Federal domain consequent to its international obligations and to the extent that the subject related to criminal law.

(b) Protection Against Harassment of Women at the Workplace Act (IV of 2010)

----S. 7(1)---Punjab Protection Against Harassment of Women at the Workplace (Amendment) Act 2012 (III of 2013), S.6---Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order (I of 1983), Art.9---Federal/Provincial Ombudsman for Protection Against Harassment of Woman at the Work Place---Jurisdiction---Scope---Where an organization was clearly a trans-provincial organization, the Federal Ombudsman for Protection Against Harassment of Woman at the Work Place was competent to look into a complaint---Jurisdiction of the Federal Ombudsman was not limited to the Federal Capital Area, rather the Federal Ombudsman had jurisdiction in relation to all employers, organizations, institutions and workplaces which had a Federal character or were established under a Federal law or were directly consequent to an international obligation under an international treaty or convention---Jurisdiction of Federal Ombudsman could not be limited to the Federal Capital Area and could be exercised all over Pakistan over a Federal employer, institution, organization or workplace---Where the employer or organization and its workplace fell strictly within the territorial boundaries of the Provincial Ombudsman, then jurisdiction vested with the Provincial Ombudsman and where the employer or organization transcended provincial boundaries then jurisdiction vested with the Federal Ombudsman.

Salim Javed and others v. Federal Ombudsman and others PLD 2016 Lah. 433 distinguished.

Farooq Zaman Qureshi and Riaz Hussain Haleem for Petitioner (in W.P. No.71556 of 2017).

Parvez I, Mir for Petitioner (in W.Ps. Nos.54146 and 60723 of 2017).

Nasar Ahmad, DAG along with Naveed Ahmad Goraya, Senior Law Officer in the Office of Respondent No.1 for Respondents.
Mrs. Samia Khalid, Addl. A.G. and Anwar Hussain, Addl. A.G. for Respondents.
Amna Tahir, Respondent No.5 in person.
Date of hearing: 6th September, 2018.

JUDGMENT

AYESHA A. MALIK, J.---This Judgment decides upon the issues raised in the instant Petition along with connected W.Ps. Nos.54146 and 60723 of 2017 whereby the Petitioners have challenged the jurisdiction of the Federal Ombudsman for Protection Against Harassment of Woman at the Work Place ("Federal Ombudsman") while hearing a complaint filed by Respondent No.5, Amna Tahir under the Protection Against Harassment of Women at the Workplace Act, 2010 ("2010 Act").
Facts and arguments

2. The common facts are that Respondent No.5 filed a complaint, before the Federal Ombudsman, against Saqib Rasheed, Petitioner in W.Ps. Nos.54146 and 60723 of 2017 and Imran Maqbool, Petitioner in W.P. No.71556/2017 along with five other officers of MCB Bank Limited on 23.6.2017 under the 2010 Act. The Petitioners along with others filed their replies before the Federal Ombudsman and raised an objection with respect to the jurisdiction of the Federal Ombudsman on two grounds; firstly, that the matter stood decided by the case cited at PLD 2016 Lahore 433 titled "Salim Javed and others v. Federal Ombudsman and others" ("Salim Javed Case") in which it was stated that jurisdiction in such cases lies with the Provincial Ombudsman and secondly that Respondent No.5 had also invoked the jurisdiction of the Provincial Ombudsman and therefore, could not seek remedy before both the Ombudsman at the same time.

3. Learned counsel for the Petitioners argued that Respondent No.5 has never filed any complaint against the Petitioners before the Bank and that the entire proceeding before the Federal Ombudsman was filed with a view to damage their reputation and to blackmail and harass them. Learned counsel also argued that the Federal Ombudsman does not have jurisdiction in the matter and despite various different restraining orders from this Court she proceeded with the matter having no regard whatsoever of the orders of this Court. In another W.P. No.54146/2017 filed by Saqib Rasheed, an interim order was passed on 24.07.2017 in which the Federal Ombudsman was restrained from proceeding with the matter yet despite issuance of the interim order, the orders of 4.8.2017 and 24.8.2017 were passed by the Federal Ombudsman. Learned counsel further argued that in the instant petition, repeated interim orders were passed by this Court, however, the Federal Ombudsman despite the warnings continued to proceed with the matter and ultimately passed judgment on 18.12.2017. Learned counsel argued that this is in total defiance of the orders of this Court which attitude was also displayed earlier by the same Federal Ombudsman in the Salim Javed Case. While relying on the said judgment, learned

counsel argued that the question of jurisdiction has been decided, therefore the Federal Ombudsman could not proceed with the matter.

4. Respondent No.5 in person argued her case. She stated that she filed a complaint before the Bank, however, they did not respond to her complaint. She then filed a complaint before the Provincial Ombudsman, however, subsequently withdrew it on 22.6.2017 believing it to be a matter for the Federal Ombudsman. She then filed a complaint before the Federal Ombudsman, who proceeded with the matter and at that time she had no knowledge of the Salim Javed Case. She argued that the Bank is a trans-provincial entity and as per the law is governed by Federal law, hence the Federal Ombudsman has jurisdiction in the matter. She also stated that this case is distinguishable from the Salim Javed Case, which was a case of an advocate whose offices are in Lahore, hence the court concluded that in such cases jurisdiction vests with the Provincial Ombudsman.

5. On behalf of the Federal Government Mr. Nasar Ahmad, DAG argued that the Federal Ombudsman has jurisdiction to entertain all complaints which have a federal character including complaints of trans-provincial organizations. He explained that the Provincial Ombudsman cannot exercise jurisdiction over a federal organization or its officers as they transcend the provincial boundaries and can be transferred out of the Province at any time rendering the claim before the Provincial Ombudsman as redundant. Further explained that the Salim Javed Case did not take these factors into consideration as the issue was with a local advocate. He further argued that the Federal Legislative List, Item No.13 provides for Federal Ombudsman, meaning thereby that if the subject matter in which a Federal Ombudsman is to be created falls within the domain of the Federal Government than the Federal Government is competent to make a Federal Ombudsman. In this case, the subject matter pertains to harassment at the work place for which the Federal Government has ratified several international conventions and treaties. Furthermore in terms of the dicta laid down by the august Supreme Court of Pakistan in Messrs Sui Southern Gas Company Ltd. and others v. Federation of Pakistan and others (2018 SCMR 802) ("NIRC case"), jurisdiction lies with the Federal Ombudsman.

6. The stance of the Province/Respondent No.3 as submitted by Mrs. Samia Khalid, Additional Advocate General and Mr. Anwaar Hussain, Additional Advocate General is that jurisdiction vests with the Provincial as well as the Federal Ombudsman. It is argued that the complainant has a choice of forum based on convenience as well as cause of action. In the event that the organization is a federal organization, the Provincial Ombudsman can still hear the matter and present its recommendations to the federal government. Reliance is placed on Article 141 of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution") to urge the point that the Parliament can make laws for the whole or any part of Pakistan and that the Provincial Government shall ensure its compliance. Further argued that even after the Province adopted the 2010 Act in the year 2012, the 2010 Act still holds the field, meaning that jurisdiction continues to vest with both Ombudsman. It

is also argued that both the Federal and Provincial laws are beneficial legislation, hence the doctrine of convenience is applicable and if considered necessary the place of occurrence can be the place where the complaint is filed.
The law and its purpose

7. The 2010 Act was promulgated as Act No. IV of 2010 and notified in the official gazette on 11.3.2010. In terms of its preamble it is an Act to make provisions for the protection against harassment of women at the workplace. Harassment is defined in Section 2(h) of the 2010 Act describing certain kinds of behaviour and attitude to be harassment because it causes interference with work performance or because it creates an intimidating, hostile or offensive work environment. The law is premised on the fundamental right of equal opportunity, for both men and women, to earn their livelihood and in furtherance of this right an obligation has been created on the employer at the workplace to create a safe working environment where both men and women can contribute and work efficiently and safely without discrimination and harassment.

8. The 2010 Act was passed in pursuance of Pakistan's obligation under the Universal Declaration of Human Rights ("UDHR"), the Convention on the Elimination of all forms of Discrimination Against Women ("CEDAW"), the International Labour Organization Convention 100 ("ILO 100") which is the Convention for Equal Remuneration for Men and Women for Work and Convention 111 ("ILO 111"). Pakistan ratified all the above mentioned treaties and conventions which provide equal opportunity at the workplace and necessitate a safe work environment. The 2010 Act extends to the whole of Pakistan. It defines the term 'Employer' to mean an organization, a person or body of persons whether incorporated or not and includes an authority, office bearer or proprietor run by the Federal Government or Provincial Government. The word 'Organization' is defined to mean Federal or Provincial Government Ministry, Division or a Department, a corporation or any autonomous or semi-autonomous body and medical institutes and faculties established or controlled by the Federal or Provincial Government or the District Government or privately managed and includes private sector organization and institutions. The term 'workplace' defines the place of work or the premises where the activity of the organization or the employer are carried out and includes work at the premises or official activity outside the office. Hence the 2010 Act is applicable over the entire gambit of workplace, employer and organization including all employees, organization and workplace in the public and private sector. In terms of Section 7 of the 2010 Act, the respective Federal and Provincial Governments are to appoint an Ombudsperson at the Federal and Provincial level. On 5.1.2013 the Government of Punjab adopted this law which is called the Punjab Protection Against Harassment of Woman at the Work Place (Amendment) Act, 2012 (III of 2013). Effectively the Provincial Assembly adopted the federal law with some changes so as to make it functional at the provincial level. Hence there is a federal law and a provincial law on the subject of protection against harassment of women at the workplace.

9. The basic issue in these petitions is with respect to the jurisdiction of the Federal Ombudsman and the Provincial Ombudsman and in particular whether Respondent No.5, Amna Tahir was to file her complaint before the Provincial Ombudsman or the Federal Ombudsman. In terms of the Salim Javed Case the Federal Ombudsman does not have jurisdiction to hear the complaint of Respondent No.5 as the matter falls within the ambit of the Provincial Ombudsman. The facts of the Salim Javed Case are that a female advocate filed a complaint against advocate Salim Javed before the Federal Ombudsman. The respondent in that case objected to the assumption of jurisdiction by the Federal Ombudsman as it was his case that the cause of action arose in Lahore, hence the Provincial Ombudsman was competent to hear the complaint. The opinion of the Court is that the Federal Ombudsman exercises jurisdiction only to the extent of the federal capital area and jurisdiction in all other situations vests with the Provincial Ombudsman. The Court concluded that the federal law lost its federal character and stands converted into a provincial law after the 18th Amendment. For ease of reference relevant paragraphs are reproduced hereunder:

8. I have considered the arguments addressed at the bar and have examined the law. The fundamental constitutional cum legal question that requires determination by this Court is the scope of Article 270AA(6) of the Constitution and the effect of the omission of the Concurrent List on the nature and character of the existing federal law. In the present facts, the Court has to determine the extent of jurisdiction enjoyed by the Federal Ombudsman under the Federal Act. In other words, whether Federal Ombudsman, under the Protection Against Harassment of Women at the Workplace Act, 2010 can assume jurisdiction over a complaint in which the cause of action arose in Punjab or whether, in such like matters, the jurisdiction vests with the Provincial Ombudsperson under the Punjab Protection Against Harassment of Women at the Workplace Act, 2012 ("Provincial Act") post 18th constitutional amendment.

9. The Federal Act was promulgated on 11.3.2010 with jurisdiction extending to the whole of Pakistan under Section 1(2) of the Federal Act. Constitution (Eighteenth Amendment) Act, 2010 was introduced on 20.4.2010. The said amendment omitted the Concurrent List from the Fourth Schedule to the Constitution, thereby enlarging and expanding the legislative domain of the provincial legislature and more importantly reinvigorating the constitutional theme of federalism and provincial autonomy. The preamble to the Amendment Act echoes the promise to establish "a Federal ... State wherein ... the Provinces have equitable share in the Federation." Admittedly, the Federal Act drew its legislative competence from entry 25 i.e. social welfare, of the erstwhile Concurrent List. Post 18th Amendment, this area stands devolved onto the Provinces. Under Article 270AA(6) of the Constitution, the Federal Act remains in force (as a Provincial Act, as discussed later) irrespective of the omission of the Concurrent List until such time that the Federal Act is altered, repealed or amended by the Competent Authority (legislature). Any such alteration or amendment in the law by the competent legislature does not affect its continuity and the law continues to be in force, albeit, as a provincial law, not

because of the alteration or amendment but because of the constitutional declaration under the 18th amendment. It is only on repeal that the law comes to an end.

10. The Punjab Protection Against Harassment of Women at the Workplace (Amendment) Act, 2012 (Act III 2013) has amended and altered the Federal Act (interestingly retaining the same title). It is actually the constitutional declaration of devolution, the underlying constitutional theme of federalism and provincial autonomy under the 18th Amendment which has metamorphosed the Federal Act into a Provincial Act. Alteration and amendment by the competent provincial legislature is a legislative exercise to align the law according to the wishes of the provincial legislature and has no bearing on the character of the law which already stands transformed into provincial law by the constitutional declaration on the promulgation of the Amendment Act.

11. Considering it from another angle, if the federal law under Article 270AA (6) can only be subjected to alteration, amendment and repeal by the provincial legislature, it means that the Federal law has lost its federal character and stands transformed into a Provincial law. What if the appropriate legislature does not carry out any amendment or alteration in the federal law, it still automatically stands converted into provincial law and remains in force as such. This is also because with the omission of the Concurrent List, the federal legislature looses its legislative fiat and command over the areas in the Concurrent List to the provincial legislature and as a consequence the federal law is deprived of its federal character. It is important to underline, that with the legislative shift from federal to provincial, the executive authority, under Article 97 also gets realigned and changes hands from federal executive to the provincial executive.

12. The Amendment Act, as well as, the Punjab Protection Against Harassment of Women at the Workplace (Amendment) Act, 2012 constitutionally trims the Federal Act and restricts its jurisdiction to territories of Pakistan that fall outside the Provinces in terms of Article 1(2) of the Constitution. The continuance of the Federal Act in federal areas finds support under Article 142(d) of the Constitution that provides that the Federal Legislature has the exclusive power to make laws with respect to all matters pertaining to such areas in the Federation as are not included in any Province. The territorial jurisdiction of the Federal Act under Section 1(2) extends to the whole of Pakistan. This geographical extent has to be pruned according to the constitutional mandate under the 18th amendment. The best interpretational tool to apply is that of reading down. Reliance is placed on Messrs Chenone Stores Ltd. through Executive Director (Finance Accounts) Federal Board of Revenue through Chairman and 2 others (2012 PTD 1815) and Nadeem Asghar Nadeem and others v. Province of the Punjab and others (2015 CLC 1509). Therefore, in order to align the Federal Act with the constitutional scheme, section 1(2) of the Federal Act is read down thereby limiting the extent of the Federal Act to areas which do not form part of any province. Reliance is also placed on Syed Imran Ali Shah v. Government of Pakistan and 2 others (2013 PLC 143).

13. The complaint filed by respondent No.2 on 14.9.2015 is based on cause of action arising in Lahore, the alleged accused also reside in Lahore, therefore, the jurisdiction to entertain and hear the complaint of respondent No.2 is with the Provincial Ombudsperson under the Provincial Act and the Federal Ombudsman has no jurisdiction to entertain the said complaint. The impugned judgment dated 4.1.2016 passed by the Federal Ombudsman along with all the prior orders assuming jurisdiction in the matter are hereby declared to be unconstitutional, illegal and without lawful authority and therefore set aside. The complaint shall be deemed to have been returned to respondent No.2, who may file the same before the Provincial Ombudsperson, if so advised. Considering that the Federal Ombudsman has no jurisdiction to entertain the complaint, other grounds agitated by the petitioners need not be gone into.

10. The findings of the Court are based on the understanding that the subject of harassment against women has devolved onto the Provincial Government post 18th Amendment. The Court considered the subject matter of harassment against women to be covered under Item No.25 of the Concurrent Legislative List ("CLL") being Population, Planning and Social Welfare. As the CLL was abolished by way of the 18th Amendment on 20.4.2010 all areas provided for under the CLL devolved on to the Provinces. Consequently the Court concluded that jurisdiction vests with the Provincial Ombudsman and only to the extent of the federal capital territory, jurisdiction vests with the Federal Ombudsman. We have considered the reasoning advanced in the Salim Javed Case, however we are not persuaded by the same. Harassment, whether verbal or physical is a behavioral issue that adversely affects the work environment. It manifests itself in many different forms of unethical and unwelcomed behaviour which renders the workplace hostile or offensive. Hence it violates the right to a safe and healthy work environment. The right to work is a multifaceted right which is recognized under different international treaties and conventions for creating a safe work environment especially for women. Article 23 of UDHR declares the right to work and the right to favourable conditions of work as a human right. Article 11 of CEDAW specifically requires States to ensure women have equal work opportunity and safe working conditions. As Pakistan has ratified these treaties and conventions it is obligated to protect the right to work and to ensure a favourable work environment. Since the 2010 Act was promulgated pursuant to Pakistan obligations under the international treaties and conventions, the subject matter of protection of the workplace for women falls under Item 3 read with Item 32 of the Federal Legislative List of the Constitution which includes implementing international treaties and conventions. It is also noted that harassment laws aim to regulate behaviour and attitudes which can be subjected to criminal punishment as well as civil liability. Section 509 of the Pakistan Penal Code, 1860 ("P.P.C.") criminalizes behaviour conduced with the intention of unreasonably interfering with an individual's work performance or behaviour which creates an intimidating hostile or offensive work environment. Therefore the subject of harassment at the workplace being a crime under the P.P.C. means that Parliament and the Provinces both are competent to make laws with respect to the crime, procedure or evidence. Hence we find that the subject of protection of women from

harassment does not fall under 'population, planning and welfare' of the CLL, rather it falls under the federal domain consequent to its international obligations and to the extent that the subject relates to criminal law.

11. We also find that the Salim Javed Case is not applicable to this case because the issue of trans-provincial organization was not taken into consideration by the Court in that case. This issue was considered by the august Supreme Court of Pakistan in the NIRC case at great length. The term 'trans-provincial organization' means an organization which operates at a trans-provincial level, that is they operate in more than one province. In terms of the NIRC case the federal legislature has extra territorial authority to legislate on matters which pertain to trans-provincial organizations. The Court relied on Item No.13 in Part II of the Federal Legislative List of the Constitution which provides for inter-provincial matters and coordination, meaning that, the Federation has to make laws relating to inter-provincial matters. Therefore in the NIRC case, the august Supreme Court of Pakistan concluded that the federal legislature has extra territorial authority to legislate, however the same authority does not lie with the provincial legislature. The august Supreme Court of Pakistan also held that in order to preserve and regulate a right which transcends provincial boundaries, only the Federation is competent to legislate on such matters and Item Nos. 58 and 59 of the Federal Legislative List provide the relevant entries to bring it in the federal domain. The Provincial legislature does not have extra territorial legislative competence, therefore it cannot legislate with regard to rights which transcend its provincial boundaries. In the NIRC judgment, the august Supreme Court of Pakistan held that the federal legislature is competent to legislate on all matters in order to discharge its obligations created under international treaties and conventions. In the case, the matter involved was with respect to trade unions and labour disputes, hence it was found that it was a federal obligation created under the International Labour Organization Convention, hence covered under Item Nos.3 and 32 of the Federal Legislative List. In the case of a trans-provincial establishment, the august Supreme Court of Pakistan held that the Federation is competent to interfere in such matters because trans-provincial establishments transcend provincial boundaries. Therefore we are of the opinion that the wisdom enumerated in the NIRC case is applicable to the instant case. Where the organization is clearly a trans-provincial organization, as in this case as it is a bank with branches all over Pakistan, the Federal Ombudsman is competent to look into the complaint of Respondent No.5. The jurisdiction of the Federal Ombudsman is not limited to the federal capital area, rather the Federal Ombudsman has jurisdiction in relation to all employers, organizations, institutions and workplaces which have a federal character or are established under a federal law or are directly consequent to an international obligation under an international treaty or convention. The Federal Ombudsman jurisdiction cannot be limited to the federal capital area and can be exercised all over Pakistan over a federal employer, institution, organization or workplace.

12. The question which needs consideration is whether the Provincial Ombudsman has concurrent jurisdiction with the Federal Ombudsman on account of the fact that

the harassment committed or complainant reside in the province who sought to complain before the Provincial Ombudsman. Although Mrs. Samia Khalid, Additional Advocate General and Mr. Anwaar Hussain, Additional Advocate General argued that being beneficially both the Provincial and Federal Ombudsman have jurisdiction, however, we are of the opinion that the intent of the law is to create a forum where harassment can be reported, inquired and penalized. If both the Provincial and Federal Ombudsman are given jurisdiction then there may be instances where the Provincial Ombudsman will have to deal with a complaint against a trans-provincial organization, or where the employer or the organization is federal in character making it difficult for the Provincial Ombudsman to proceed with the complaint or to impose penalty on the employer or organization since it falls within the federal domain. Under the circumstances, we hold that if the employer or organization and its workplace falls strictly within the territorial boundaries of the Provincial Ombudsman, then jurisdiction vests with the Provincial Ombudsman and where the employer or organization transcends provincial boundaries such as in this case then jurisdiction vests with the Federal Ombudsman. To clarify we add that for the reasons stated herein we disagree with the findings in the Salim Javed Case that the Federal Ombudsman jurisdiction is limited to the federal capital area as the Federal Ombudsman is competent to hear complaints related to trans-provincial organizations, institutions, employers and workplace.

13. So far as the proceedings conducted by the Federal Ombudsman, we find that they were done in utter disregard of the orders of this Court. On 24.7.2017 an order was passed in W.P. No.54146/17 directing that the proceedings before the Federal Ombudsman shall remain stayed. She ignored the order and proceeded with the matter. In another order dated 9.10.2017 passed in W.P. No.71556/17 she was again restrained, however she proceeded with the case. Thereafter a series of orders were issued by the Federal Ombudsman including the final order on 18.12.2017 without any consideration of the orders of this Court. It was only when the Court restrained Respondent No.5 from proceeding with the execution of the final order that the proceedings were stopped. We note that the Salim Javed Case categorically addressed the issue with reference to the Federal Ombudsman obligation and to obey the orders of the High Court. However, displaying the same attitude as was discussed in that case, the Federal Ombudsman (Justice (R) Yasmin Abbasey) showed no regard whatsoever to the orders of this Court. Under the circumstances all orders passed after 4.8.2017 including the final order dated 18.12.2017 are illegal and void, hence set aside. The complaint of Amna Tahir shall be treated as pending before the Federal Ombudsman who shall decide the same in accordance with law, expeditiously, after hearing all necessary parties.

14. In view of the aforesaid, W.Ps. Nos.71556/2017, 54146 and 60723 of 2017 are allowed to the extent that the impugned orders and the final order dated 18.12.2017 passed by the Federal Ombudsman are set aside. However, the parties are directed to appear before the Federal Ombudsman on 4.10.2018 so as to proceed with the compliant on its merit. The Registrar of this Court is directed to inform the Registrar of the office of the Federal Ombudsman of the orders of this Court.

MWA/I-11/L Petition allowed.

2019 C L C 46
[Lahore]
Before Ayesha A. Malik and Jawad Hassan, JJ
NISAR AHMAD----Appellant
Versus
MEMBER BOARD OF REVENUE (COLONIES), PUNJAB LAHORE and another----Respondents
I.C.A. No.1024 of 2016, heard on 19th October, 2017.

Colonization of Government Lands (Punjab) Act (V of 1912)---

----S.30---Lambardari grant---Grant of proprietary rights by the competent authority---Scope---Application for proprietory right was moved by father of petitioner---Competence---Limitation---Issuance of show-cause notice after final adjudication of matter---Scope---Proprietary rights of land in question were confirmed in favour of petitioner---Authorities instead of assailing the said order issued show-cause notice raising same allegations which had already been adjudicated upon in the order of Member Board of Revenue (Colonies)---Constitutional petition against issuance of show-cause notice was dismissed by the Single Judge of High Court on the ground that petitioner should appear before competent authority and raise his objections before the same---Contention of petitioner was that respondents could not re-open the case by simply issuing show-cause notice---Validity---Single Judge of High Court had not considered the fact that issue with regard to proprietary rights had already been adjudicated upon---Application for grant of proprietary rights was filed by the father of petitioner well within time and petitioner had stepped into the shoes of his father---Petitioner was entitled for grant of proprietary rights in circumstances---Substantive rights had been accrued in favour of petitioner on the basis of application moved by his father within prescribed time---Authorities had re-opened the matter requiring the petitioner to once again prove that application was moved by his father---Petitioner could not be forced to face such proceedings when competent forum had conclusively held that he was entitled to proprietary rights on the basis of application moved by his father---Requiring the petitioner to defend himself before competent authority would tantamount to re-opening the case---Authorities could not issue fresh show-cause notice with regard to the matter which had been adjudicated upon in finality by the competent forum---Impugned order passed by the Single Judge of High Court was set aside---Intra court appeal was allowed accordingly.
Hafeez Saeed Akhtar for Appellant.
Muhammad Siraj-ul-Islam Khan, Addl. AG along with M. Azam Khan, Incharge Lambardari Scheme for Respondent.
Date of hearing: 19th October, 2017.

JUDGMENT
AYESHA A. MALIK, J.----Through this ICA, the Appellant has impugned order dated 16.5.2016 passed by the learned Single Judge in W.P. No. 16261/2016.

2. The facts of the case are that the Appellant is the owner of land measuring 95 Kanals 14 Marlas situated in Chak No.187/EB, District Vehari Under 'Lambardari Grant'. The grant was confirmed pursuant to an order dated 5.6.2014 passed in W.P. No.1055/2014 and thereafter through order dated 21.10.2015 passed by Respondent No.1, Member (Colonies), Board of Revenue, Punjab. The matter in issue with respect to the proprietary rights of the Appellant therefore came to an end and the Respondents if aggrieved should have challenged the order of the Board of Revenue dated 21.10.2015. Instead of challenging the said order, the Respondents issued show-cause notice dated 2.5.2016 raising the same allegations which had already been adjudicated upon in the order of the Member Board of Revenue. Learned counsel for the Appellant argued that the matter has been adjudicated upon by the proper forum and the Respondents cannot revive a matter again through a show-cause notice. Further argued that the impugned order finds that the Appellant has challenged a show-cause notice and since no final order has been passed in the show-cause notice, the Appellant can appear before the competent authority and raise its objections. Explains that the show-cause notice is patently illegal and the Respondents cannot be allowed to re-open a case which has already been adjudicated upon in finality. Furthermore by requiring the Appellant to appear before the Respondents and submit its objections against the show-cause notice in fact means that the Respondents will re-open the case and will have to decide whether or not they accept the arguments of the Appellant. Learned counsel argued that this will mean that whenever the matters are adjudicated upon by the competent jurisdiction in government department they can re-open the matter by simply issuing show-cause notice without any regard to the orders of the Court which would be inherently wrong.

3. On behalf of the Respondents, learned Law Officer argued in support of the impugned order. He stated that show-cause notice was issued as there is no record available with respect to the application filed by the father of the Appellant on the basis of which the Respondents anticipate a fraudulent transaction. He argued that at this stage no adverse order has been passed against the Appellant. The Appellant should file his reply and any objection that he may have can be decided by the Respondents in the first instance before taking up the case on its merits. Learned Law Officer further stated that it is just a notice and no substantive right of the Appellant is prejudiced

4. We have heard the learned counsel for the parties and find that the impugned order has failed to consider the fact that the issue with respect to proprietary rights of the Appellant has already been adjudicated upon by this Court vide order dated 5.6.2014 passed in W.P. No.1055/2014, on the basis of which the matter was remanded to Respondent No. 1. Respondent No.1 on the basis of direction given, heard all the parties and passed an exhaustive order dated 21.10.2015. In terms of the order, it is an admitted fact that an application for grant of proprietary rights was filed by the father of the Appellant well within time on 27.8.1976. It was also admitted in that order that the Appellant has stepped into the shoes of his father and was entitled to the grant of proprietary rights. We note that the findings of

Respondent No.1 have created substantive rights in favour of the Appellant on the basis of an application moved by his father within the prescribed time. The Respondents have now re-opened the matter requiring the Appellant to once again prove that an application was moved by his father. This is neither permissible under the law nor the Appellant can be forced to face such proceedings given that the competent forum has conclusively held in favour of the Appellant that he is entitled to proprietary rights on the basis of the application moved by his father. The learned Single Judge in the impugned order while recognizing that Respondent No.1 has declared that the Appellant has proprietary rights with reference to the land in question, has required the Appellant to defend himself before the Respondents on account of the fact that it is merely a show-cause notice. We are of the opinion that requiring the Appellant to defend himself before Respondent No.1 tantamounts to re-opening the case. The Respondents have had ample opportunity to deal with this issue and prove it to the contrary before Respondent No.1. Having failed to do so, they cannot issue a fresh show-cause notice on matters which are adjudicated upon in finality by the competent forum. This would amount to a travesty of law giving the Respondents the ability to re-open matters which have been adjudicated upon in finality.

5. Under the circumstances, the instant appeal is accepted and the impugned order dated 16.5.2016 passed by the learned Single Judge in WP No.16261/2016 is set aside.

ZC/N-18/L Appeal allowed.

2019 P T D 1
[Lahore High Court]
Before Ayesha A. Malik, J
MUBASHAR IJAZ AWAN
Versus
FEDERATION OF PAKISTAN through President and 6 others
W.P. No.38145 of 2016, heard on 24th October, 2018.

Sales Tax Act (VII of 1990)---

----Ss. 45B & 48---Arrears of sales tax, recovery of---Attachment of Bank accounts---Remedy of appeal under S. 45B of the Sales Tax Act, 1990---Association of Persons (AOP) setup as special administrative arrangements---Scope---Petitioner impugned attachment of his Bank account by the Department, in pursuance of recovery of tax liability of an Association of Persons (AOP) , where petitioner was shown as partner, under S. 48 of the Sales Tax Act, 1990---Contention of petitioner, inter alia, was that he was merely an employee of the AOP and was made member of the AOP for administrative reasons as the AOP was made in pursuance of a special department of the Provincial Government ---Contention of Department, inter alia, was that remedy of appeal was available to petitioner under S. 45B of the Sales Tax Act, 1990---Validity----Department had not denied that the petitioner was in fact an employee of the AOP and the assessment order against said AOP had nothing to do with the petitioner---Remedy of appeal under S. 45B of the Sales Tax Act, 1990 was neither effective nor efficacious for the petitioner, and the matter was also argued before the Federal Tax Ombudsman where case of maladministration against Department was made out---High Court directed that Department refund amounts recovered from petitioner's Bank account within a period of two weeks---Constitutional petition was allowed, accordingly.

Waheed Shahzad Butt for Petitioner.
Nasar Ahmad, DAG for Respondents.
Ms. Foziya Bukhsh for Respondents Nos. 3 and 4.
Mansoor Beg for Respondent No.5.
Date of hearing: 24th October, 2018.

JUDGMENT
AYESHA A. MALIK, J.---Through this petition, the Petitioner has impugned order dated 7.10.2016 passed by Respondent No. 1.

2. The Petitioner is a registered taxpayer with the Federal Board of Revenue ("FBR") is aggrieved by the actions of Respondent No.4 who attached the bank account of the Petitioner maintained at Soneri Bank Limited, Main Branch, Mall Road, Lahore. The money was withdrawn from the account of the Petitioner on the misconception that the Petitioner is the owner/partner of Idara-e-Kissan which is a special project of Punjab Livestock and Dairy Development Department. In terms of the impugned order, the Respondent Department admitted that the Petitioner was

a paid employee of Idara-e-Kissan Project and was made a member of the Association of Partnership ("AOP") as a special administrative arrangement and that he was not actual partner for the benefit of the AOP. Further that he only withdrew his salary from Idara-e-Kissan. Instead of recovering sales tax from Idara-e-Kissan, Respondent No.4 attached the bank account of the Petitioner under Section 48 of the Sales Tax Act, 1990 ("Act") without issuing any notice or following due process. The Petitioner challenged these actions before the Federal Tax Ombudsman ("FTO") who ordered in his favour. The Respondents challenged the order of the FTO before the President of Pakistan which is impugned in this Petition. The impugned order set aside the order of the FTO dated 25.3.2016 on the ground that remedy of appeal is available to the Petitioner.

3. Learned counsel for the Petitioner argued that remedy of appeal is not available to the Petitioner because he is neither the owner of Idara-e-Kissan nor does he figure in the assessment of tax for Idara-e-Kissan. He further argued that Idara-e-Kissan was a joint venture, a special project of Punjab Livestock and Dairy Development Department and the Petitioner was merely an employee of this project and was shown as a partner of the AOP just for administrative reasons. The Respondents without issuing any notice to the Petitioner attached his bank accounts and recovered Rs.403,066/-. Learned counsel argued that the FTO recommended that the amount be refunded to the Petitioner within 10 days' time. However against this/ order, the Respondents filed a representation before the President of Pakistan in terms of Section 32 of the Federal Tax Ombudsman Ordinance, 2000 ("FTO Ordinance"). The matter was heard at length and decided on the question of jurisdiction.

4. Report and parawise comments have been filed on behalf of Respondents Nos.1, 4 and 5. As per the record, the Petitioner was an employee of Idara-e-Kissan earning a salary of Rs.23,000/-. He resigned from Idara-e-Kissan on 15.12.2010. On 1.10.2015 Respondent No.4 issued a letter to Respondent No.5 for attachment of bank account of the Petitioner which is the personal account of the Petitioner. The reason for attachment is an assessment order passed on 27.5.2015 in which Idara-e-Kissan was held liable in the amount of Rs.2,015,323/-. In terms of the report and parawise comments filed, the Respondents have not denied the allegation that no notice was served to the Petitioner. They also not denied the allegation that the Petitioner was in fact an employee of Idara-e-Kissan who resigned from his post in 2010. These factual contentions have been deliberated upon by the FTO and the President where clear finding on the facts in favour of the Petitioner have been given. Learned counsel for Respondents Nos.3 and 4 argued that in terms of Taxpayer Registration Profile, he has been shown as owner of Idara-e-Kissan. She further submitted that the impugned order is in accordance with law and the remedy of appeal is available to the Petitioner.

5. The question before this Court is whether the Petitioner has remedy available to him under the Act to recover amounts illegally extracted from his personal account. In terms of the Act, against an assessment order, remedy of appeal is available to

the taxpayer under Section 45-B of the Act within 30 days. In this case the assessment order is that of Idara-e-Kissan and has nothing to do with the Petitioner. Therefore the remedy under Section 45-B of the Act in the form of an appeal is neither effective nor efficacious for the Petitioner. On the other hand Section 9(1) of the FTO provides for the jurisdiction, functions and powers of the FTO. As per the Section, the FTO may on a complaint by any aggrieved person, or on a reference by the President, the Senate or the National Assembly, as the case may be, or on a motion of the Supreme Court or a High Court proceed on matters by way of investigation into any allegation of maladministration on the part of the Revenue Division or tax employee. Maladministration is defined in Section 2(3) of the FTO Ordinance to include a decision, process, recommendation, act of omission or commission which is contrary to law, rules or regulations or is a departure from established practice or procedure, unless it is bona fide and for valid reasons and includes coercive methods of tax recovery in cases where default in payment of tax or duty is not apparent from the record. The case of the Petitioner as argued is one of maladministration for which the FTO has jurisdiction.

6. In this case, there is admittedly no tax default on the part of the Petitioner and the recovery made against the account of the Petitioner was in fact recovery of amounts owed by Idara-e-Kissan based on the assessment order dated 27.5.2015. The FTO in its order dated 25.3.2016 made the following recommendations:
i) refund the amount recovered from bank account of the Complainant within 10 days; and
ii) report compliant within one week thereafter
The record shows that the Petitioner resigned from his position as Manager Accounts on 15.12.2010 and that he had nothing to do with the Idara-e-Kissan. The Department does not dispute these facts and admits that the Petitioner was never the owner or partner of Idara-eKissan and his name was only placed there for administrative reasons. Therefore the deduction made was against the law.

7. In view of the aforesaid, the instant petition is allowed and impugned order dated 7.10.2016 is set aside. The Respondents are directed to refund the amounts of the Petitioner recovered from his bank account within two weeks time of receipt of certified copy of this order.

KMZ/M-162/L Petition allowe

2019 C L D 113
[Lahore]
Before Ayesha A. Malik and Jawad Hassan, JJ
HOUSE BUILDING FINANCE COMPANY LIMITED through Branch Manager---Appellant
Versus
Ms. RUKHSANA MUMTAZ---Respondent
R.F.A. No. 761 of 2016, decided on 26th April, 2018.

Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----Ss. 10, 9 & 22---Application for leave to defend---Adjudication---Principle---Charges imposed by Financial Institution on finance availed by customer---Suit filed by customer seeking declaration that customer was not liable to pay "appreciation charges" on finance facility, was decreed after Banking Court dismissed leave to defend application of defendant Financial Institution---Validity---Suit was decreed by Banking Court without considering arguments raised by defendant in its application for leave to defend and there was nothing before the Banking Court on basis of which it could conclude that said appreciation charges were contrary to applicable State Bank Regulations---Impugned order was set aside and case was remanded to Banking Court---Appeal was allowed accordingly.

Khawaja Muhammad Ajmal for Appellant.
Nazim Ali Awan for Respondent.
Date of hearing: 26th April, 2018.

JUDGMENT

AYESHA A. MALIK, J.---This appeal under section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 ("FIO") is directed against judgment and decree dated 16.3.2016 passed by the Judge Banking Court-I, Gujranwala/Camp Office at Sialkot.

2. Brief facts of the case are that the Respondent filed a suit for declaration, rendition of accounts along with permanent injunction praying herein that the plaintiff is only entitled to pay the principal amount which she has already paid and that there is nothing due to the Respondent. Further that she is not liable to pay appreciation charges. The Appellant filed its application for leave to defend the suit ("PLA") against which reply was filed by the Respondent. It is stated in the PLA that the Respondent in terms of the agreement is bound to pay the appreciation charges as per the State Bank Regulations. The Banking Court on the first date of hearing dismissed the PLA vide the impugned order dated 16.3.2016 and found that the Appellant is not entitled to claim appreciation charges from the Respondent and the suit of the Respondent was decreed in her favour.
3. Learned counsel for the Appellant argued that the suit could not have been decreed on the first hearing. It was a suit for rendition of accounts in which the

Respondent had also challenged appreciation charges. Learned counsel further argued that the terms and conditions of the finance facility are in accordance with law and were agreed to by the Respondent. Therefore she could not have required anything contrary to the contractual terms. Furthermore there was nothing before the court on the basis of which it gave the finding that the charging of appreciation charges are illegal and against the State Bank Regulations.

4. On the other hand, learned counsel for the Respondent argued that the Respondent has paid the principal amount and is not liable to pay appreciation charges which are contrary to law. Learned counsel further argued that the Appellant cannot charge excessive markup or make money at the cost of the Respondent. Further that the Respondent is liable to pay the principal amount but not liable to pay any other charges.

5. We have heard the learned counsel for the parties at length and have also gone through the record. In terms of the original record, we note that the suit for declaration, rendition of accounts along with permanent injunction was filed on 12.12.2011. PLA was filed on 17.3.2012. The suit was heard by the Judge Banking Court on 16.3.2016 on which date the court dismissed the PLA and decreed the suit. The prayer of the Respondent in the suit was that she is only entitled to pay the principal amount which she has already paid and that there is nothing due from her. Further that she is not liable to pay appreciation charges. The Banking Court vide the impugned order dated 16.3.2016 allowed this prayer without considering the arguments raised by the Appellant in the PLA being that it was entitled to charge appreciation charges as per its requirements and that she agreed to the same in the contract and that the said charges were not in violation of any State Bank Regulations. We also note that there was nothing before the court on the basis of which it concluded that appreciation charges are contrary to the State Bank Regulations.

6. In view of the above, the instant appeal is allowed. The impugned order dated 16.3.2016 passed by the Judge Banking Court-I, Gujranwala/Camp Office at Sialkot is set aside. The case is remanded back to the Banking Court before whom the PLA shall be deemed pending and is directed to decide the same within a period of three months of receipt of certified copy of this judgment, after hearing all the necessary parties, in accordance with law.

KMZ/H-14/L Case remanded.

2019 P L C 68
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
Ch. RAHMAT ALI MEMORIAL TRUST
Versus
PUNJAB EMPLOYEES SOCIAL SECURITY INSTITUTION through Deputy Director and others
I.C.A. No. 1737 of 2015, heard on 4th October, 2017.

Provincial Employees' Social Security Ordinance (X of 1965)---

----S. 1(2)---Payment of social security contribution---Notification for exemption of payment of contribution---Withdrawal of---Requirements---Special notification for exemption from payment of social security contribution was issued in favour of the organisation---Department subsequently issued letter to the organisation to pay social security contribution---Constitutional petition filed by the organisation was dismissed by Single Judge of High Court on the ground that it had alternate efficacious remedy---Contention of organisation was that general notification could not take away the right accrued through special notification issued by the competent authority---Validity---No alternate efficacious remedy under the law was available to the organization (petitioners)---Rights had been accrued in favour of petitioner due to notification passed in its favour which could not be set aside by any subsequent notification---Department without giving any notice or right of hearing proceeded against the petitioner---Impugned notification issued subsequently was general in nature---Rights accrued in favour of petitioner could not be withdrawn without affording an opportunity of hearing and disclosing reasons---Order passed by the Single Judge of High Court was set aside by the Division Bench---Department was directed to follow due process before raising any demand, if in their opinion petitioner did fall within their purview---Intra court appeal was allowed in circumstances.
State Life Insurance Corporation of Pakistan through Chairman and others v. Mst. Sardar Begum and others 2017 SCMR 999; Raja Industries (Pvt.) Ltd. through General Manager v. Central Board of Revenue, Government of Pakistan, Islamabad through Chairman and 4 others 1996 MLD 980; Neimat Ali Goraya and 7 others v. Jaffar Abbas, Inspector/Sargent Traffic through S.P., Traffic, Lahore and others 1996 SCMR 826 and Messrs Standard Printing Press v. Sindh Employees' Social Security Institution 1988 SCMR 91 ref.
Hafeez Saeed Akhtar for Appellant.
Muhammad Nauman Aslam Raza for Respondents.
Date of hearing: 4th October, 2017.

JUDGMENT

AYESHA A. MALIK, J.---Through this ICA, the Appellant has impugned order dated 23.11.2015 passed by the learned Single Judge in W.P. No.36074/ 2015.

2. The grievance of the Appellant is that the learned Single Judge has dismissed the petition of the Appellant on the ground that alternate, efficacious remedy is available to the Appellant with reference to its grievance against the Provincial Employees Social Security Institution ("PESSI"), hence the petition is not maintainable. The Appellant is a Trust registered under the Voluntary Social Welfare Agencies (Registration and Control) Ordinance, 1961. It runs schools and hospitals for public benefit. On 23.11.2000 a notification was issued in favour of the Appellant under subsection (3) of Section 1 of the West Pakistan Employees Social Security Ordinance, 1965 whereby Chaudhry Rehmat Ali Memorial Model Girls College, Township, Lahore was de-notified from notification of 24.7.1998. The notification of 24.7.1998 notified all those institutions which were required to pay social security contribution under subsection (3) of section 1 of the Provincial Employees Social Security Ordinance, 1965 ("Ordinance"). Learned counsel for the Appellant argued that the Appellant provided an undertaking to the Respondents explaining that it was a charitable trust and that all employees of this trust have been provided medical facilities. Hence it should be exempted from complying with the requirements of the Ordinance, which request was duly acceded to vide notification dated 23.11.2000. Subsequently the Appellant was issued letters dated 25.4.2013 and 14.9.2013 in which demand was raised from the Appellant to pay social security contribution under the Ordinance, in terms of a subsequent notification issued on 18.7.2013. Learned counsel argued that the Appellant was exempted in terms of a special notification issued by the competent authority and a general notification cannot take away the rights accrued in favour of the Appellant without following due process. Learned counsel further argued that no remedy is available to the Appellant under the Ordinance for redressal of its grievance as the Appellant seeks a decision on the applicability of the notification issued on 23.11.2000 as opposed to the notification issued on 18.7.2013. In this regard, Social Security Institution cannot look into the vires of a notification nor can it decide which of its notification is applicable. Learned counsel has relied upon section 1(3) of the Ordinance which provides that the Ordinance shall apply to such classes of establishment as may be specified by notification and is not applicable to such classes of establishment as may be specified by notification. Since a notification was issued in favour of the Appellant, hence a general notification issued subsequent thereof cannot repeal or replace a special notification. Reliance has been placed on State Life Insurance Corporation of Pakistan through Chairman and others v. Mst. Sardar Begum and others (2017 SCMR 999); Raja Industries (Pvt.) Ltd. through General Manager v. Central Board of Revenue, Government of Pakistan, Islamabad through Chairman and 4 others (1996 MLD 980), Neimat Ali Goraya and 7 others v. Jaffar Abbas, Inspector/Sargent Traffic through S.P., Traffic, Lahore and others (1996 SCMR 826) and Messrs Standard Printing Press v. Sindh Employees' Social Security Institution (1988 SCMR 91).

3. On behalf of the Respondents, it is argued that the Appellant is liable to pay social security contribution in terms of the requirements of law and the notification of 18.7.2013. It is also argued that the notification of 23.11.2000 is only for the benefit of Chaudhry Rehmat Ali Memorial Model Girls College, Township, Lahore

and not for the trust in general. Learned counsel further argued that the Appellant falls within the ambit of the Ordinance, hence the notification of 18.7.2013 is mandatory and requires compliance.

4. We have heard the learned counsel for the parties and are in agreement with the learned counsel for the Appellant that alternate, efficacious remedy under the law was not available to him. We further agreed with the grievance of the Appellant that vide notification dated 23.11.2000 rights have accrued in its favour, which it has been enjoying since the year 2000. The Respondents admit that this notification has not been set aside by any subsequent notification particularly with reference to the Appellant. Therefore, we are of the opinion that since the notification holds the field, at least the Respondents were obligated to inform the Appellant through a notice that the notification of 18.7.2013 is applicable and that the trust now fell within the purview of the Ordinance. Without giving any notice or a right of hearing the Respondents proceeded on the assumption that the notification of 18.7.2013 is applicable on the Appellant. In this regard we noted that notification dated 23.11.2010 is a special notification issued with specific reference to the Appellant. Notification dated 18.7.2013 is general in nature issued subsequently which defines the jurisdiction of PESSI and the benefits available for employees working within the province of Punjab in terms of the Ordinance. As per this notification employees in the Punjab are entitled to the benefits under the Ordinance. Hence as per the Respondents, the Appellant also falls within its jurisdiction. The Appellant was exempted from social security contribution since 2000 in terms of the notification of 23.11.2010. At that time the Appellant raised a request before PESSI which was permissible under the law. The request was heard and on the basis of an undertaking by the Appellant notification dated 23.11.2010 was issued. The issuance of the notification created rights in favour of the Appellant which cannot be withdrawn without giving the Appellant an opportunity of hearing without disclosing the reasons for withdrawal of a right granted and without giving the Appellant an opportunity to file a representation to explain why it is entitled to continue under the notification of 23.11.2000. Furthermore we also note that admittedly the Appellant was given this benefit and not just the girls school, hence the right accrued under the notification of 23.11.2010 cannot be taken away through a general notification issued on 18.7.2013.

5. Under the circumstances, the instant appeal is accepted and the impugned order dated 23.11.2015 passed by the learned Single Judge in W.P. No. 36074/2015 is set aside. The Respondents are directed to follow due process if in their opinion the Appellant falls within their purview before raising any demand.

ZC/R-9/L Appeal allowed.

PLJ 2019 Lahore 71 (DB)
[Multan Bench Multan]
***Present*: MRS. AYESHA A. MALIK AND MUZAMIL AKHTAR SHABBIR, JJ.**
IMRAN MAQBOOL, PRESIDENT, MCB BANK LIMITED--Petitioner
versus
FEDERATION OF PAKISTAN through Secretary Law, Justice and Human Rights Division, Islamabad etc.--Respondents
W.P. No. 71556 of 2017, heard on 6.9.2018.

Constitution of Pakistan, 1973--
----Art. 199--Constitutional petition--Protection Against Harassment of Women at Workplace Act, (IV of 2010), S. 2(h)--Harassment of women at work place--Jurisdiction of Federal and Provincial ombudsman--Challenge to--Question of--Whether provincial ombudsman has concurrent jurisdiction with Federal ombudsman on account of woman harassment at work place--Determination--Provincial Ombudsman was competent to hear complaint--Opinion of Court is that Federal Ombudsman exercises jurisdiction only to extent of federal capital area and jurisdiction in all other situations vests with Provincial Ombudsman--Court concluded that federal law lost its federal character and stands converted into a provincial law after 18th Amendment--Jurisdiction of Federal Ombudsman is not limited to federal capital area, rather Federal Ombudsman has jurisdiction in relation to all employers, organizations, institutions and workplaces which have a federal character or are established under a federal law or are directly consequent to an international obligation under an international treaty or convention--Federal Ombudsman jurisdiction cannot be limited to federal capital area and can be exercised all over Pakistan over a federal employer, institution, organization or workplace--If employer or organization and its workplace falls strictly within territorial boundaries of Provincial Ombudsman, then jurisdiction vests with Provincial Ombudsman and where employer or organization transcends provincial boundaries such as in this case then jurisdiction vests with Federal Ombudsman--To clarify we add that for reasons stated herein we disagree with findings in Salim Javed Case that Federal Ombudsman jurisdiction is limited to federal capital area as Federal Ombudsman is competent to hear complaints related to trans-provincial organizations, institutions, employers and workplace--Federal Ombudsman (Justice (R) Yasmin Abbasey) showed no regard whatsoever to orders of this Court--Under circumstances all orders passed including final order are illegal and void, hence set aside. [Pp. 76, 81 & 82] A, E, F & G

Universal Declaration of Human Rights--
----Article 23 of UDHR declares right to work and right to favourable conditions of work as a human right. [P. 80] B

Elimination of all forum of Discrimination Against Women--
----Article 11 of CEDAW specifically requires States to ensure women have equal work opportunity and safe working conditions. [P. 80] C
Pakistan Penal Code, 1860 (XLV of 1860)--

----S. 509--Harassment Law aim to regulate behaviour and attitude--Criminal punishment as well as civil liability--Criminalizes behaviour conduced with intention of unreasonably interfering with an individual's work performance or behaviour which creates an intimidating hostile or offensive work environment--Therefore subject of harassment at workplace being a crime under PPC means that Parliament and Provinces both are competent to make laws with respect to crime, procedure or evidence--Hence we find that subject of protection of women from harassment does not fall under '*population, planning and welfare'* of CLL, rather it falls under federal domain consequent to its international obligations and to extent that subject relates to criminal law--Petition was allowed.
[P. 80] D

Mr. Farooq Zaman Qureshi and Mr. Riaz Hussain Haleem, Advocates (in WP No. 71556/2017).
Mr. Parvez I. Mir, Advocate (in WP Nos.54146 and 60723 of 2017).
Mr. Nasar Ahmad, DAG along with *Naveed Ahmad Goraya,* Senior Law Officer in office of Respondent No. 1.
Mrs. Samia Khalid, Addl. AG and *Mr. Anwaar Hussain,* Addl. AG for Respondents.
Amna Tahir, Respondent No. 5 in person.
Date of hearing: 6.9.2018

JUDGMENT

Mrs. Ayesha A. Malik J.--This Judgment decides upon the issues raised in the instant Petition along with connected WP Nos. 54146 and 60723 of 2017 whereby the Petitioners have challenged the jurisdiction of the Federal Ombudsman for Protection Against Harassment of Woman at the Work Place **("Federal Ombudsman")** while hearing a complaint filed by Respondent No. 5, Amna Tahir under the Protection Against Harassment of Women at the Workplace Act, 2010 **("2010 Act").**
Facts and arguments

2. The common facts are that Respondent No. 5 filed a complaint, before the Federal Ombudsman, against Saqib Rasheed, Petitioner in WP Nos. 54146 and 60723 of 2017 and Imran Maqbool, Petitioner in WP No. 71556/2017 along with five other officers of MCB Bank Limited on 23.6.2017 under the 2010 Act. The Petitioners along with others filed their replies before the Federal Ombudsman and raised an objection with respect to the jurisdiction of the Federal Ombudsman on two grounds; firstly, that the matter stood decided by the case cited at PLD 2016 Lahore 433 titled *"Salim Javed and others v. Federal Ombudsman and others" ("Salim Javed Case")* in which it was stated that jurisdiction in such cases lies with the Provincial Ombudsman and secondly that Respondent No. 5 had also invoked the jurisdiction of the Provincial Ombudsman and therefore, could not seek remedy before both the Ombudsman at the same time.

3. Learned counsel for the Petitioners argued that Respondent No. 5 has never filed any complaint against the Petitioners before the Bank and that the entire proceeding before the Federal Ombudsman was filed with a view to damage their reputation and to blackmail and harass them. Learned counsel also argued that the Federal Ombudsman does not have jurisdiction in the matter and despite various different restraining orders from this Court she proceeded with the matter having no regard whatsoever of the orders of this Court. In another WP No. 54146/2017 filed by Saqib Rasheed, an interim order was passed on 24.07.2017 in which the Federal Ombudsman was restrained from proceeding with the matter yet despite issuance of the interim order, the orders of 4.8.2017 and 24.8.2017 were passed by the Federal Ombudsman. Learned counsel further argued that in the instant petition, repeated interim orders were passed by this Court, however, the Federal Ombudsman despite the warnings continued to proceed with the matter and ultimately passed judgment on 18.12.2017. Learned counsel argued that this is in total defiance of the orders of this Court which attitude was also displayed earlier by the same Federal Ombudsman in the Salim Javed Case. While relying on the said judgment, learned counsel argued that the question of jurisdiction has been decided, therefore the Federal Ombudsman could not proceed with the matter.

4. Respondent No. 5 in person argued her case. She stated that she filed a complaint before the Bank, however, they did not respond to her complaint. She then filed a complaint before the Provincial Ombudsman, however, subsequently withdrew it on 22.6.2017 believing it to be a matter for the Federal Ombudsman. She then filed a complaint before the Federal Ombudsman, who proceeded with the matter and at that time she had no knowledge of the Salim Javed Case. She argued that the Bank is a trans-provincial entity and as per the law is governed by Federal law, hence the Federal Ombudsman has jurisdiction in the matter. She also stated that this case is distinguishable from the Salim Javed Case, which was a case of an advocate whose offices are in Lahore, hence the Court concluded that in such cases jurisdiction vests with the Provincial Ombudsman.

5. On behalf of the Federal Government Mr. Nasar Ahmad, DAG argued that the Federal Ombudsman has jurisdiction to entertain all complaints which have a federal character including complaints of trans-provincial organizations. He explained that the Provincial Ombudsman cannot exercise jurisdiction over a federal organization or its officers as they transcend the provincial boundaries and can be transferred out of the Province at any time rendering the claim before the Provincial Ombudsman as redundant. Further explained that the Salim Javed Case did not take these factors into consideration as the issue was with a local advocate. He further argued that the Federal Legislative List, Item No. 13 provides for Federal Ombudsman, meaning thereby that if the subject matter in which a Federal Ombudsman is to be created falls within the domain of the Federal Government than the Federal Government is competent to make a Federal Ombudsman. In this case, the subject matter pertains to harassment at the work place for which the Federal Government has ratified several international conventions and treaties. Furthermore in terms of the dicta laid down by the august Supreme Court of

Pakistan in *Messrs Sui Southern Gas Company Ltd. and others v. Federation of Pakistan and others* (2018 SCMR 802) *("NIRC case"),* jurisdiction lies with the Federal Ombudsman.

6. The stance of the Province/Respondent No. 3 as submitted by Mrs. Samia Khalid, Additional Advocate General and Mr. Anwaar Hussain, Additional Advocate General is that jurisdiction vests with the Provincial as well as the Federal Ombudsman. It is argued that the complainant has a choice of forum based on convenience as well as cause of action. In the event that the organization is a federal organization, the Provincial Ombudsman can still hear the matter and present its recommendations to the federal government. Reliance is placed on Article 141 of the Constitution of Islamic Republic of Pakistan, 1973 **("Constitution")** to urge the point that the Parliament can make laws for the whole or any part of Pakistan and that the Provincial Government shall ensure its compliance. Further argued that even after the Province adopted the 2010 Act in the year 2012, the 2010 Act still holds the field, meaning that jurisdiction continues to vest with both Ombudsman. It is also argued that both the Federal and Provincial laws are beneficial legislation, hence the doctrine of convenience is applicable and if considered necessary the place of occurrence can be the place where the complaint is filed.

The law and its purpose

7. The 2010 Act was promulgated as Act No. IV of 2010 and notified in the official gazette on 11.3.2010. In terms of its preamble it is an Act to make provisions for the protection against harassment of women at the workplace. Harassment is defined in Section 2(h) of the 2010 Act describing certain kinds of behaviour and attitude to be harassment because it causes interference with work performance or because it creates an intimidating, hostile or offensive work environment. The law is premised on the fundamental right of equal opportunity, for both men and women, to earn their livelihood and in furtherance of this right an obligation has been created on the employer at the workplace to create a safe working environment where both men and women can contribute and work efficiently and safely without discrimination and harassment.

8. The 2010 Act was passed in pursuance of Pakistan"s obligation under the Universal Declaration of Human Rights **("UDHR"),** the Convention on the Elimination of all forms of Discrimination Against Women **("CEDAW"),** the International Labour Organization Convention 100 **("ILO 100")** which is the Convention for Equal Remuneration for Men and Women for Work and Convention 111 **("ILO 111")**. Pakistan ratified all the above mentioned treaties and conventions which provide equal opportunity at the workplace and necessitate a safe work environment. The 2010 Act extends to the whole of Pakistan. It defines the term 'Employer' to mean an organization, a person or body of persons whether incorporated or not and includes an authority, office bearer or proprietor run by the Federal Government or Provincial Government. The word 'Organization' is defined to mean Federal or Provincial Government Ministry, Division or a Department, a corporation or any autonomous or semi-autonomous body and medical institutes

and faculties established or controlled by the Federal or Provincial Government or the District Government or privately managed and includes private sector organization and institutions. The term 'workplace' defines the place of work or the premises where the activity of the organization or the employer are carried out and includes work at the premises or official activity outside the office. Hence the 2010 Act is applicable over the entire gambit of workplace, employer and organization including all employees, organization and workplace in the public and private sector. In terms of Section 7 of the 2010 Act, the respective Federal and Provincial Governments are to appoint an Ombudsperson at the Federal and Provincial level. On 5.1.2013 the Government of Punjab adopted this law which is called the Punjab Protection Against Harassment of Woman at the Work Place (Amendment) Act, 2012 (III of 2013). Effectively the Provincial Assembly adopted the federal law with some changes so as to make it functional at the provincial level. Hence there is a federal law and a provincial law on the subject of protection against harassment of women at the workplace.

9. The basic issue in these petitions is with respect to the jurisdiction of the Federal Ombudsman and the Provincial Ombudsman and in particular whether Respondent No. 5, Amna Tahir was to file her complaint before the Provincial Ombudsman or the Federal Ombudsman. In terms of the Salim Javed Case the Federal Ombudsman does not have jurisdiction to hear the complaint of Respondent No. 5 as the matter falls within the ambit of the Provincial Ombudsman. The facts of the Salim Javed Case are that a female advocate filed a complaint against advocate Salim Javed before the Federal Ombudsman. The respondent in that case objected to the assumption of jurisdiction by the Federal Ombudsman as it was his case that the cause of action arose in Lahore, hence the Provincial Ombudsman was competent to hear the complaint. The opinion of the Court is that the Federal Ombudsman exercises jurisdiction only to the extent of the federal capital area and jurisdiction in all other situations vests with the Provincial Ombudsman. The Court concluded that the federal law lost its federal character and stands converted into a provincial law after the 18th Amendment. For ease of reference relevant paragraphs are reproduced hereunder:

8. I have considered the arguments addressed at the bar and have examined the law. The fundamental constitutional cum legal question that requires determination by this Court is the scope of Article 270AA(6) of the Constitution and the effect of the omission of the Concurrent List on the nature and character of the existing federal law. In the present facts, the Court has to determine the extent of jurisdiction enjoyed by the Federal Ombudsman under the Federal Act. In other words, whether Federal Ombudsman, under the Protection Against Harassment of Women at the Workplace Act, 2010 can assume jurisdiction over a complaint in which the cause of action arose in Punjab or whether, in such like matters, the jurisdiction vests with the Provincial Ombudsperson under the Punjab Protection Against Harassment of Women at the Workplace Act, 2012 ("Provincial Act") post 18th constitutional amendment.

9. The Federal Act was promulgated on 11.3.2010 with jurisdiction extending to the whole of Pakistan under Section 1(2) of the Federal Act. Constitution (Eighteenth Amendment) Act, 2010 was introduced on 20.4.2010. The said amendment omitted the Concurrent List from the Fourth Schedule to the Constitution, thereby enlarging and expanding the legislative domain of the provincial legislature and more importantly reinvigorating the constitutional theme of federalism and provincial autonomy. The preamble to the Amendment Act echoes the promise to establish "a Federal ... State wherein ... the Provinces have equitable share in the Federation." Admittedly, the Federal Act drew its legislative competence form entry 25 i.e. social welfare, of the erstwhile Concurrent List. Post 18th Amendment, this area stands devolved onto the Provinces. Under Article 270AA(6) of the Constitution, the Federal Act remains in force (as a Provincial Act, as discussed later) irrespective of the omission of the Concurrent List until such time that the Federal Act is altered, repealed or amended by the Competent Authority (legislature). Any such alteration or amendment in the law by the competent legislature does not affect its continuity and the law continues to be in force, albeit, as a provincial law, not because of the alteration or amendment but because of the constitutional declaration under the 18th amendment. It is only on repeal that the law comes to an end.

10. The Punjab Protection Against Harassment of Women at the Workplace (Amendment) Act, 2012 (Act III 2013) has amended and altered the Federal Act (interestingly retaining the same title). It is actually the constitutional declaration of devolution, the underlying constitutional theme of federalism and provincial autonomy under the 18th Amendment which has metamorphosed the Federal Act into a Provincial Act. Alteration and amendment by the competent provincial legislature is a legislative exercise to align the law according to the wishes of the provincial legislature and has no bearing on the character of the law which already stands transformed into provincial law by the constitutional declaration on the promulgation of the Amendment Act.

11. Considering it from another angle, if the federal law under Article 270AA(6) can only be subjected to alteration, amendment and repeal by the provincial legislature, it means that the Federal law has lost its federal character and stands transformed into a Provincial law. What if the appropriate legislature does not carry out any amendment or alteration in the federal law, it still automatically stands converted into provincial law and remains in force as such. This is also because with the omission of the Concurrent List, the federal legislature loses its legislative fiat and command over the areas in the Concurrent List to the provincial legislature and as a consequence the federal law is deprived of its federal character. It is important to underline, that with the legislative shift from federal to provincial, the executive authority, under Article 97 also gets realigned and changes hands from federal executive to the provincial executive.

12. The Amendment Act, as well as, the Punjab Protection Against Harassment or Women at the Workplace (Amendment) Act, 2012 constitutionally trims the

Federal Act and restricts its jurisdiction to territories of Pakistan that fall outside the Provinces in terms of Article 1(2) of the Constitution. The continuance of the Federal Act in federal areas finds support under Article 142(d) of the Constitution that provides that the Federal Legislature has the exclusive power to make laws with respect to all matters pertaining to such areas in the Federation as are not included in any Province. The territorial jurisdiction of the Federal Act under Section 1(2) extends to the whole of Pakistan. This geographical extent has to be pruned according to the constitutional mandate under the 18th amendment. The best interpretational tool to apply is that of reading down. Reliance is placed on *Messrs Chenone Stores Ltd. through Executive Director (Finance Accounts) Federal Board of Revenue through Chairman and 2 others* (2012 PTD 1815) and *Nadeem Asghar Nadeem and others v. Province of the Punjab and others* (2015 CLC 1509). Therefore, in order to align the Federal Act with the constitutional scheme, section 1(2) of the Federal Act is read down thereby limiting the extent of the Federal Act to areas which do not form part of any province. Reliance is also placed on *Syed Imran Ali Shah v. Government of Pakistan and 2 others* (2013 PLC 143).

13. The complaint filed by Respondent No. 2 on 14.9.2015 is based on cause of action arising in Lahore, the alleged accused also reside in Lahore, therefore, the jurisdiction to entertain and hear the complaint of Respondent No. 2 is with the Provincial Ombudsperson under the Provincial Act and the Federal Ombudsman has no jurisdiction to entertain the said complaint. The impugned judgment dated 4.1.2016 passed by the Federal Ombudsman along with all the prior orders assuming jurisdiction in the matter are hereby declared to be unconstitutional, illegal and without lawful authority and therefore set aside. The complaint shall be deemed to have been returned to Respondent No. 2, who may file the same before the Provincial Ombudsperson, if so advised. Considering that the Federal Ombudsman has no jurisdiction to entertain the complaint, other grounds agitated by the petitioners need not be gone into.

10. The findings of the Court are based on the understanding that the subject of harassment against women has devolved onto the Provincial Government post 18th Amendment. The Court considered the subject matter of harassment against women to be covered under Item No. 25 of the Concurrent Legislative List ("**CLL**") being *Population, Planning and Social Welfare.* As the CLL was abolished by way of the 18th Amendment on 20.4.2010 all areas provided for under the CLL devolved on to the Provinces. Consequently the Court concluded that jurisdiction vests with the Provincial Ombudsman and only to the extent of the federal capital territory, jurisdiction vests with the Federal Ombudsman. We have considered the reasoning advanced in the *Salim Javed Case*, however we are not persuaded by the same. Harassment, whether verbal or physical is a behavioral issue that adversely affects the work environment. It manifests itself in many different forms of unethical and unwelcomed behaviour which renders the workplace hostile or offensive. Hence it violates the right to a safe and healthy work environment. The right to work is a multifaceted right which is recognized under different international treaties and conventions for creating a safe work environment especially for women. Article 23

of UDHR declares the right to work and the right to favourable conditions of work as a human right. Article 11 of CEDAW specifically requires States to ensure women have equal work opportunity and safe working conditions. As Pakistan has ratified these treaties and conventions it is obligated to protect the right to work and to ensure a favourable work environment. Since the 2010 Act was promulgated pursuant to Pakistan obligations under the international treaties and conventions, the subject matter of protection of the workplace for women falls under Item 3 read with Item 32 of the Federal Legislative List of the Constitution which includes implementing international treaties and conventions. It is also noted that harassment laws aim to regulate behaviour and attitudes which can be subjected to criminal punishment as well as civil liability. Section 509 of the Pakistan Penal Code, 1860 ("**PPC**") criminalizes behaviour conduced with the intention of unreasonably interfering with an individual's work performance or behaviour which creates an intimidating hostile or offensive work environment. Therefore the subject of harassment at the workplace being a crime under the PPC means that Parliament and the Provinces both are competent to make laws with respect to the crime, procedure or evidence. Hence we find that the subject of protection of women from harassment does not fall under '*population, planning and welfare'* of the CLL, rather it falls under the federal domain consequent to its international obligations and to the extent that the subject relates to criminal law.

11. We also find that the Salim Javed Case is not applicable to this case because the issue of trans-provincial organization was not taken into consideration by the Court in that case. This issue was considered by the august Supreme Court of Pakistan in the NIRC case at great length. The term "trans-provincial organization" means an organization which operates at a trans-provincial level, that is they operate in more than one province. In terms of the NIRC case the federal legislature has extra territorial authority to legislate on matters which pertain to trans-provincial organizations. The Court relied on Item No. 13 in Part II of the Federal Legislative List of the Constitution which provides for inter-provincial matters and coordination, meaning that the Federation has to make laws relating to inter-provincial matters. Therefore in the NIRC case, the august Supreme Court of Pakistan concluded that the federal legislature has extra territorial authority to legislate, however the same authority does not lie with the provincial legislature. The august Supreme Court of Pakistan also held that in order to preserve and regulate a right which transcends provincial boundaries, only the Federation is competent to legislate on such matters and Item Nos. 58 and 59 of the Federal Legislative List provide the relevant entries to bring it in the federal domain. The Provincial legislature does not have extra territorial legislative competence, therefore it cannot legislate with regard to rights which transcend its provincial boundaries. In the NIRC judgment, the august Supreme Court of Pakistan held that the federal legislature is competent to legislate on all matters in order to discharge its obligations created under international treaties and conventions. In the case, the matter involved was with respect to trade unions and labour disputes, hence it was found that it was a federal obligation created under the International Labour Organization Convention, hence covered under Item No. 3 and 32 of the Federal

Legislative List. In the case of a trans-provincial establishment, the august Supreme Court of Pakistan held that the Federation is competent to interfere in such matters because trans-provincial establishments transcend provincial boundaries. Therefore we are of the opinion that the wisdom enumerated in the NIRC case is applicable to the instant case. Where the organization is clearly a trans-provincial organization, as in this case as it is a bank with branches all over Pakistan, the Federal Ombudsman is competent to look into the complaint of Respondent No. 5. The jurisdiction of the Federal Ombudsman is not limited to the federal capital area, rather the Federal Ombudsman has jurisdiction in relation to all employers, organizations, institutions and workplaces which have a federal character or are established under a federal law or are directly consequent to an international obligation under an international treaty or convention. The Federal Ombudsman jurisdiction cannot be limited to the federal capital area and can be exercised all over Pakistan over a federal employer, institution, organization or workplace.

12. The question which needs consideration is whether the Provincial Ombudsman has concurrent jurisdiction with the Federal Ombudsman on account of the fact that the harassment committed or complainant reside in the province who sought to complain before the Provincial Ombudsman. Although Mrs. Samia Khalid, Additional Advocate General and Mr. Anwaar Hussain, Additional Advocate General argued that being beneficially both the Provincial and Federal Ombudsman have jurisdiction, however, we are of the opinion that the intent of the law is to create a forum where harassment can be reported, inquired and penalized. If both the Provincial and Federal Ombudsman are given jurisdiction then there may be instances where the Provincial Ombudsman will have to deal with a complaint against a trans-provincial organization, or where the employer or the organization is federal in character making it difficult for the Provincial Ombudsman to proceed with the complaint or to impose penalty on the employer or organization since it falls within the federal domain. Under the circumstances, we hold that if the employer or organization and its workplace falls strictly within the territorial boundaries of the Provincial Ombudsman, then jurisdiction vests with the Provincial Ombudsman and where the employer or organization transcends provincial boundaries such as in this case then jurisdiction vests with the Federal Ombudsman. To clarify we add that for the reasons stated herein we disagree with the findings in the Salim Javed Case that the Federal Ombudsman jurisdiction is limited to the federal capital area as the Federal Ombudsman is competent to hear complaints related to trans-provincial organizations, institutions, employers and workplace.

13. So far as the proceedings conducted by the Federal Ombudsman, we find that they were done in utter disregard of the orders of this Court. On 24.7.2017 an order was passed in WP No. 54146/17 directing that the proceedings before the Federal Ombudsman shall remain stayed. She ignored the order and proceeded with the matter. In another order dated 9.10.2017 passed in WP No. 71556/17 she was again restrained, however she proceeded with the case. Thereafter a series of orders were issued by the Federal Ombudsman including the final order on 18.12.2017 without any consideration of the orders of this Court. It was only when the Court restrained

Respondent No. 5 from proceeding with the execution of the final order that the proceedings were stopped. We note that the Salim Javed Case categorically addressed the issue with reference to the Federal Ombudsman obligation and to obey the orders of the High Court. However, displaying the same attitude as was discussed in that case, the Federal Ombudsman (Justice (R) Yasmin Abbasey) showed no regard whatsoever to the orders of this Court. Under the circumstances all orders passed after 4.8.2017 including the final order dated 18.12.2017 are illegal and void, hence set aside. The complaint of Amna Tahir shall be treated as pending before the Federal Ombudsman who shall decide the same in accordance with law, expeditiously, after hearing all necessary parties.

14. In view of the aforesaid, WP Nos.71556/2017, 54146 and 60723 of 2017 are allowed to the extent that the impugned orders and the final order dated 18.12.2017 passed by the Federal Ombudsman are set aside. However, the parties are directed to appear before the Federal Ombudsman on 4.10.2018 so as to proceed with the compliant on its merit. The Registrar of this Court is directed to inform the Registrar of the office of the Federal Ombudsman of the orders of this Court.

(M.M.R.) Petition allowed

PLJ 2019 Lahore (Note) 29
***Present*: MRS. AYESHA A. MALIK, J.**
TAHIR KHAN--Petitioner
versus
SECRETARY, PRIMARY AND SECONDARY EDUCATION, GOVERNMENT OF PUNJAB, LAHORE and 4 others--Respondents

W.P. No. 13278 of 2016, decided on 18.1.2018.

Punjab Free and Compulsory Education Act, 2014--

----S. 15--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Appearance in class 9th Examination--Requirement of B-form--Public interest matter--Question of whether requirement of submission of child registration certificate (CRC) also known as a "B-form" for appearance in nine class exam is unconstitutional--Violation of Act--Challenge to--Requirement of a CRC does not violate Section 15 of Act as said section itself provides that it may be a birth certificate or any other document, as may be prescribed--Furthermore explanation given by B.I.S.E. for requiring CRC to ensure transparency and exactness with respect to proof of age is also reasonable--Therefore, on this account requirement of CRC/B-form is not unconstitutional--Issuance of a CRC also means that information contained therein is valid and correct--Under circumstances, it is a valid document to be required for registration for class nine board exam--Application has to be filled, required documents submitted and CRC is issued within five days' time--Ordinary registration fee is Rs.50/- and urgent fee is Rs.500/- which neither seems exorbitant nor does it suggest unjust enrichment--Petition was dismissed.
[Para 7 & 8] A, B & C

Mr. Sheraz Zaka, Advocate for Petitioner.
Kh. Salman Mehmood, AAG for Respondents.
Mr. Mehboob Azhar Sheikh, Advocate for Respondent No. 4.
Mr. Jamil Khan, Legal Advisor NADRA for Respondent No. 3.
Date of hearing: 18.1.2018.

JUDGMENT

Through this petition, the Petitioner seeks a declaration that the requirement of producing B-form issued by National Database and Registration Authority **("NADRA")** for the purposes of appearance in the 9th class examination carried out by Respondent No. 4, Board of Intermediate and Secondary Education, Lahore **("BISE")** be declared illegal and unconstitutional.

2. The basic facts of the case are that the Petitioner is a student of class nine and has challenged the requirement of submission of B-form for the purposes of appearance in the class nine board exam, as he along with other students are facing difficulties in obtaining the B-form. The B-form is required as proof of age for registration with Respondent No. 4 who carries out the board exam. During the

pendency of this writ petition the Petitioner was registered with Respondent No. 4 and has taken the ninth class exam. However, the learned counsel for the petitioner stated that notwithstanding the same since the matter is of public interest the Petitioner wants to pursue the matter.

3. Counsel for the Petitioner argued that the Petitioner is entitled to free education under the Punjab Free and Compulsory Education Act, 2014 **("Act")**. That Section 15 of the Act requires all applicants to produce their birth certificates for the purposes of admission to a school. That as per Section 15 only the birth certificate is required and Respondent No. 4 cannot require the B-form, which requirement is extraneous to the Act. Learned counsel further argued that the requirement of B-form is an unreasonable requirement and imposes a financial burden on the students. The fee charged by NADRA for issuing B-form is Rs.500/- which is exorbitant and causes unjust enrichment.

4. On behalf of Respondent No. 4, BISE it is argued that the requirement of B-form by the BISE is getting for proof of age of the student. Uptill 2017 it was never mandatory as it was agreed by the BISE that students can be given admission without the B-form due to the difficulties faced by them to obtain the B-form from NADRA. In this regard he has placed reliance on the decisions of the Punjab Board Committee of Chairman dated 12.02.2012, 15.02.2013, 13.06.2014, 07.10.2015 and for the year 2016 held on the issue of B-form. He explained that initially the requirement was relaxed to facilitate and encourage submission of B-form and it is only for the year 2017 that it became mandatory to encourage transparency in proof of age. So far as the Petitioner is concerned, he has been given admission and has taken his examination before the 2017 decision, therefore, he has no genuine grievance to be adjudicated upon by this Court.

5. Counsel for NADRA stated that they are the issuing authority for the B-from. Learned counsel argued that B-form is mandatory under the National Database and Registration Authority Ordinance, 2000 **("Ordinance")** and ensures that all candidates produce a reliable document for proof of their age. He further stated that the regular fee for issuance of B form is Rs.50/- and urgent fee is Rs.500/- which is quite reasonable. He further stated that a regular form is issued within two weeks and urgent within five days and no complaints have ever been received.

6. Heard and record perused.

7. The basic issue in the instant case is whether the requirement of submission of a Child Registration Certificate **("CRC")** also known as a "B-form" for appearance in the class nine BISE exam is unconstitutional. The Petitioner has relied upon Section 15 of the Act. The mandate of the said Act is *to provide for free and compulsory education to all children of the age of five to sixteen years*. Section 15 of the Act provides for the documents required as proof of age at the time of admission. In terms of the said section for the purposes of admission in a school, the age of a child

is determined on the basis of a birth certificate or any other document as may be prescribed but a child shall not be denied admission in a school for lack of proof of age. In the event that a child is admitted without producing the birth certificate, the school authority will be responsible for obtaining the particulars of the birth registration of a child. In the first instance it is noted that as per Section 15 of the Act in order to prove age the competent authority may ask for a birth certificate or any other document as may be prescribed. Furthermore the Act itself provides that admission will not be denied for lack of proof and that the school may obtain the required particulars. The Petitioner seeks registration for the class nine board exam for which proof of age is required. Respondent No. 4 being the competent authority requires that a student provide his or her CRC as proof of his or her age. Respondent No. 4 has justified its demand on the ground that requirement of CRC means that there is a document which is unanimously relied upon by all the BISE in the Punjab for the purposes of determining the correct age of the candidates. Also that it is very difficult to verify birth certificate issued by private clinics and hospitals. The requirement of a CRC does not violate Section 15 of the Act as the said Section itself provides that it may be a birth certificate or any other document, as may be prescribed. Furthermore the explanation given by Respondent No. 4 for requiring the CRC to ensure transparency and exactness with respect to proof of age is also reasonable. Therefore, on this account requirement of CRC/B-form is not unconstitutional.

8. It is also noted that in the Ordinance every citizen must be registered with NADRA such that if he or she has attained the age of eighteen years they shall be issued a Computerized National Identity Card **("CNIC")**. In the event any citizen who has not attained the age of eighteen years he or she will be issued a Registration Certificate as may be prescribed by the competent authority. In this case the prescribed certificate is the CRC. NADRA maintains the citizens database and CRC is the relevant document under which children under the age of 18 are being registered. The issuance of a CRC also means that the information contained therein is valid and correct. Under the circumstances, it is a valid document to be required for registration for the class nine board exam. In terms what has been stated by learned counsel for NADRA the procedure for applying for the CRC certificate is simple and not costly. The application has to be filled, required documents submitted and CRC is issued within five days' time. The ordinary registration fee is Rs.50/- and urgent fee is Rs.500/- which neither seems exorbitant nor does it suggest unjust enrichment.

9. Under the circumstances, no illegality has been made out. Resultantly, this petition is failed and stands **dismissed**.

(Y.A.) Petition dismissed

2019 P L C (C.S.) 220
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
GOVERNMENT OF PUNJAB through Secretary Planning and Development Department
Versus
ALI AMIR RAZA BUKHARI and others
I.C.A. No.188 of 2013, heard on 15th May, 2018.

Civil service---

----Project transferred from development side to non-development side---Contract and regular employees of the Project---Promotion---Criteria---Department advertised the posts for recruitment through Public Service Commission---Contention of petitioners who were contract employees was that they were entitled for regularization/ promotion against the said posts---Validity---Only 25% of the posts could be filled in through recruitment and remaining 75% posts had to be filled in through promotion---Contract employees were to be considered against 25% of the posts being available for their regularization---Permanent employees had right under the departmental Rules to be considered for promotion against available vacant seats as per the given ratio---Regular posts of the Project were subject to the departmental Rules---Constitutional petition was disposed of accordingly. [p. 223, 224] A, B & C

Kh. Salman Mahmood, Assistant Advocate General for Appellants (in I.C.A. No.188 of 2013 with Muhammad Tahir Ata SO(P&D) and Muhammad Saleem D.S. (Reg.) S&GAD).
Hafiz Tariq Nasim for Appellant (in I.C.A. No.189 of 2013).
Dr. A. Basit and Malik Muhammad Awais Khalid for Respondents/Petitioners (in W.P. No.22283 of 2016).
Date of hearing: 15th May, 2018.

JUDGMENT

AYESHA A. MALIK, J.---This judgment decides upon the issues raised in the instant I.C.A. as well as in I.C.A. No.189/2013 arising out of the judgment dated 19.09.2012 passed in W.P. No.23977/2011 as well as on the issues raised in W.P. No.22283/2016 as they are all interconnected.

2. The Appellant in I.C.A. No.188/2013 is the Government of Punjab whereas the Appellants in I.C.A. No.189/2013 are regular employees of Bureau of Statistics working in BS-17 and BS-18. The Petitioners in W.P. No.22283/2016 are contract employees, who were appointed as Assistant Director in BS-17 and Deputy Director in BS-18 in the Development Scheme titled Restructuring/Revamping and Strengthening of Punjab Bureau of Statistic ("the Project").

3. The dispute before the Court is with regard to the right of regular employment against the post in BS-17 and in BS-18 versus the right to promotion of the regular employees. The Government of Punjab is aggrieved by the impugned judgment dated 19.09.2012, which allowed W.P. No.23977/2011 filed by contract employees working for the Project, who sought regularization against their seats in BS-17 and BS-18, as the Project was transferred from the development side to non-development SNE i.e Schedule of New Expenditure and consequently 126 posts were created w.e.f. 01.07.2011 out of which 30 posts are gazetted. The dispute pertains to the ten gazetted posts in BS-17 and ten seats in BS-18.

4. The Respondents in I.C.A. No.188/2013 and the Petitioners in W.P. No.22283/2016 claim that they were recruited for the Project on a one year contract, which was subject to extension on annual basis. Their contracts were regularly extended uptil 30.12.2011 after which it is their case that since the posts were transferred to the non-development side, meaning thereby that their posts have become permanent, hence their employment is deemed to have become permanent as well. The Respondents and the Petitioners rely upon judgment dated 05.05.2014 passed by the august Supreme Court of Pakistan in C.As. Nos.275 and 276 of 2014 in which it is held that where development project is transferred to the non-development side and it becomes a permanent department of the Government, the employees having been appointed through a regular process are entitled to be considered for permanent employment against their seats. It is the case of these Respondents and the Petitioners that they are entitled to be treated as regular employees against their seats and at best a scrutiny committee can check their credentials for the purposes of permanent employment.

5. The Appellants in I.C.A. No.189/2013 are aggrieved by the impugned judgment as they are regular employees of Bureau of Statistics who are in line for promotion to BS-17 and BS-18. It is their contention that in terms of Punjab Bureau of Statistics Recruitment Rules, 1985 ("Rules"), the seats in the Bureau of Statistics are subject to 75:25 ratio wherein 75% of the seats are to be filled in by promotion from amongst the Assistant Directors in BS-17 and BS-18 and only 25% of the seats are to be filled in by initial recruitment. It is their case that with respect to the seats for BS-17 and BS-18 they are entitled to be promoted against the 75% seats and any vacancy that is to be filled in through initial recruitment is limited to 25% of the seats. Therefore, they claim a right of promotion against the post of Assistant Director BS-17 and Deputy Director BS-18 and if their 20 seats are allocated in favour of the Petitioners of W.P. No.22283/2016 and Respondents in I.C.A. No.188/2013 such that they are regularized against these posts, their right of promotion will be adversely prejudice, which is against the spirit of the law.

6. On behalf of the Government of Punjab, it is argued that on 31.01.2008 the posts of BS-17 and BS-18 were advertised for the Project initially for a period of one year, however, the contracts were extended from time to time uptil the completion of the Project on 30.06.2011. On 28.05.2011 one hundred and twenty-six (126) posts were created as the Project moved from the development side to the non-

development side. Out of these seats, 30 seats are for gazetted officers, out of which the dispute relates to ten seats in BS-18 and BS-17 respectively. It is the case of the Government of Punjab that on the creation of these 126 seats SNE posts are to be filled in accordance with the Rules meaning thereby that they are subject to the 75:25 ratio such that only 25% of the seats are to be filled in by initial recruitment. Hence, the Respondents in I.C.A. No.188/2013 and the Petitioners in W.P. No.22283/2016 can be adjusted against 25% of the seats and no more. They rely on a Summary for the Chief Minister dated 23.06.2011 in which it is stated that the gazetted staff working in the Project on contract basis including Assistant Director BS-17 and Deputy Director BS-18 may be referred to the Punjab Public Service Commission ("PPSC") for determining their suitability for appointment against SNE posts. The proposal in the summary was approved such that the posts in BS-16 and above may be filled as per service Rules and on the recommendations of the PPSC through open competition. Hence as per their contention, the vacant seats are subject to the Rules where the 75:25 ratio is applicable. They also rely on Appointment Policy dated 10.11.2010 for contract employees, who are to be appointed on a regular basis and are to be appointed on the recommendations of the selection committee as per the provision of the service Rules. It is their case that the policy also shows that the Rules are relevant. It is also argued that the impugned judgment did not consider the fact that vacancies in the Bureau of Statistics against the newly created posts in BS-17 and BS-18 are to be filled in accordance with the Rules and that the contract employees can be considered against the permanent post subject to the requirement of the Rules. Therefore, the impugned judgment failed to take into consideration the fact that the contract employees can only be considered against 25% seats for initial recruitment as 75% of the seats must be filled through promotion. Learned Law Officer argued that effectively the impugned judgment requires all the seats to be filled in through initial recruitment which means that the employees of the department, who are waiting for promotion will not be promoted, hence being against the mandate of the Rules. It is their case that the contract employees have to appear before the PPSC as only the seats have been regularized and made permanent and the contract employees at best have a right to be considered against those seats subject to the Rules.

7. Heard and record perused.

8. The basic issue before the Court is with respect to filling up of the permanent seats in BS-17 and BS-18 in Bureau of Statistics. The contention of the Respondents in both the appeals and the Petitioners of W.P. No.22283/2016 is that they are entitled to be considered for the purposes of regularization against the seats, which have been made permanent because they were all Project employees and since the Project is now on the non-development side, they have a right to be considered for permanent employment. In this regard, they have relied upon the judgment dated 05.05.2014 passed by the august Supreme Court of Pakistan in C.As. Nos.275 and 276 of 2014 wherein it has been held that contract employees are entitled to be considered for permanent employment for the non-development department. In that case, the Court held that since the department has become a

permanent department of the Government the contract employees must be considered for regular appointment against the vacant seats. We are of the opinion that there is no cavil to the findings of the judgment of the august Supreme Court of Pakistan and that contract employees may be considered against the available vacant seats in the department, however there will be subject to the Rules. The Rules clearly prescribes a 75:25 ratio in terms of which only 25% of the seats can be filled in through the recruitment process and the remaining 75% of the seats have to be filled in through promotion. Therefore, the contract employees will be considered against 25% of the seats being the available seats for regularization of the contract employees. The Appellants in I.C.A. No.189/2013 are permanent employees of the department, who have been waiting for their promotion and they have a right under the Rules to be considered for promotion against available vacant seats as per the given ratio. Under the circumstances, we find that although the impugned judgment gives the Respondents in both the appeals and the Petitioners of W.P. No.22283/2016 a right to be considered against the vacant seats, it is clarified that the department can only fill up 25% of those seats while the remaining will have to be filled up through promotion as prescribed under the Rules.

9. In this regard, we have also looked at the Appointment Policy dated 10.11.2010 and the summary for the Chief Minister dated 23.06.2011, which is specifically with reference to the approval of the Project under transfer to the non-development side which also proposes that vacancies should be filled in as per Rules. It goes without saying that the Rules prescribe for the manner in which the seats of the department are to be filled up and simply because a Project has been converted and shifted to the non-development side it does not mean that recruitment to the permanent department will not be subject to the Rules. Once the Project becomes permanent and 126 seats were made regular then the regular seats are subject to the Rules of the department. The contract employees have a right to be considered which they will be by the PPSC, however, the seats will be filled as per the Rules which means PPSC will recommend candidates to fill up 25% of the seats. In this regard the judgment dated 05.05.2014 passed by the august Supreme Court of Pakistan in C.As. Nos. 275 and 276 of 2014 simply finds that contract employees have a right to be considered, however it does not provide that the recruitment process shall be contrary to the prescribed Rules.

10. Under the circumstances, I.C.As. Nos. 188 and 189 of 2013 are accepted and W.P. No. 22283 of 2016 is dismissed.

ZC/G-8/L Petition dismissed.

2019 C L D 375
[Lahore]
Before Ayesha A. Malik, Sadaqat Ali Khan and Ali Akbar Qureshi, JJ
Mian AYAZ ANWAR and others---Petitioners
Versus
STATE BANK OF PAKISTAN and others---Respondents
W.P. No. 14172 of 2012, decided on 24th December, 2018.

(a) National Accountability Ordinance (XVIII of 1999)---

----Preamble---Object, scope and purpose---National Accountability Ordinance, 1999, is a special law promulgated to eradicate corruption and corrupt practices and to hold people accused of such practices accountable---Objective of the law is to protect public money and ensure its recovery---Nature of investigation and inquiry under National Accountability Ordinance, 1999, is therefore, a kind of special dealing with offences which are deemed necessary in order to protect public money and ensure that public exchequer is not deprived of amounts due to it---Law also ensures that cases of corruption and corrupt practices are duly investigated in order to hold accountable persons involved in abuse of authority and office.

(b) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----S. 2(g) & Preamble---Object, scope and purpose---Financial Institutions (Recovery of Finances) Ordinance, 2001, is a special law promulgated in year 2001 to provide effective remedy for recovery of finances extended by Banks and for fulfillment of obligation defined in S. 2(e) of Financial Institutions (Recovery of Finances) Ordinance, 2001, in favour of financial institution---Procedure has been prescribed under Financial Institutions (Recovery of Finances) Ordinance, 2001, to be adopted for the purposes of invoking jurisdiction of Banking Court for recovery of amounts due to financial institution or breach of any obligation as defined under Financial Institutions (Recovery of Finances) Ordinance, 2001---Law prescribes for a special procedure to be followed when filing a suit under Financial Institutions (Recovery of Finances) Ordinance, 2001, and also prescribes for certain offences which are triable before Banking Court---Banking Court is a specialized Court where issue of 'default' can be contested which is established for the purposes to pass judgment and decree for recovery of outstanding amounts in cases of defaults.

(c) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----S. 2(g)--- National Accountability Ordinance (XVIII of 1999), S.2(r)---"Wilful default"---Scope---Wilful default is a specific offence triable by Banking Court---Provisions of National Accountability Ordinance, 1999, and Financial Institutions (Recovery of Finances) Ordinance, 2001, both are special laws dealing with offence of "wilful default"---Only difference is that National Accountability Ordinance, 1999, deals with the offence to pay which is due by a financial institution whereas Financial Institutions (Recovery of Finances) Ordinance, 2001, gives the Banking

Court jurisdiction to determine if a customer has committed any default of an obligation with regard to any finance and has added offence of wilful default as stipulated in S. 2(g) of Financial Institutions (Recovery of Finances) Ordinance, 2001.

(d) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----Ss. 2(g)(ii)(iii), 9 & 20--- Offences--- Scope--- Offences in S. 2(g)(ii)(iii) of Financial Institutions (Recovery of Finances) Ordinance, 2001, provide for independent offences which can be tried under S.20 of Financial Institutions (Recovery of Finances) Ordinance, 2001, independent of any determination of default in an obligation to pay---Neither such offences are dependent on civil liability of "default" under S. 9 of Financial Institutions (Recovery of Finances) Ordinance, 2001, as they are offences due to the very act of the customer.

(e) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----Ss. 2(g) & 20(7)---National Accountability Ordinance (XVIII of 1999), Ss. 5(r), 19 & 31D---Constitution of Pakistan, Art. 199---Constitutional petition---"Wilful default", offence of---Jurisdiction to investigate---Scope---Notices of wilful default were issued to all petitioners either under S. 5(r) of National Accountability Ordinance, 1999 or under S. 2(g) of Financial Institutions (Recovery of Finances) Ordinance, 2001--- Petitioners assailed the notices on the ground that National Accountability Bureau did not have jurisdiction in the matter---Validity---Banking Court was a special forum to try offences under Financial Institutions (Recovery of Finances) Ordinance, 2001, and was the proper forum to try offences of wilful default---In such regard in terms of provisions of S. 20(7) of Financial Institutions (Recovery of Finances) Ordinance 2001, once civil liability of default was established the offence of wilfulness could be investigated by Federal Investigation Agency or any other nominated Federal Government agency---Offence under S. 2(g)(ii)(iii) of Financial Institutions (Recovery of Finances) Ordinance, 2001, were not dependent on determination of civil liability and could be investigated in terms of S. 20(7) of Financial Institutions (Recovery of Finances) Ordinance, 2001, by the nominated government agency---In all such cases Banking Court was to try cases of "wilful default" as per S. 20 of Financial Institutions (Recovery of Finances) Ordinance, 2001---High Court declared that notices issued under Ss. 5(r), 19 & 31D of National Accountability Ordinance, 1999, and notices issued under Ss. 2(g) & 20 of Financial Institutions (Recovery of Finances) Ordinance, 2001, were illegal and were set aside---High Court declined to interfere in notices issued under S. 2(g)(iii) of Financial Institutions (Recovery of Finances) Ordinance, 2001, as the same constituted an independent offence---Constitutional petition was allowed accordingly.

Syed Mushahid Shah and others v. Federal Investment Agency and others 2017 SCMR 1218; Khan Asfandyar Wali and others v. Federation of Pakistan through Cabinet Division, Islamabad and others PLD 2001 SC 607; Syed Zafar Ali Shah

and others v. General Pervez Musharraf, Chief Executive of Pakistan and others PLD 2000 SC 869 and The State through Chairman, NAB and others v. Muhammad Asif Saigol and others PLD 2016 SC 620 rel.

Shahid Ikram Siddiqui, Muhammad Imran Malik, Akif Majeed, Syed Muhammad Mohsin Raza, Salman Akram Raja, Tariq Bashir, Bilal Bashir, Syed Shahab Qutab and Mian Taiq Hassan, Salman Aslam Butt, Munawar-us-Salam, Muhammad Shoaib Rashid, Walid Khalid, Usman Akram Sahi, Furqan Naveed, Arslan Riaz, Mehmood A. Sheikh, Ms. Ayesha Hamid, Atta Mustafa Rizvi, Mian Sultan Tanvir Ahmad, Usman Ali Cheema, Hafiz Mubashr Ullah, Uzair Karamat Bhandari, Mian Muhammad Kashif, Ms. Saba Saeed Sheikh, Ch. Muhammad Amin Javed, Mian Asghar Ali, Nadeem Ahmad Sheikh, Muhammad Ahmad Pansota, Rab Nawaz Baloch, Jameel Ahsan Gill, Asim Ali Chohan, Muhammad Umar Riaz, Ms. Hina Bandealy, Khizar Javed, Haq Nawaz Chattha, Malik Haider Ali Langah, M. Salman Masood, Syed Zeeshan Haider Zaidi, Rao Muhammad Nasir Khan, Salman Safdar, Chaudhry Shahbaz Akhtar, Masood Sadiq, Mian Muhammad Faheem Bashir, Syed Amir Ali Shah, Ashar Elahi, Adnan Kazmi, Ghulam Hussain Chaudhary, Sardar Azeem Afrasiab, Nadeem Irshad, Ch. Amjad Iqbal Sandhu, Mian Zulfiqar Ali and Shahid Mehmood Khan for Petitioners.

Nasar Ahmad, DAG. Mrs. Samia Khalid, Addl. AG and Ms. Shazia Ashraf Khan, AAG for Respondents.
Arif Mehmood Rana, Haroon Rasheed Cheema, Mian Nadeem Ahmad Qazi and Syed Faisal Raza Bukhari for NAB.
Kh. Muhammad Farooq and Abid Hussain for State Bank of Pakistan.
Syed Murtaza Ali Zaidi for MEPCO.
Muhammad Bilal Akhtar and Sheikh Muhammad Ali for NTDC.
Imtiaz Rashid Siddiqui, Shehryar Kasuri, Muhammad Asif Butt, Rana Imtiaz Siddiqui and Jamshid Alam for Bank of Punjab.
Shezada Mazhar and Ghulam Mustafa Malik for Saudi Pak Industrial and Agricultural Investment Company Limited.
Adnan Shuja Butt for Bank of Punjab.
Rashdeen Nawaz Kasuri, Muhammad Akram Pasha, Nadeem Yousaf Rana and Malik Asad Ullah Waghra for Bank of Punjab and Askari Bank Limited.
Hafeez Saeed Akhtar for Saudi Pak Industrial Company and Bank of Punjab.
Nadeem Yousaf Rana for Bank of Punjab and Askari Bank Limited.
Mian Belal Ahmad, Adil Fayyaz, Rashid Mehmood Gill, Waqas Mehmood Gill, A. W. Butt, Nadeem Saeed and Sardar Qasim Farooq Ali for Bank of Punjab.
Muhammad Khalid Sajjad Khan, Advocate for Saudi Pak Industrial and Agricultural Investment Company Limited.
Ahmad Pervaiz and Umar Toor for JS Bank.
Muhammad Raza Qureshi, Rana Haseeb Ahmad Khan, Abdul Ghaffar Malik and Majid Ali Wajid for MCB Bank.
Iftikhar Hussain Shah for NBP Bank.
Husain Ali Ramzan for NIB Bank.
Husnain Ali Ramzan for Summit Bank.

Ch. Hashim Hayat Wathra for Habib Metropolitan Bank Limited.
Saqib Haroon Chishti for Punjab Provincial Cooperative Bank Limited.
Date of hearing: 7th December, 2018.

JUDGMENT

AYESHA A. MALIK, J.---This common judgment decides upon the issues raised in the Writ Petitions detailed in Schedule "A", appended with the judgment, as all petitions raise common questions of law and facts.

2. The Petitioners are all customers of different financial institutions who have availed some form of finance from the Respondent Banks. Respondent No.1 is the State Bank of Pakistan which is arrayed in all the Petitions. The other Banks are the Bank of Punjab, Askari Bank Limited, JS Bank, MCB Bank Limited, National Bank of Pakistan, Punjab Provincial Cooperative Bank Limited, Saudi Pak Industrial Company, NIB Bank, Summit Bank and Habib Metropolitan Bank Limited ("the Banks"). The Banks allege that the Petitioners owe money to the Banks for which, in some cases suit for recovery of finance have been filed before the competent court. During the pendency of the aforementioned suits the Banks also filed complaint before the State Bank of Pakistan, which then filed reference under section 31D of the National Accountability Ordinance, 1999 ("NAB Ordinance") before the National Accountability Bureau ("NAB") calling for an inquiry into the matter of willful default by the Petitioners. In some cases direct notices were issued to the Petitioners alleging willful default calling for immediate payment under the Financial Institutions (Recovery of Finances) Ordinance, 2001 ("FIO").

3. Consequently, the Petitioners have challenged; (a) notices issued under section 5(r) of the NAB Ordinance which called upon the Petitioners to show cause within seven days as to why they should not be proceeded against as willful defaulters under the NAB Ordinance; (b) notices under section 2(g) of the FIO calling upon the Petitioners to pay their liability within thirty days failing which the Bank shall approach the investigating agency nominated by the Federal Government in terms of sections 20(7) and 20(8) of the FIO to proceed against the act of willful default as defined under section 2(g) of the FIO; and (c) notices under section 19 read with section 31D of the NAB Ordinance which calls upon the Petitioners to provide information for the investigation with reference to the amounts owed to the Banks. The notices call upon the Petitioners to provide documentation and details for the benefit of the combined investigation team, which is inquiring into the matter of willful default and in some cases called upon the Petitioners to show cause as to why proceedings should not be initiated against them under the NAB Ordinance for willful default. The Petitions also challenged the vires of sections 5(r), 9, 19, 23, 27 and 31D of the NAB Ordinance seeking declaration that these provisions are ultra vires of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution") and are in direct conflict with the provisions of the subsequently promulgated special law, the FIO. Some Petitioners have challenged the vires of sections 2(g) and 20(8) of the FIO for being ultra vires the Constitution giving unguided and excessive

power to the Government appointed agency to investigate into the matter of willful default.

4. All the Petitioners before the Court are therefore aggrieved by various actions taken by NAB at the behest of the State Bank of Pakistan and the Banks who for the purposes of recovering amounts stated to be due from the Petitioners have alleged willful default in order to enable NAB or the Federal Investigating Agency ("FIA") to recover and settle the debt of the Banks. The Petitioners' case is that the act of initiating inquiry or investigation or calling upon them to show cause on allegations of willful default is illegal and contrary to the mandate of the FIO. It is their case that the question whether there is default by a customer of a financial obligation to a financial institution in such cases, jurisdiction vests with the Banking Court established under the FIO. It is for the Banking Court to determine whether there is default in the repayment of financial obligations and if the Banking Court makes a determination on the issue of default then the question whether the default was willful be decided. In support of their arguments, learned counsel have relied upon "Syed Mushahid Shah and others v. Federal Investment Agency and others" (2017 SCMR 1218) where the issue of parallel jurisdiction has been decided by the august Supreme Court of Pakistan with specific reference to the FIO and the Banking Courts established thereunder. It is also their case that NAB and the FIA's inquiry and interference is an infringement of their fundamental right to fair trial under Article 10A of the Constitution. With respect to the provisions of the FIA under section 20(8), the case of the Petitioners is that the FIA has no jurisdiction in such matters and the impugned provision grants immense discretionary powers to the FIA or any nominated Government agency so as to prejudice the basic rights of the customer. Their argument is the same as that for NAB, that parallel action by the FIA or any Government Agency, for pursuing criminal charges before the conclusion of the civil proceedings will seriously prejudice the rights of the Petitioners. It was argued that this power amounts to unfettered discretion at the hands of the government agency allowing them to harass and coerce the customer into paying amounts which are not due to the Banks.

5. On behalf of the State Bank of Pakistan, the Bank of Punjab being the Respondents in most of the cases, along with other Banks, report and parawise comments have been filed. Learned counsel stated that the Governor State Bank of Pakistan can issue show cause notice under section 5(r) of the NAB Ordinance alleging therein the offence of willful default and subsequently, can make recommendations to the Chairman NAB for proceedings against a willful defaulter in order to ensure recovery of defaulted amounts. As per the NAB Ordinance, the Governor State Bank of Pakistan makes a tentative assessment of the liability and issues notices under section 31D of the NAB Ordinance. Due process is followed and a decision with respect to the willful default is made under the NAB Ordinance. Hence there is no violation of Article 10A of the Constitution. Furthermore, it is their case that the NAB has concurrent jurisdiction with the Banking Court which jurisdiction has been rightly exercised by the Respondents. Even otherwise they

argued that civil and criminal proceedings can be conducted at the same time. Hence there is no merit in these petitions which are liable to be dismissed.

6. Notice in terms of Section XXVII-A of the Civil Procedure Code, 1908 has been issued to the Federation of Pakistan. On behalf of Federation, learned DAG stated that the Ministry of Law and Justice is not involved in these issues and no relief is claimed against the Federation. The issues raised in these petitions relate directly to the recovery of outstanding loans, which is a matter inter se the customer and the financial institutions and the State Bank of Pakistan. As to the vires of the law challenged, the learned DAG argued that the laws are in consonance with the Constitution and the august Supreme Court of Pakistan has settled the issues related to the challenge against the vires of the NAB Ordinance in Khan Asfandyar Wali and others v. Federation of Pakistan through Cabinet Division, Islamabad and others (PLD 2001 SC 607).

7. On behalf of Respondent No.3 NAB, report and parawise comments have also been filed. So far as the vires of the offence of willful default are concerned, these have been upheld by the august Supreme Court of Pakistan in PLD 2001 SC 607 (supra). It was argued that in terms of the judgment certain recommendations were made with reference to amending the NAB Ordinance which recommendations were duly implemented and the NAB (Amendment) Ordinance, 2001 and 2002 were promulgated on 10.8.2001 and 13.11.2002 respectively; that the purpose of the NAB Ordinance and the FIO is totally separate and distinct and each will work within the ambit of its own objective. It is their case that no harassment is made out to the Petitioners and that NAB had acted strictly in accordance with law. Further these cases relate to misappropriation and criminal breach of trust along with corruption and loss of amounts due to financial institutions, which falls within the ambit of the jurisdiction vested with NAB. Moreover the State Bank of Pakistan upon a request by the Bank of Punjab and the Respondents Banks probed into the matter of willful default by the Petitioners who were not paying the amounts due to the Banks. A joint investigation team was formed to calculate the outstanding liability of the Petitioners and after a determination was made by the investigation team, notices were issued to the Petitioners giving them a fair chance to respond and explain why action should not be taken against them under the NAB Ordinance for willful default.

8. On the basis of what has been argued, the issues before the Court are the vires of sections 5(r), 19 and 31D of the NAB Ordinance and whether NAB can conduct an inquiry or investigation into willful default by a customer of a financial institution especially if a suit for recovery of defaulted amount is pending before the competent Banking Court. The question of jurisdiction is also involved that is whether the NAB Ordinance and the FIO have parallel jurisdiction to determine the issue of willful default or whether FIO's jurisdiction takes precedence over NAB Ordinance. With respect to the FIO, the vires of sections 2(g) and 20(8) are under challenge and whether sections 20(7) and (8) give unfettered discretion to the government agency nominated to investigate the offence of willful default.

Relevant Law

9. The basic law under challenge before this court is the NAB Ordinance specifically the powers contained in sections 5(r), 19 and 31D. For ease of reference, these provisions are reproduced hereunder:-

5(r) Willful default

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

Provided that it is not willful default under this Ordinance if [such person or holder of public office] was unable to pay return or repay the amount as aforesaid on account of any willful breach of agreement or obligation or failure to perform statutory duty on the part of any bank, financial institution, cooperative society, government department, statutory body or an authority established or controlled by Government:

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

Provided further that [the] aforesaid thirty days or seven days notice shall not apply to cases pending trial at the time of promulgation of the National Accountability Bureau (Amendment) Ordinance, 2001.

19 Power to call for information

The Chairman NAB or an officer of the NAB duly authorized by him may, during the course of an inquiry or investigation of an offence under this Ordinance:-

(a) call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Ordinance or any rule or order made thereunder.

(b) require any person to produce or deliver any document or thing useful or relevant to the inquiry or investigation;

(c) examine any person acquainted with the facts and circumstances of the case;

(d) require any bank or financial institution, notwithstanding anything contained in any other law for the time being in force, to provide any information relating to any person whosoever, including copies of entries made in a bank's or a financial institution's books such as ledgers, day books, cash books and all other books including record of information and transactions saved in electronic or digital form, and the keepers of such books or records shall be obliged to certify the copies in accordance with law and

(e) where there is reasonable suspicion that any person is involved in or is privy to an offence under this Ordinance, the Chairman NAB may, with the prior approval in

writing of the High Court concerned, direct that surveillance of that person may be carried out through such means as may be necessary in the facts and circumstances of the case and the Chairman NAB may in this regard seeks the aid and assistance of any Government agency and the information so collected may be used as evidence in the trial under this Ordinance.
Provided that the copies obtained or information received or evidence collected under classes (d) and (e) shall be kept confidential and shall not be used for any purpose other than for legal proceedings under this Ordinance.
31D Inquiry, investigation or proceedings in respect of imprudent bank loans, etc.
Notwithstanding anything contained in this Ordinance or any other law for the time being in force, no inquiry, investigation or proceedings in respect of imprudent loans, defaulted loans or rescheduled loans shall be initiated or conducted by the National Accountability Bureau against any person, company or financial institution without reference from the Governor, State Bank of Pakistan:
Provided that cases pending before any Accountability Court before coming into force of the National Accountability Bureau (Second Amendment) Ordinance, 2000, shall continue to be prosecuted and conducted without reference from the Governor, State Bank of Pakistan.

10. The NAB Ordinance is a special law, promulgated in 1999 to eradicate corruption and corrupt practices and to hold people accused of such practices accountable. The objective of the law is to protect public money and ensure its recovery. The nature of investigation and inquiry under the NAB Ordinance is therefore a kind of special dealing with offences which are deemed necessary in order to protect public money and ensure that the public exchequer is not deprived of amounts due to it. It also ensures that cases of corruption and corrupt practices are duly investigated in order to hold accountable persons involved in the abuse of authority and office. At various different times, the provisions of the NAB Ordinance have been challenged for being ultra vires the Constitution and the fundamental rights enshrined thereunder. However, the august Supreme Court of Pakistan in PLD 2001 SC 607 (supra) has upheld the provisions of the NAB Ordinance stating therein that they are not ultra vires the fundamental rights or the Constitution.

11. The FIO is also a special law promulgated in 2001 to provide effective remedy for the recovery of finances extended by Banks and for the fulfillment of obligation defined in section 2(e) of the FIO in favour of the financial institution. The FIO prescribe the procedure to be adopted for the purposes of invoking the jurisdiction of the Banking Court for recovery of amounts due to the financial institution or breach of any obligation as defined under the FIO. The law prescribes for a special procedure to be followed when filing a suit under the FIO and also prescribes for certain offences which are triable before the Banking Court. Hence the Banking Court is a specialized court where the issue of 'default' can be contested which established for the purposes which pass judgment and decree for recovery of outstanding amounts in cases of default.
Opinion of the Court

12. So far as the question of vires of the various provisions of the NAB Ordinance are concerned, in particular section 5(r) and section 31D of the NAB Ordinance, the matter in issue has already been decided by the august Supreme Court of Pakistan in the case of PLD 2001 SC 607 (supra). The petition before the august Supreme Court of Pakistan sought to challenge the vires of the NAB Ordinance, as amended from time to time, on the ground that the NAB Ordinance is ultra vires of the Constitution and is in violation of the fundamental rights guaranteed under the Constitution. The Court considered several questions, of which two of the questions have again been raised in the Petitions before this Court that is whether there is parallel judicial system created under the NAB Ordinance for recovery of amounts due in disregard to the provision of the Constitution and whether section 5(r) of the NAB Ordinance which defines "willful default" is ultra vires the constitutional provisions. The august Supreme Court of Pakistan examined the law in great detail on the question of parallel jurisdiction, holding therein that there is no bar under the Constitution to investigate and criminalize or prosecute the conduct of those who are guilty of not discharging their contractual obligation in repayment of loans. The Court while relying on Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and others (PLD 2000 SC 869) held that there is no bar to promulgate legislation to make such conduct an offence, which should be duly investigated and prosecuted through fail trial. The Court also found that the provisions of the NAB Ordinance, in particular with reference to the creation of the offence of willful default and the punishment given thereunder did not offend Article 12 of the Constitution. With specific reference to section 5(r) of the NAB Ordinance guidelines were provided so as to ensure that due process was followed and those accused of willful default get a fair trial. Consequently section 31D of the NAB Ordinance was inserted whereby calling for a report from the Governor State Bank of Pakistan was made necessary before any inquiry or investigation under the NAB Ordinance. The august Supreme Court of Pakistan concluded that by adopting the given guidelines an investigation may reach a logical conclusion and it will ensure that in cases of willful default due process is followed for the purposes of the investigation. Therefore we find that the issue of the vires of the NAB Ordinance is settled on the basis of the judgment cited at PLD 2001 SC 607 (supra).

13. On the issue of concurrent jurisdiction of the FIO and the NAB Ordinance, in a case before the august Supreme Court of Pakistan, the trying of offences under a special law as opposed to the general law was considered in 2017 SCMR 1218 (supra). The question before the Court was whether the Banking Courts constituted under the FIO have exclusive jurisdiction to try offences mentioned therein, to the exclusion of the special courts constituted under the Offences in Respect of Banks (Special Courts) Ordinance, 1984 ("ORBO"), the courts of ordinary criminal jurisdiction under the Code of Criminal Procedure, 1898 ("Cr.P.C.") read with Pakistan Penal Code, 1860 ("P.P.C.") and the inquiry and investigation by the FIA under the Federal Investigation Agency Act, 1974 ("FIA Act"). In these cases financial institutions filed complaints before the Special Courts constituted under the ORBO and the FIA Act as well as registered FIRs under the P.P.C. with respect

to cheques that had been dishonoured. The customers approached the High Court challenging the exercise of jurisdiction under ORBO, P.P.C. and FIA Act on the ground that the Banking Courts established under the FIO have exclusive jurisdiction in such cases. The august Supreme Court of Pakistan considered the case at length and held that as a consequence of section 4 of the FIO, the Banking Courts have exclusive jurisdiction to determine whether an offence has been committed by a customer in terms of section 20 of the FIO. The Court also held that the FIO shall have an overriding effect on all those cases which are covered by it, concomitantly the offences not covered by the FIO would be triable under the ORBO. The reasons explained by the Court in para 16 of the judgment are as follows:-

Were both laws to apply concurrently and permit of parallel platforms for the adjudication of offences under both laws then banks/financial institutions would always choose to initiate proceedings under the more onerous law, in this case the ORBO. Such an interpretation would give banks/financial institutions unbridled power to choose the forum before which trial of offences should take place, and they would obviously choose the Special Courts under the ORBO being more burdensome and prejudicial to the accused (as demonstrated above). A natural corollary is that in such circumstances the Ordinance, 2001 would, in effect, be rendered redundant. This is not permissible under any principle of interpretation of law when the Courts are trying to reconcile two potentially conflicting laws; our duty is to bridge the gap between what is and what was intended to be. We are not willing to attribute redundancy to the legislature. We do not wish to give financial institutions the unrestricted power to choose, when there has been an alleged dishonor of a cheque, between section 20(4) of the Ordinance, 2001 and section 489-F of the P.P.C., as they would of a certainty opt to initiate proceedings under the latter which offence carries a greater punishment than the former.

Hence in the opinion of the august Supreme Court of Pakistan financial institution cannot choose whether to initiate proceedings under ORBO, P.P.C. or FIA Act or whether to proceed under the FIO as the ability to make such a choice means giving unfettered power to the financial institution enabling them to exert unfair power over the customer. The Court also opined that to allow ORBO, P.P.C. or the FIA Act to operate concurrently with FIO would offend the provision of Article 25 of the Constitution which guarantees that all citizens are equal before the law and are entitled to equal protection of law. The august Supreme Court of Pakistan also relied on Article 4 of the Constitution holding that customers cannot be left to speculate on which offence they will be charged with, under which law and before which forum. That the rule of law requires law to be intelligible, clear and predictable for it to be accessible to citizens. Hence the court held that FIO would have an overriding effect over ORBO and P.P.C. and the FIA Act.

14. On this premise we now set out to examine the question of 'willful default' and whether the offence of willful default is to be decided under the FIO or can it be decided, in parallel proceedings under the NAB Ordinance. Section 5(r) was inserted in the NAB Ordinance on 3.2.2000 by Ordinance IV of 2000 and the 3 provisos were inserted in the NAB Ordinance vide the National Accountability

Bureau (Amendment) Ordinance, 2001 promulgated on 10.8.2001. This definition in section 5(r) of the FIO has been interpreted in The State through Chairman NAB and others v. Muhammad Asif Saigol and others (PLD 2016 SC 620) by the august Supreme Court of Pakistan to mean a deliberate and calculated refusal to pay. The august Supreme Court of Pakistan held that to constitute the offence of "willful default" the prosecution, in addition to establishing default, has to prove that the default was willful, that is an intentional and conscious act. Consequently mere inability to pay will not constitute the offence of "willful default" meaning thereby that the element of willfulness must be present where there is a default. 'Willful default' is also defined in Section 2(g) of the FIO as follows:

2(g) willful default

(i) deliberate or international failure to repay any finance, loan, advance or any financial assistance received by any person from financial institution after such payment has become due under the terms of any law or an agreement, rules or regulations issued by the State Bank of Pakistan;

(ii) Utilization of finance, loan advance or financial assistance or a substantial part thereof, obtained by any person from a financial institution for a purpose other than that for which such finance, loan, advance or financial assistance had been obtained and payment in part or full not made to the financial institution; or

(iii) Removal, transfer, misappropriation or sale of any assets collateralized to secure a finance, loan advance or financial assistance obtained from a financial institution without permission of such institution."

As per section 2(g) of the FIO, "willful default" is with reference to the three separate situations. It is an intentional or deliberate failure to repay any finance, loan, advance or financial assistance received by a person which is due under the terms of an agreement or under a law. It also includes the wrongful use of finance that is not as per the purpose for which it was given and the misappropriation or sale of collateral or security given to a financial institution. Hence it prescribes three different cause of actions for willful default. Willful default is also an offence under section 20 of the FIO in the following terms:

20 Provisions relating to certain offences

20(7) Notwithstanding anything to the contrary provided in any other law for the time being in force, action in respect of an offence of wilful default shall be taken by an investigating agency, to be nominated in this behalf by the Federal Government, on a complaint in writing filed by an authorized officer of a financial institution after it has served a thirty days notice upon the borrower demanding payment of the loan, advance or financial assistance.

(8) An offence of willful default shall be cognizable, non-bailable and non-compoundable and punishable with imprisonment which may extend to seven years or fine not exceeding the amount of default or with both.

(9) Any person convicted of the offence of willful default by a Banking Court shall not be eligible to receive any loan, advance or finance from any financial institution for a period of ten years and shall not be permitted to contest any election as a member of the Majlis-e-Shoora (Parliament), any Provincial Assembly or a local body for a period of five years, after serving out a sentence after conviction.

In terms of the Section, the offence of willful default is with reference to the three situations stipulated in the definition under section 2(g). Hence for the purposes of Section 20, three separate offences are defined in section 2(g) which are triable under sections 20(7)(8) and (9) of the FIO. In terms of section 20, an offence is to be investigated by an investigating agency nominated by the Federal Government. After the investigation agency completes its investigation, it shall tender its findings before the Banking Court and thereafter the offence of willful default is triable by the Banking Court. Therefore the Banking Court may take cognizance of a deliberate failure to re-pay any finance, loan, advance or financial assistance received by a person which is due under the terms of an agreement or under a law or the wrongful use of finance being an offence where finance is not used for the purpose it was given. And finally the offence of removing, transferring or misappropriating or selling any of the security provided to the financial institution to secure the loan. These offences can be looked at separately and are to be tried as individual offences for the purposes of section 20(7), (8) and (9) of the FIO. Essentially this means that a customer can be tried for the offence stipulated in section 2(g)(i) or 2(g)(ii) or 2(g)(iii) of the FIO. In the majority cases before us the issue is that notwithstanding the powers of the Banking Court to investigate and try the offence of willful default under section 20 of the FIO, NAB also has the power to investigate and try the offence of "willful default". Hence the question is which law will take priority over the other and whether section 20(7) can be invoked prior to a determination on the civil liability of default.

15. The FIO was promulgated on 30.8.2001 and section 20(7), (8) and (9) were inserted vide Financial Institutions (Recovery of Finances) (Amendment) Act (XXXVII of 2016) in 2016. Section 2(g) of the FIO defines the offence of willful default and was also inserted in 2016 vide the Financial Institutions (Recovery of Finances) (Amendment) Act (XXXVIII of 2016). Prior to 2016 willful default was an offence investigated only under the NAB Ordinance. However after 2016 it is a specific offence triable by the Banking Court. From what has been argued before us, the NAB Ordinance and the FIO are both special laws dealing with the offence of "willful default". The only difference is that the NAB Ordinance deals with the offence to pay that which is stated to be due by a financial institution whereas the FIO gives the Banking Court jurisdiction to determine if a customer has committed any default of an obligation with regard to any finance and has added the offence of willful default as stipulated in section 2(g) of the FIO. The august Supreme Court of Pakistan in 2017 SCMR 1218 (supra) examined the question of concurrent jurisdiction with reference to the FIO, P.P.C. and ORBO in great detail. Para 9 of the stated Judgment reads as follows:

Section 7(4) of the Ordinance, 2001 confers exclusive jurisdiction on the Banking Courts with respect to certain matters albeit subsection (5) creates an exception to the exclusive jurisdiction of the Banking Courts. This confers a right on the financial institution to seek any remedy before any court or otherwise which may be available to it under the law by which the financial institution may have been established [Section 7(5)(a)]. According to section 4 of the Ordinance, 2001 reproduced above, its provisions "shall have effect notwithstanding anything

inconsistent therewith contained in any other law for the time being in force." This is essentially a non obstante clause which is defined as "A phrase used in documents to preclude any interpretation contrary to the stated object or purpose. 'Notwithstanding' means despite, in spite of or regardless of something. In this respect Justice G. P. Singh has aptly explained:-

"A clause beginning with 'notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force', is sometimes appended to a section in the beginning, with a view to give the enacting part of the section in case of conflict an overriding effect over the provision or Act mentioned in the non obstante clause. It is equivalent to saying that in spite of the provision or Act mentioned in the non obstante clause, the enactment following it will have its full operation or that the provisions embraced in the non obstante clause will not be an impediment for the operation of the enactment."

In the judgment reported as Packages Limited through its General Manager and others v. Muhammad Maqbool and others (PLD 1991 SC 258) this Court observed:-

"In our opinion a 'non abstante' clause operates as an ouster of the earlier provisions only where there is a conflict and inconsistency between the earlier provisions and those contained in the later provision and, therefore, must be read in the context in which it is operating. Accordingly, a non obstante clause will operate as ouster only if an inconsistency between the two is found to exist."

In the judgment reported as Muhammad Mohsin Ghuman and others v. Government of Punjab through Home Secretary, Lahore and others (2013 SCMR 85), this Court cited with approval a passage from Interpretation of Statutes by N. S. Bindra which reads as under:-

It has to be read in the context of what the legislature conveys in the enacting part of the provision. It should first be ascertained what the enacting part of the section provides on a fair construction of words used according to their natural and ordinary meaning and the non obstante clause is to be understood as operating to set aside as no longer valid anything contained in relevant existing law which is inconsistent with the new enactment. The enacting part of a statute must, where it is clear, be taken to control the non obstante clause where both cannot be read harmoniously, for even apart from such clause a later law abrogates earlier laws clearly inconsistent with it.

The proper way to construe a non obstante clause is first to ascertain the meaning of the enacting part on a fair construction of its words. The meaning of the enacting part which is so ascertained is then to be taken as overriding anything inconsistent to that meaning in the provisions mentioned in the non obstante clause. A non obstante clause is usually used in a provision to indicate that that provision should prevail despite anything to the contrary in the provision mentioned in such non obstante clause. In case there is any inconsistency between the non obstante clause and another provision one of the objects of such a clause is to indicate that it is the non obstante clause which would prevail over the other clauses. It does not, however, necessarily mean that there must be repugnancy between the two provisions in all such cases. The principle underlying non obstante clause may be invoked only in the case of 'irreconcilable conflict'."

From the above it is clear that the non obstante clause of section 4 of the Ordinance, 2001 has been used by the legislature to give the provisions of the said Ordinance an overriding effect over any other law for the time being in force which may be contrary thereto. The use of the word 'notwithstanding' in section 4 ibid indicates the legislative intent to avoid the operation of conflicting provisions, by providing that in the event of such conflict, the provisions of the Ordinance, 2001 would take precedence over any such inconsistent law.
In terms of these findings, the FIO is a special law which gets priority over the ORBO, the Cr.P.C. and the P.P.C. to try the same offence, hence the Banking Court has exclusive jurisdiction to try such cases. On the same analogy the FIO will have exclusive jurisdiction to try the offence of "willful default" where the matter is between a customer and a financial institution. In terms of section 7(4) of the FIO, the Banking Court has exclusive jurisdiction with all matters falling within its domain under the FIO. Not only does the FIO prevail on account of being promulgated later in time but also because the FIO is a special law which gives exclusive jurisdiction to the Banking Court to establish whether or not there has been a "default" by a customer in the fulfillment of any "obligation" with regard to any finance as defined under section 2 of the FIO. The definition of "obligation" as given under the FIO includes a vast number of situations which tantamount to a breach and includes the issue of determining whether any amounts are due to the financial institution. Since the Banking Court has exclusive jurisdiction to determine the question of "default" it also has exclusive jurisdiction to try the offence of "willful default" under section 20 of the FIO. In the event that there are two different forums adjudicating or investigating on the question of "willful default" at the same time, means that there is a likelihood of conflicting judgments or findings not to mention that parallel proceedings can prejudice the rights of a customer charged for willful default against whom the issue of default is yet to be established. Hence in the context of the definition given in section 2(g)(i) of the FIO, "willful default" is an intentional failure to pay that which is due to the financial institution. In all such cases, the element of "default" precedes the criminality of the offence of willfulness, meaning thereby that the question of default must be established first as per the prescribed procedure under the FIO, before it can be alleged that the default was deliberate or intentional.

16. In this regard NAB is a special law which is to look into corruption and corrupt practices and hold the persons involved in such practices as responsible. Section 5(r) of the NAB Ordinance was inserted by way of Ordinance No. IV of 2000 dated 3.2.2000. The Section provides for the offence of "willful default" which offence is limited to the extent of payment of amounts stated to be due by a financial institution, giving the Accountability Court jurisdiction to decide cases of willful default and giving investigative powers to the NAB against any customer complained against by the financial institution through the Governor State Bank of Pakistan as per section 19 or section 31D which was also inserted on 5.7.2000 vide Ordinance No.XXIV. At the time the FIO did not include the definition of willful default nor was willful default an offence under section 20 of the FIO, hence NAB had jurisdiction in such cases. However as we have already held that the FIO will

take priority over the NAB Ordinance with respect to the offence of "willful default". Consequently section 5(r) or section 31D of the NAB Ordinance and any other related proceedings cannot be invoked by NAB simultaneously with the FIO or prior to the determination of default of an obligation to pay under the FIO. We find that this gives unfettered power to the financial institution to use the NAB Ordinance as a means to exert unfair pressure on customers to pay amounts which may be disputed or which they are not in default of, for which adjudication is necessary. Furthermore it allows financial institution to bypass the mechanism prescribed under the FIO and compel customers to pay amounts alleged to be due to financial institutions without any chance of exercising their rights under the FIO. Even otherwise as we have already observed that the offence of willfulness will come after the civil liability of default, in an obligation to pay, is determined as there has to be an obligation to pay before it can be alleged that the obligation to pay was deliberately avoided. Section 20(7) of the FIO can only be invoked once the civil liability of default has been established.

17. So far as the offences in section 2(g)(ii) and (iii) of the FIO are concerned, they provide for independent offences which can be tried under section 20 of the FIO independent of any determination of a default in an obligation to pay. Neither offences are dependent on the civil liability of 'default' under section 9 of the FIO as they are offences due to the very act of the customer. So if a customer utilizes the finance obtained from a financial institution for purposes other than for which it was given for or if a customer removes, transfers or misappropriates collateral or security of the financial institution, then the act of such removal, transfer or misappropriation constitutes an offence for which criminal proceedings can be initiated under section 20 of the FIO. A lot has been argued with reference to the power given to a government agency for investigating into the offence of "willful default" under section 20(7). However, we find that the power is simply to investigate, that too on a complaint filed in writing by the Bank and after securing a thirty days' notice. Hence it is neither unconstitutional nor excessive. The Banking Court being the special forum to try offences under the FIO is the proper forum to try the offence of willful default and in this regard in terms of the provisions of section 20(7) once the civil liability of default is established the offence of willfulness can be investigated by the FIA or any other nominated Federal Government Agency. Offences under section 2(g)(ii) and (iii) however are not dependent on the determination of the civil liability and can be investigated in terms of section 20(7) by the nominated government agency. In all such cases the Banking Court will try the offence of willful default as per section 20 of the FIO.

18. Writ Petitions Nos. 28883/14, 31141/15 and 13400/16 challenge the NAB Ordinance as according to them the same has been repealed. However, the said three petitions stand dismissed on account of the fact that this issue has already been decided by a learned Full Bench of this Court vide judgment dated 31.8.2018 passed in W.P. No.196881/2018.

19. Under the circumstances and in view of the aforesaid, the petitions are decided in the following terms:

(i) All Petitions as detailed in Schedule "A" which challenge notices issued under sections 5(r), 19 and 31D of the NAB Ordinance or related thereto and notices issued by the FIA under section 2(g) read with section 20 of the FIO or related thereto are allowed and the stated notices are declared to be illegal, hence set aside.

(ii) The petitions which challenge notices issued under section 2(g)(iii) of the FIO being W.Ps. Nos.241265/18, 231658/18 and 237281/18 are dismissed on account of the fact that they constitute an independent offence;

(iii) W.Ps. Nos.28883/14, 31141/15 and 13400/16 which challenge the vires of the NAB Ordinance after promulgation of the Constitution (Eighteenth Amendment) Act, 2010 are dismissed on account of the fact that this issue has already been decided by a learned Full Bench of this Court vide judgment dated 31.8.2018 passed in W.P. No.196881/2018 titled Lawyers Foundation for Justice v. Federation of Pakistan etc.

MH/A-80/L Order accordingly.

2019 P T D 1077

[Lahore High Court]

Before Ayesha A. Malik and Muzamil Akhtar Shabir, JJ

WISAL KAMAL FABRICS (PVT.) LTD., LAHORE

Versus

COMMISSIONER INLAND REVENUE, LAHORE and another

I.T.R. No. 220282 of 2018, heard on 5th November, 2018.

Income Tax Ordinance (XLIX of 2001)---

----Ss. 18(1)(d), 122(5A) & 133---Reference---Tax liability, determina-tion of---Interest free loans by directors of company---Nature---Taxpayer was receiving interest free loans extended by its directors which was declared as taxpayer's benefits by tax authorities---Taxpayer's appeal before Appellate Tribunal Inland Revenue was dismissed ex-parte---Validity---No business relationship existed between taxpayer and its directors---Directors were managing taxpayers and had a fiduciary relationship with taxpayer, as such they were not engaged in business relationship with taxpayer hence, interest free loans given by directors given to taxpayer did not fall within meaning of "benefit derived during course of business relationship"---Provisions of S. 18(1)(d) of Income Tax Ordinance, 2011 were not applicable for the purposes of determining tax liability---High Court set aside order passed by Appellate Tribunal Inland Revenue---Reference was allowed in circumstances.

Commissioner Inland Revenue, Zone-II v. Lucky Cotton Mills (Pvt.) Ltd. 2017 PTD 864 and 2015 PTD (Trib.) 386 ref.
Mohammad Saqib Jillani for Appellant.
Javed Athar for Respondents.
Date of hearing: 5th November, 2018.

JUDGMENT

AYESHA A. MALIK, J.---This Reference along with connected References being ITRs Nos.221219/18 and 221226/18 have been filed by the Applicant under section 133 of the Income Tax Ordinance, 2001 ("Ordinance") involving common questions of law.

2. The following questions of law have been raised in all three Reference, which are asserted to have arisen out of order dated 3.10.2017 passed by the Appellate Tribunal Inland Revenue, Lahore Bench, Lahore ("Appellate Tribunal"):--
i) "Whether the learned ATIR was justified to pass the order based on assumptions, which is not sustainable in the eyes of law being against the spirit of section 122(5A) of the Income Tax Ordinance, 2001 in tax years 2010, 2011, 2012?"

ii) "Whether the learned ATIR was justified to treat provision of interest free loan given to the petitioner by the directors/sponsors as benefit and chargeable with Income Tax in terms of section 18(1)(d) of the Ordinance in respect of tax years 2010, 2011, 2012 which was even otherwise contrary to judgment of Sindh High Court titled 'Commissioner Inland Revenue v. Lucky Cotton Mills (Pvt.) Limited' reported as 2017 PTD 864 wherein it was held that no business relationship in terms of section 18(1)(d) of the Income Tax Ordinance existed between company and its Directors who had advanced interest free loan to the company. The Honourable High Court disapproved/rejected the treatment of loan by director as 'income from business' and held that such benefit could not be termed a taxable benefit under section 18(1)(d) of the Income Tax Ordinance."

3. An assessment order was passed for the tax years 2010, 2011 and 2012 where after proceedings under Section 122(5A) of the Ordinance were initiated to amend the assessment. The amendment order was passed on 8.3.2016 whereby the Applicant is aggrieved. The main grievance of the Applicant is that interest free loans in the amount of Rs.168,250,000/-, Rs. 143,254,000/- and Rs. 11,317,995/- were given by the Directors of the Applicant Company to the Company which loans were treated as benefits of the company chargeable to income tax under Section 18(1)(d) of the Ordinance. Consequently the Commissioner applied a random rate of 13.5% to calculate interest and raised a demand for Rs.22,713,750/- as tax liability of the Applicant. The Applicant filed an appeal before the Commissioner Inland Revenue (Appeals-II), Lahore who upheld the original assessment order dated 8.3.2016 vide order dated 7.6.2016. The Applicant then filed appeal before the Appellate Tribunal which passed an ex-parte order dated 3.10.2017 and dismissed the appeal without hearing or considering the grounds of the Applicant.

4. Learned counsel for the Applicant argued that the grounds were provided for in the appeal yet the requirements of Section 18(1)(d) of the Ordinance were not taken into consideration. Learned counsel stated that this matter has been decided by the Hon'ble Sindh High Court in the case cited at Commissioner Inland Revenue, Zone-II v. Lucky Cotton Mills (Pvt.) Ltd. (2017 PTD 864). Further stated that the Inland Revenue Appellate Tribunal has also decided the same issue in another case cited at 2015 PTD (Trib.) 386 in line with the judgment of the Hon'ble Sindh High Court yet a different meaning is being given to Section 18(1)(d) of the Ordinance in the present proceedings by the Respondents.

5. The basic contention of the Applicant is that Section 18(1)(d) of the Ordinance provides that any benefit derived by a person will be chargeable to income tax under the head of business income. The benefit can be derived by virtue of past, present or prospective business relationships. Learned counsel argued that the directors of a private limited Company, in this case Applicant Company, do not have a business relationship with the Company. Learned counsel argued that this matter was considered in 2017 PTD 864 (supra) wherein it was held that there is no business relationship between the company and its directors. Accordingly any

interest free loan given to the company by the director cannot be made chargeable to income tax under Section 18(1)(d) of the Ordinance.
6. On behalf of Respondent No.1, it is argued that the relationship between the company and its director is a business relationship. He further argued that the case was heard and decided ex-parte because the Applicant did not present itself on the date when the case was fixed.

7. We have heard the learned counsel for the parties and gone through the record. The fact that the impugned order was passed ex-parte did not absolve the Appellate Tribunal from considering the law applicable to the case of the Applicant. The case of the Applicant is that two Directors of the Applicant Company advanced interest free loans to the company from time to time, which has been made chargeable to income tax under Section 18(1)(d) of the Ordinance for the tax years 2010, 2011 and 2012. Section 18(1)(d) of the Ordinance reads as under:--

Income from business (1).---The following incomes of a person for a tax year, other than income exempt from tax under this Ordinance, shall be chargeable to tax under the head "Income from Business"

(d) the fair market value of any benefit or perquisite, whether convertible into money or not, derived by a person in the course of, or by virtue of, a past, present, or prospective business relationship

For the purposes of this clause, it is declared that the word `benefit' includes any benefit derived by way of waiver of profit on debt or the debt itself under the State Bank of Pakistan, Banking Policy Department's Circular No.29 of 202 or in any other scheme issued by the State Bank of Pakistan.
The statute basically states that any benefit derived by a person during the course of a business relationship is chargeable to income tax for the purposes of charging tax. The key requirement is that the benefit must be derived during the course of a business relationship. There is no business relationship between the company and its directors as the directors are managing the company and have a fiduciary relationship with the company. As such they are not engaged in a business relationship with the company. Hence interest free loans given by directors to the company do not fall within the meaning of benefit derived during the course of a business relationship, meaning that the provisions of section 18(1)(d) of the Ordinance are not applicable for the purposes of determining the tax liability.

8. In these cases of the Commissioner Inland Revenue and the Appellate Tribunal agreed with the views contained in the original order dated 8.3.2016 which is not in consonance with the law. The Hon'ble Sindh High Court in 2017 PTD 864 (supra) has also expressed the same view. Interestingly the Inland Revenue Appellate Tribunal also expressed the same view in 2015 PTD (Trib.) 386 (supra) yet has adopted a totally different interpretation in this case.

9. Therefore, under the circumstances, Reference applications are decided in favour of the Applicant and impugned order dated 3.10.2017 passed by the Appellate Tribunal is set aside to the extent of interest free loan.

10. Office shall send a copy of this order under seal of the Court to the Appellate Tribunal as per Section 133(5) of the Ordinance.

MH/W-3/L Reference allowed.

P L D 2019 Lahore 382
Before Ayesha A. Malik, J
IKHLAQ-E-MADINA TOURS AND TRAVELS PRIVATE LIMITED---Petitioner
Versus
FEDERATION OF PAKISTAN through Secretary Ministry of Religious Affairs and Interfaith Harmony, Islamabad and others---Respondents
Writ Petitions Nos.13829, 13144, 13145, 13818, 13819, 13820, 18678, 23938, 15188, 17952, 18007, 19716, 22709, 18969, 20673 and 22271 of 2019, heard on 18th April, 2019.

(a) Hajj Policy and Plan 2019---

----Quota of pilgrims---Old and new Hajj Group Organizer Companies ("HGOs")---Separate criteria for assessment---No discrimination---Petitioners challenged the Hajj Policy and Plan 2019 ("Hajj Policy 2019") on the ground that they had not been issued a quota of pilgrims despite the fact that they were Hajj Group Organizer Companies ("HGOs") who were duly enrolled and entitled to the quota of pilgrims for Hajj 2019; that Hajj Policy 2019 was illegal and arbitrary because it did not equally distribute the quota of pilgrims for Hajj 2019; that on the basis of the criteria set out in the Hajj Policy 2019 the petitioners were discriminated against as they did not have the requisite experience of conducting Hajj, hence they would never be eligible since this was the primary criteria, and that the petitioners faced discrimination as the relevant authorities were still maintaining old HGOs and new HGOs list, such that the new were considered against a 2% quota only---Held, that criteria for Assessment of Profiles of new HGOs was placed before the High Court for assessment of new profiles and as per the criteria it was based on the judgment of the Supreme Court of Pakistan in Dossani Travels Pvt. Ltd. and others v. Messrs Travels Shop (Pvt.) Ltd. and others (PLD 2014 SC 1) ("Dossani Travels Case")---On the basis of said criteria for new HGOs a merit list had been made which provided for the name of the HGO, the Province from which it was applying, year of its incorporation, year of its tax return filing, year of Securities and Exchange Commission of Pakistan (SECP) filings and experience in carrying out Umrah---On the basis of the marks obtained in these categories, the overall marks set out the merit---In terms of the merit list provided, the cases of the petitioners had been considered and their names were duly incorporated in the merit list---However, for the purposes of the allocation of quota of pilgrims to new HGOs, the first 35 HGOs had been selected as the quota was satisfied till Serial No.35---With reference to old HGOs a criteria had also been provided to ensure that they met the given standards---Old HGOs were the HGOs who were providing Hajj services, hence were scrutinized considering their past Hajj services---New HGOs were those who had never carried out Hajj services yet were considered on the basis of Umrah services---Such distinction did not suggest discrimination rather showed that a thought through process had been put in place to consider all HGOs favourably---Ministry of Hajj in 2019, reserved an additional 5000 Hajj quota for allocation to newly enrolled HGOs in compliance of the order of (Islamabad) High Court and against

another quota as promised by the Saudi King, which would give newly approved HGOs the opportunity to be issued Hajj quotas---In terms of the criteria set out for old and new HGOs, there appeared to be no arbitrariness or randomness in the selection process---Hajj Policy 2019 provided for a Hajj Policy Formulation Committee ('the Committee') which included Secretary, Ministry of Religious Affairs as Chairman, representative from the office of the Attorney General for Pakistan, from the Ministry of Foreign Affairs, and Ministry of Law and Justice and representative from the Competition Commission of Pakistan---Bare look at the members who sat in the Committee showed that it was an impartial Committee comprising of a diverse set of members who formulated the Hajj Policy 2019 and the criteria for allocation of Hajj quota---Hajj Policy 2019 was approved by the Cabinet whereafter the quota allocation process was started---Petitioners along with other HGOs were all duly considered, on the basis of which a merit list was made---Assessment was made by engaging a third party, which was a well reputed Chartered Accountant, hence the question of favouritism and random picking of HGOs had no force---Hajj Policy 2019 and quota allocated thereunder was in compliance with the pronouncement of the Supreme Court especially the "Dossani Travels Case"---Fact that every HGO could not be accommodated while allocating Hajj quota did not tantamount to discrimination and the fact that petitioners (HGOs) had not been given Hajj quota also did not suggest discrimination---High Court directed that any grievances of the petitioners regarding selection of HGOs contrary to the criteria could be raised before the Committee, and in the event that such applications were filed before the Committee, the same shall be decided expeditiously so as to prevent any disturbance in the allocation of Hajj quota---Constitutional petition challenging the Hajj Policy 2019 was dismissed accordingly. Dossani Travels Pvt. Ltd. and others v. Messrs Travels Shop (Pvt.) and others PLD 2014 SC 1 and Muhammad Arif Idrees and others v. Sohail Aamir and others 2017 SCMR 1379 ref.

(b) Hajj Policy and Plan, 2019---

----Quota of pilgrims---Hajj Group Organizer Companies ("HGOs") and tour operators having experience of Ziarats only---Hajj quota not awarded to Ziarat operators---Policy decision---No discrimination---Plea of petitioner, who was a specialist in Ziarat tours, that on the basis of the Hajj Policy and Plan 2019 (Hajj Policy 2019) past performance of the tour operators was to be judged on Hajj or Umrah only and not Ziarat operations; that operators who specialized in Ziarat only were being discriminated against in the matter of allocation of Hajj quota---Held, that the stance of the Government was that matter of Ziarat operations were duly considered by the Hajj Policy Formulation Committee ('the Committee') and it was decided that Hajj quota would not be given to those tour operators who only had experience in Ziarat operations as there was no way to verify their credentials or information on the basis of which it could be ascertained whether the tour operator had carried out Ziarat operations and whether there were any complaints or problems related thereto; that for the purposes of Umrah, the Kindgom of Saudi Arabia issued Umrah ID, hence it was verified and only Umrah ID holders were

considered, however, there was no official ID given for the purposes of Ziarat operations, and that the Committee on the recommendations of the Competition Commission of Pakistan in the larger interest of allocation of Hajj quota decided that Ziarat operations would not be considered under the Hajj Policy 2019---No plea of arbitrariness or discrimination could be raised in the present case as the Committee was well within its domain to determine the Hajj Policy 2019 and was not obligated to include Ziarat operations under any judgment of the Supreme Court---Committee had rationalized its reasons to explain why Ziarat operations had not been considered in the Hajj Policy 2019 which explanation had been accorded by the Competition Commission as per the requirements of the judgment of the Supreme Court of Pakistan in Dossani Travels Pvt. Ltd. and others v. Messrs Travels Shop (Pvt.) Ltd. and others (PLD 2014 SC 1) ("Dossani Travels Case")---Cabinet had also approved the Hajj Policy 2019 which set out a transparent process to allocate Hajj quota---Constitutional petition challenging the Hajj Policy 2019 was dismissed accordingly.

Dossani Travels Pvt. Ltd. and others v. Messrs Travels Shop (Pvt.) and others PLD 2014 SC 1 ref.
Petitioners by:
M. Asad Manzoor Butt, Abdul Rasheed Baloch and Mian Ghazanfar Ali Joiya (in W.Ps. Nos.13829, 13144, 13145, 13818, 13819, 13820, 18678 and 23938 of 2019).
Tafazul Haider Rizvi, Haider Ali Khan and Muhammad Usman (in W.P. No.15188 of 2019).
Muhammad Anwar Bhatti (in W.Ps. Nos.17952, 18007, 19716 and 22709 of 2019).
Aleem Baig Chughtai (in W.P.No.18969 of 2019).
Adnan Ahmad Chaudhary (in W.P.No.20673 of 2019).
Dost Muhammad Kahoot (in W.P.No.22271 of 2019).
Respondents by:
Ms. Ambreen Moeen, D.A.G. along with Muhammad Arif Zahoor, Deputy Assistant Director, Ministry of Religious Affairs and Interfaith Harmony, Directorate of Hajj, Lahore.
Date of hearing: 18th April, 2019.

JUDGMENT

AYESHA A. MALIK, J.---This common judgment decides upon the issues raised in the petitions detailed in Schedule "A" and "B" appended with the judgment as all the petitions raise common questions of law and facts.

2. The Petitioners before the Court have challenged the Hajj Policy and Plan 2019 ("Hajj Policy") on the ground that they have not been issued the quota of pilgrims despite the fact that they are Hajj Group Organizer Companies ("HGOs") who are duly enrolled and entitled to the quota of pilgrims for Hajj 2019. The Petitioners before the Court claim that they are duly enrolled as HGOs with the Respondents and are providing services for performing Umrah for many years yet they have never been given quota of pilgrims for Hajj despite repeated judgments by the

august Supreme Court of Pakistan calling for a fair and transparent hajj policy. The first case relied upon was the Corruption in Hajj Arrangements 2010, in Suo Motu Case No.24 of 2010 and Human Rights Cases Nos.57701-P, 57719-G, 57754-P, 58152-P, 59036-S, 59060-P, 54187-P, 58118-K of 2010, 1291-K and 1292-K of 2011 decided on 29.7.2011 (PLD 2011 SC 963) followed by Dossani Travels Pvt. Ltd. and others v. Messrs Travels Shop (Pvt.) Ltd. and others (PLD 2014 SC 1) ("Dossani Travels Case") yet the Respondents have failed to make a transparent and fair policy on the basis of which there should be equal distribution of the quota of pilgrims for the performance of Hajj .

3. Learned counsel for the Petitioners argued that every year issues arise out of allocation of the pilgrims' quota on account of the wrong doings of the Respondents as they tend to give preference to their favourites; that they do not follow any formula nor is there criteria on the basis of which the quota of pilgrims is distributed. The Petitioners all claim to be eligible having requisite experience and state that they have been ousted from this process simply alleging that they do not have the requisite experience of carrying out Hajj, hence they have never been properly considered. Learned counsel further argued that the Petitioners are pre-qualified; that they are duly enrolled, however they have not been able to send pilgrims to Hajj as they have never given the quota of pilgrims despite all hectic efforts. Learned counsel further argued that under the Hajj Policy, there is 40% quota available for private HGOs which should have been equally distributed among all enrolled HGOs. This is in line with the spirit of the Dossani Travels Case, however, the Respondents have failed to comply with the judgments of the august Supreme Court of Pakistan and have once again issued the hajj quota to their favourites who happened to be members of the Hajj Organization Association of Pakistan ("HOAP"). Learned counsel further submitted that in some cases the Petitioners have provided a more cost effective Hajj package compared to the one the Government is offering yet despite the same, the Petitioners have not been considered.

4. Report and parawise comments have been filed by the Respondents. Learned DAG argued that the Hajj Policy is neither arbitrary nor discriminatory but in fact is based on a mathematical formula and criteria for assessment of profiles under which the Hajj quota has been allocated. She further submitted that it has been done in a transparent manner by a Hajj Policy Formulation Committee ("Committee") comprising of Secretary, MORA as Chairman, representative from the office of the Attorney General for Pakistan, from the Ministry of Foreign Affairs, and Ministry of Law and Justice and also a representative from the Competition Commission. Further that Third Party Assessment is carried out for selection and the Hajj Policy has been approved by the Cabinet. She further explained that the Petitioners before the Court were all duly considered but they did not qualify on merit, hence they have not been allocated Hajj quota. She further explained that even in the previous years, the Petitioners did not meet the criteria, hence they were not allocated Hajj quota. Moreover the Committee recommended quota of 5000 pilgrims to newly enrolled companies for which the Petitioners did not qualify. She argued that it is

the discretion of the Government to devise a policy and the Petitioners' contention that the Respondents are obligated to give equal distribution is unfounded as the Hajj Policy ensures a fair and transparent criteria on the basis of which allocation of quota is made. She has placed on file the merit list of the HGOs which has been put up on the website of Respondent No.1 and has also placed on file the criteria for assessment of profiles on the basis of which assessment of HGOs was made.

5. Heard. Record perused. The basic contention of the Petitioners is that the Hajj Policy is illegal and arbitrary because it does not equally distribute the quota of pilgrims for Hajj 2019. The Petitioners claim that on the basis of the criteria set out they are discriminated against as they do not have the requisite experience of conducting Hajj, hence they will never be eligible since this is the primary criteria. They also allege discrimination as the Respondents are still maintaining old HGOs and new HGOs list, such that the new are considered against a 2% quota only. This is against the Dossani Travels Case as per their contention. Therefore it is expedient to first consider the directions given in the Dossani Travels Case which are as follows:

51. Before we part with the judgment, we may add that the performance of Hajj is a sacred duty for Muslims. But the quota allocated to Government of Pakistan by the Saudi Government is limited and within that limited quota, it allocates a certain portion to private HGOs. Since several hundred HGOs apply for allocation of quota from the Private Hajj Scheme share as worked out by the MORA, all applicants HGOs cannot be accommodated and the dismay of those who are left out is understandable. We are conscious that the MORA has to take several steps to ensure that travel, accommodation and other arrangements are made to the satisfaction of Hujjaj. It requires a couple of weeks to complete the exercise. However since Hajj operation is a time bound exercise, arrangements have to be made within that limited time. It is therefore, imperative that the Hajj Policy be framed well in time in such a manner which is fair, just, inspires confidence and evokes minimum criticism. It is also imperative that the Hajj Policy for the next year should be announced at the earliest after the conclusion of Hajj. In these circumstances, we are persuaded to direct as under:-

(i) The Hajj Policy should be framed, announced and placed on the website of MORA preferably within six weeks of the arrival of last flight of Hajis from KSA under intimation to the Registrar of this Court. This of course would be subject to any policy decision of the Saudi Government regarding allocation of Hajj quota for Pakistan;

(ii) The Hajj Policy should be framed by a Committee headed by the Secretary, Ministry of Religious Affairs (MORA); a nominee of the Competition Commission of Pakistan; a nominee of the Secretary, Ministry of Foreign Affairs, Government of Pakistan; a nominee of the Secretary Ministry of Law and Justice Division and Parliamentary Affairs; and a nominee of the Attorney General for Pakistan;

(iii) The credentials of each applicant/HGO should be examined and decision taken on merit;

(iv) While framing the Hajj Policy, the MORA should be guided, inter alia, by the recommendations made by the Competition Commission of Pakistan to which reference has been made in Para 8 above; and
(v) The MORA should constantly monitor the working and performance of each HGO during Hajj and this assessment should form basis for further improvements in Hajj Policy for next year's Hajj.

6. Subsequent thereof in Muhammad Arif Idrees and others v. Sohail Aamir and others (2017 SCMR 1379), the august Supreme Court of Pakistan held that the distinction between Hajj quota holders and non-quota holders was discriminatory and has no rationale or nexus to the allocation of Hajj quota. Hence the Court reiterated the direction in Dossani Travels Case whereby the Competition Commission of Pakistan should provide its recommendations and that the credentials of each HGO should be considered on merit.

7. The Criteria for Assessment of Profiles of New HGOs was placed before the Court for assessment of new profiles and as per the criteria it is based on the judgment of the august Supreme Court of Pakistan in Dossani Travels Case in terms of which the following factors are considered:
i) Past performance of Hajj or Umrah or Ziarat Operations.
ii) Economy of financial packages offered.
iii) Quality of management and services provided.
iv) The financial strength of the NGOs.
v) Weightage should be allocated to these variables in a manner which does not give undue consideration to experience only.
vi) MORA shall also allocate specific percentage of hajj quotas to the new entrants to encourage entry of new payers in the market and such quota may be allocated based on the separate criteria.
vii) MORA shall ensure that the NGOs to whom the quota is allocated, should perform the Hajj operations on their own and this fact should also be verified from their financial statement. In case, any NGO continues with such practices, MORA should consider it for blacklisting for an appropriate period.
viii) All the variables mentioned above should be evaluated by a third party, preferably a chartered accountancy firm approved by ICAP, to ensure transparency for the process.
ix) MORA should consider forming a panel whose responsibility will be to monitor all the NGOs. All the complaints against the NGOs shall also be reviewed by that panel. The recommendations and the finding of that panel shall be taken into account when allocating the quota to the NGOs. The panel shall be completely independent to ensure transparency of the process.
The documents that are scrutinized as per this criteria are as follows:
i) Paid up and authorized capital are not less than Rs.5 million and Rs.7.5 million respectively.
ii) No management dispute.
iii) Having appropriate office located at proper place, at least three employees with adequate furniture and IT facilities.

iv) The company is not Bank defaulter/loan defaulter, tax defaulter and is on the Active Taxpayer List.
v) Non-conviction of management in criminal case(s) by any court of law. (Affidavit on stamp paper of Rs.500/- duly attested by notary).
vi) The company is not presently debarred for carrying out its operation by the government of Pakistan or KSA as the case may be.
Subsequently the allocation of marks is as follows:

a) Company should be a private/public limited

company duly incorporated under Companies

Ordinance, 1981- with Securities and Exchange

Commission of Pakistan (SECP) since;

a) 2001 or before	20 Marks
ii) 2005	18 Marks
iii) 2006	16 Marks
iv) 2007	14 Marks
v) 2008	12 Marks
vi) 2009	10 Marks
vii) 2010	08 Marks
viii) 2011	06 Marks
ix) 2012	04 Marks

On the basis of this criteria a merit list has been made which provides for the names of HGOs, the Province from which it is applying, year of its incorporation, year of its tax return filing, year of SECP filings and experience in carrying out Umrah. On the basis of the marks obtained in these categories, the overall marks sets out the merit. In terms of the merit list provided, the cases of the Petitioners have been considered and their names are duly incorporated in the merit list. However, for the purposes of the allocation of quota of pilgrims to new HGOs, the first 35 HGOs have been selected as the quota is satisfied till Serial No.35.

8. With reference to old HGOs a criteria has also been placed on file in terms of which:
The honourable Supreme Court of Pakistan's orders dated 27.08.2013 passed in Civil Appeals Nos.800-L, 801-L and 802-L of 2013 contain following recommendations by the Competition Commission of Pakistan:-
i) Past performance of Hajj or Umrah or Ziarat Operations.
ii) Economy of financial packages offered.
iii) Quality of management and services provided.
iv) The financial strength of the HGOs.
v) Weight-age should be allocated to these variables in a manner which does not give undue consideration to experience only.
vi) MORA shall also allocate specific percentage of hajj quotas to the new entrants to encourage entry of new payers in the market and such quota may be allocated based on the separate criteria.

vii) MORA shall ensure that the HGOs to whom the quota is allocated, should perform the Hajj operations on their own and this fact should also be verified from their financial statement. In case, any HGO continues with such practices, MORA should consider it for blacklisting for an appropriate period.
viii) All the variables mentioned above should be evaluated by a third party, preferably a chartered accountancy firm approved by ICAP, to ensure transparency for the process.
ix) MORA should consider forming a panel whose responsibility will be to monitor all the HGOs. All the complaints against the HGOs shall also be reviewed by that panel. The recommendations and the finding of that panel shall be taken into account when allocating the quota to the HGOs. The panel shall be completely independent to ensure transparency of the process.
Basic Eligibility Criteria for further scrutiny of documents
Only those HGOs will be eligible for further scrutiny of documents which meet following basic criteria:
i) Paid up and authorized capital are not less than Rs.7.5 million and Rs.10 million respectively.
ii) No management dispute.
iii) Having appropriate office (located at a proper place, at least three operational staff with adequate furniture and IT facilities).
iv) The company is not Bank defaulter/Loan defaulter or tax defaulter and is an active taxpayer.
v) Non-conviction of management in criminal case(s) by any court of law. (Affidavit on stamp paper of Rs.500/- duly attested by notary).
vi) The company is not presently debarred for carrying out its operation by the government of Pakistan or KSA as the case may be.
vii) The company is organizing Hajj operations by itself and has not sublet it to any other operator, duly supported by a verifiable document.
a) Compliance of SECP Regulation i.e. submission of regular audit reports of last three years prepared by an Auditing Firm of Chartered Accountants registered with ICAP i.e..
i. Submitted audit report of last three years 15 Marks
ii. Submitted audit report of last two years 10 Marks
iii. Submitted audit report of last one year 05 Marks
b) Filing of annual tax returns of the company:
i. Last three years 10 Marks
ii. Last two years 06 Marks
iii Last one year 03 Marks
c) Company is complaint to filing of annual returns to SECP for the last three consecutive years:
i. Three years 10 Marks
ii. Two years 06 Marks
iii. One years 03 Marks
d) Company has not been convictd by CDC on complaints of hujjaj and confirmed by the appellate committee for last three consecutive years (Conviction means

reduction in quota or suspension for a specific period, imposition of fine deposited in government treasury etc.):
i. No Conviction in complaints 0 marks
ii) One or two convictions -5 marks
iii) Three or more convictions -10 marks
Hence even old HGOs are tested against a criteria to ensure that they meet the given standards.

9. Based on the above mentioned criterias the Respondents state that there are more than 2500 enrolled HGOs which include the Petitioners out of which 801 HGOs have been allocated Hajj quota. 79 new HGOs have been added over the years on the basis of the guidelines in Dossani Travels Case and subsequent cases. The Ministry of Hajj in 2019, reserved an additional 5000 Hajj quota for allocation to newly enrolled HGOs in compliance of the order of the Islamabad High Court, Islamabad dated 15.3.2018 and against another quota as promised by the Saudi King, will give newly approved HGOs the opportunity to be issued Hajj quota. The recommendations of the Competition Commission of Pakistan in compliance with Dossani Travels Case have been considered and a criteria for establishing the merit is being followed. With reference to the policy challenge, learned DAG has placed reliance on the judgment of this Court dated 14.2.2019 passed in W.P. No.8796/2019 titled Advocate Mian Asif Mehmood v. Federation of Pakistan etc. in which the Hajj Policy was challenged and it was found that there is no illegality or arbitrariness or mala fide established on the part of the Executive.

10. The entire case of the Petitioners is that the process of selection is arbitrary, random and discriminatory. However, in terms of the criterias set out before the Court, there appears to be no arbitrariness or randomness in the selection process. The Hajj Policy provides for a Hajj Policy Formulation Committee which includes Secretary, MORA as Chairman, representative from the office of the Attorney General for Pakistan, from the Ministry of Foreign Affairs, and Ministry of Law and Justice and representative from the Competition Commission of Pakistan. A bare look at the members who sit in the Committee shows that it is an impartial Committee comprising of a diverse set of members who formulated the Hajj Policy and the criteria for allocation of Hajj quota. The Hajj Policy was approved by the Cabinet whereafter the quota allocation process was started. The Petitioners before the Court along with other HGOs were all duly considered, on the basis of which a merit list was made and the merit list has been duly posted on the website of Respondent No.1. The Court has also been informed that the assessment was made by engaging a Third Party being a well reputed Chartered Accountant, hence the question of favouritism and random picking of HGOs has no force. Therefore the Hajj Policy and quota allocated thereunder is in compliance with the pronouncement of the august Supreme Court of Pakistan especially the Dossani Travels Case.

11. With respect to the Petitioners' allegation that in certain cases HGOs have been selected contrary to the criteria or without due regard to the criteria is a question of

record and fact. In such cases the Petitioners can raise specific objections before the Committee who can review the allegations and determine whether or not there is any merit in the same within the shortest possible time. In this context, the relevant HGO should also be given a hearing so as to enable it to defend its position. In the event that such applications are filed before the Committee, the same shall be decided expeditiously so as to prevent any disturbance in the allocation of Hajj quota.

12. The only contention left is that of discrimination where the Petitioners seek equal distribution of the Hajj quota, such that all enrolled HGOs should be given equal quota, meaning that each of the enrolled HGO is awarded a quota if it meets the criteria. The Petitioners claim discrimination on the ground that the Respondents are still distinguishing between old HGOs and newly enrolled HGOs, thereby reducing their chance of getting a Hajj quota. Learned DAG clarified that for the purposes of reference only old HGOs are those enrolled since 2005 who are carrying out the provision of Hajj services and are allocated Hajj quota. The merit of these HGOs is scrutinized against the given criteria. The new HGOs are the ones enrolled from 2012 and they are also allocated quotas. However, not every newly enrolled HGO has been given Hajj quota as the same is determined on the basis of the given criteria and on its merit. In the cases before the Court the Petitioners do not satisfy the merit requirement but have been duly considered. It appears that this dispute for equal distribution has continued for some time and the Petitioners continue their demand for equal distribution of Hajj quota. The fact that every HGO cannot be accommodated while allocating Hajj quota does not tantamount to discrimination and the fact that HGOs before the Court have not been given Hajj quota does not suggest discrimination. A transparent process has been placed before the Court on the basis of which the selection was made and in terms of the HGOs before the Court, none of them were able to make it on the merit list. The judgment of the august Supreme Court of Pakistan have been followed and a policy has been devised which allows HGOs to compete for the merit. Old HGOs are the HGOs who are providing Hajj services, hence are scrutinized considering their past Hajj services. New HGOs are those who have never carried out Hajj services yet are considered on the basis of Umrah services. This distinction does not suggest discrimination rather shows that a thought through process has been put in place to consider all HGOs favourably. Hence there is no merit in the discrimination argument. Learned DAG stated that it is expected that the quota promised by the Saudi King will be allocated shortly for which again an exercise shall take place for enrollment of new HGOs provided that they meet the criteria. Therefore as such the Petitioners can be considered again and may be allocated quota if they meet the given criteria.

13. In W.P. No. 15188/19, the Petitioners seek a declaration that past performance of the tour operators is to be judged on Hajj or Umrah or Ziarat operations and the Respondents cannot exclude Ziarat operations as this Petitioner specializes in Ziarat operations and was previously considered for Hajj quota. Learned counsel stated that the applicants who only applied on the basis of Ziarat have not been given any

quota this year, hence are discriminated against. Learned counsel further argued that in terms of the given criteria, Ziarat operation was also to be considered and that many of the old HGOs were granted quota only on the basis of Ziarat operations. It is also his case that this is against the dicta laid down by the august Supreme Court of Pakistan in Dossani Travels Case.

14. Report and parawise comments have also been filed in the stated Writ Petition. Learned DAG argued that the matter of Ziarat operations were duly considered by the Committee and it was decided that Hajj quota will not be given to those tour operators who only have experience in Ziarat operations as there is no way to verify their credentials or information on the basis of which it can be ascertained whether the tour operator has carried out Ziarat operations and whether there were any complaints or problems related thereto. She explained that for the purposes of Umrah, the Kindgom of Saudi Arabia issues Umrah ID, hence it is verified and only Umrah ID holders are considered. However there is no official ID given for the purposes of Ziarat operations, hence the Committee on the recommendations of the Competition Commission of Pakistan in the larger interest of allocation of Hajj quota decided that Ziarat operations would not be considered under the Hajj Policy. She again reiterated that this is a policy decision and as such the Petitioner has no fundamental right on the basis of which it can claim entitlement to Hajj quota as a reasonable and fair policy has been executed on the basis of which the Petitioners are not entitled to any Hajj quota.

15. On the basis of the contentions raised, there appears to be no arbitrariness or discrimination in this case as the Committee is well within its domain to determine the Hajj Policy and is not obligated to include Ziarat operations under any judgment of the august Supreme Court of Pakistan. It is also noted that the Committee has rationalized its reasons to explain why Ziarat operations have not been considered in this policy which explanation has been accorded by the Competition Commission as per the requirements of the Dossani Travels Case. The Cabinet has also approved the Hajj Policy which sets out a transparent process to allocate Hajj quota. Therefore as such there is no merit in this petition as well.

16. Therefore in view of the aforesaid, there is no merit to the challenge of Hajj Policy in these petitions, hence all the petitions are dismissed.

MWA/I-9/L Petitions dismissed.

2019 P T D 1124
[Lahore High Court]
Before Ayesha A. Malik, J
KHURRAM SHAHZAD
Versus
FEDERATION OF PAKISTAN and others
Writ Petition No.14138 of 2019, heard on 23rd April,, 2019.

(a) Income Tax Ordinance (XLIX of 2001)---

----S. 175---Power to enter and search premises---Scope---Commissioner could authorize entry and search of the premises of a taxpayer in order to enforce any provision of the Income Tax Ordinance, 2001 ('the Ordinance') i.e. that there must be an infringement or non-compliance of some provision of the Ordinance which the tax department sought to enforce---Must be some default by the taxpayer under the Ordinance, or in audit proceeding or some inquiry or investigation for evasion of income tax which the taxpayer was avoiding on the basis of which the power under S.175 of the Ordinance was called into use---Purpose of S.175 of the Ordinance was to enable enforcement of any provision of the Ordinance, hence there must be a clear statement before the Commissioner of which provision of the Ordinance was to be enforced and the reasons for it---In order to exercise the power under S.175, the tax department must record the reasons for initiating action under said section---Commissioner had to justify with sufficient reasons for exercising such power and while prior notice was not required under S.175, the Commissioner could, if deemed necessary, issue notice to the taxpayer.

(b) Income Tax Ordinance (XLIX of 2001)---

----S. 175---Power to enter and search premises---Seizure of record, computer and accounts of a business---No compelling reasons provided for initiating seizure proceedings---Tax department on the basis of an authorization order issued under S.175 of the Income Tax Ordinance, 2001 ('the Ordinance') by the Commissioner entered into the business premises of the petitioner-restaurant and seized the accounts, documents, computer and related material available at the premises---Legality---Power under S.175 of the Ordinance could only be exercised if the Commissioner was satisfied and had justified in writing that it was necessary to enter and search the premises, place, accounts, documents or computer of the taxpayer---In the present case the tax department had not been able to justify actions under S.175 of the Ordinance---Authorization order did not provide for any reason and simply suggested that it was for carrying out the objects of S.175, which created suspicion not only about the intent but also the reasons for which entry and seizure had taken place---Tax department had repeatedly referred to default by petitioner in paying sales tax which for the purpose of S.175 of the Ordinance was irrelevant and it could not be used as a reason to enter into the premises of a taxpayer---Furthermore, the tax department's reliance on notices issued to the petitioner prior to the seizure proceedings was also misleading as the said notices did not explain the

reason for carrying out entry and search of the petitioner's business premises as in both the notices the allegations were with respect to some property which was not disclosed in the wealth tax return for which the petitioner had provided relevant information and for which proceedings were dropped---Tax department had not been able to justify the action taken under S.175 of the Ordinance as it was unable to satisfy the Court as to the compelling reasons to initiate proceedings under the said section---Proceedings initiated by the tax department in terms of the authorization letter were set aside and the tax department was directed to hand over all the material seized from the business premises of the petitioner i.e. record, accounts, documents, computer etc to the petitioner immediately---Constitutional petition was allowed accordingly.

Muhammad Shahid Baig and Muhammad Bilal Pervaiz for Petitioners.
Ms. Ambreen Moeen, D.A.G. and Syed Zain-ul-Abadien Bokhari for Respondents.
Date of hearing: 23rd April, 2019.

JUDGMENT

AYESHA A. MALIK, J.---Through this Petition, the Petitioner, Proprietor Yasir Broast has challenged the action of the Respondents initiated under Section 175 of the Income Tax Ordinance, 2001 ("Ordinance") in terms of authorization letter dated 21.02.2019 and subsequent proceedings thereto including the seizure of the record, computer and accounts of the Petitioner business.

2. The basic grievance of the Petitioner is that the Respondents on the basis of authorization order dated 21.02.2019 issued under Section 175 of the Ordinance by Commissioner Inland Revenue, Zone-V, RTO-II, Lahore entered into the business premises of the Petitioner and seized the accounts, documents, computer and related material available at the business premises and continue to confiscate such material without due process of law. Learned counsel argued that the Petitioner is not under any inquiry or investigation nor has the business been selected for audit nor there are any proceedings for evasion of income tax pending against the Petitioner. The Petitioner is registered on the Restaurants Invoice Monitoring System ("RIMS") and consequently is monitored by the Punjab Revenue Authority under the Punjab Sales Tax on Services Act, 2012 ("Act"). Despite the same, the Respondents raided the business premises of the Petitioner on 21.02.2019 and forcibly seized computers, accounts and record of the Petitioner without any lawful authority or justification. Since then the Petitioner has been seeking reasons for the raid, however has found no plausible answer from the Respondents. Learned counsel argued that in the very least the Respondents must issue a speaking order providing for the reasons and there must be some proceedings pending under the Ordinance which culminates into the requirement to access the business premises of the taxpayer. Therefore, he seeks a declaration that the action of the Respondents on 21.02.2019 was illegal and that the confiscated items be returned to the Petitioner immediately. Reliance is placed on "K.K. Oil and Ghee Mills (Pvt.) Ltd v. Federal Board of Revenue and others" (2016 PTD 2601).

3. Report and parawise comments have been filed by Respondents Nos.4 to 6, in terms of which action was taken on the basis of definite information for which the Petitioner was confronted through notice under Section 122(9) read with Section 122(5) of the Ordinance. Learned counsel argued that Section 175 of the Ordinance has an overriding effect over all rules under the law and provides free access to premises, place, accounts, documents or computer impounded to the Respondents where it deemed necessary. Learned counsel further submitted that the proceedings are underway against the Petitioner for the tax year 2015 for non-payment of sales tax and consequently it is likely that there has been evasion of income tax by the Petitioner. He has placed on record details of sales tax evasion by the Petitioner, a copy of notice under Section 176(1)(B) of the Ordinance for personal hearing dated 15.3.2019 and the reply filed by the Petitioner dated 22.3.2019. Learned counsel has placed reliance on "Messrs Vincraft (Pvt.) Ltd., through Authorised Representatives v. Federal Board of Revenue through Chairman and 4 others" (2017 PTD 2114).

4. In rebuttal learned counsel for the Petitioner has again reiterated that there are no proceedings against the Petitioner. The contention of definite information of notice under Section 122(9) read with Section 122(5) of the Ordinance is false as earlier a notice was issued under Section 129(9) dated 17.10.2018 with respect to the declaration of property bearing No.210-E-2, MA Johar Town, Lahore, which was duly complied with and the Respondents were shown that the property has been declared in the wealth tax return of the Petitioner for the tax year 2015. Hence all proceedings were dropped. Therefore, he states the Respondents illegally entered into his premises.

5. The basic issue before the Court is the manner in which Section 175 of the Ordinance being the power to enter and search premises is to be invoked. In terms of this Section in order to enforce any provision of the Ordinance including for the purpose of making an audit for a taxpayer or a survey of a person liable to tax, the Commissioner or any officer authorized by the Commissioner in writing can, without prior notice have full and free access to any premises, place, accounts, documents or computer. The Section essentially authorizes the Commissioner to ensure compliance of the Ordinance by the taxpayer and if required to enter into the premises of a taxpayer. This means that the Commissioner can authorize entry and search of the premises of a taxpayer in order to enforce any provision of the Ordinance. Hence the emphasis is on enforce provisions of the Ordinance. The meaning of to enforce any provision of the Ordinance is that there must be an infringement or non-compliance of some provision of the Ordinance which the Respondents seek to enforce. Meaning that there must be some default by the taxpayer under the Ordinance, or in audit proceeding or some inquiry or investigation for evasion of income tax which the taxpayer is avoiding on the basis of which the power under Section 175 of the Ordinance is called into use. The objective of the Section is to ensure that taxpayers are compliant with the law and where there is non-compliance in order to prevent evasion of income tax, Section 175 of the Ordinance can be invoked for compliance.

6. Section 175 of the Ordinance while granting power to Commissioner or any authorized officer by the Commissioner to enter and search premises without notice has to be seen in conjunction with the rights enjoyed by a taxpayer with reference to its premises and property and with the right of due process. The purpose of this Section is to enable enforcement of any provision of the Ordinance, hence there must be a clear statement before the Commissioner of which provision of the Ordinance is to be enforced and the reasons for it without such an explicit statement, in writing this power under this Section can be abused. Therefore, in order to exercise the power under Section 175 of the Ordinance, the Respondents must record the reasons for initiating action under Section 175 of the Ordinance. The Commissioner has to justify with sufficient reasons for exercising this power and while prior notice is not required under this Section, the Commissioner can if deemed necessary issue notice to the taxpayer. Where prior notice is dispensed with as the statute allows it under Section 175(1) (a) of the Ordinance, the Commissioner must justify invoking Section 175 of the Ordinance in the order of authorization issued prior to entering and searching or confiscating documents or computers or files from the premises of a taxpayer. While interpreting Section 175(1)(a) of the Ordinance it can be seen that the provisions of Section 175(1)(a) to (e) of the Ordinance not only provide power to enter and search premises giving free access to the Commissioner to any premises, place, accounts, documents or computer but also gives the power to impound any account or document and retain them for as long as may be necessary for its examination or for the purposes of prosecution or to retain information required. This by itself suggests that information required is necessary for some proceedings or prosecution or inquiry which is under way. Hence the meaning given to Subsection (7) of Section 175 of the Ordinance which provides that the Section shall have effect notwithstanding any rule of law relating to privilege or the public interest in relation to access to premises or places or the production of accounts, documents or computer-stored information is not without due process. Hence this power can only be exercised if the Commissioner is satisfied and has justified in writing that it is necessary to enter and search the premises, place, accounts, documents or computer of the taxpayer.

7. In this case the Respondents have not been able to justify action under Section 175 of the Ordinance. The authorization order does not provide for any reason and simply suggests that its for carrying out the objects of the said Section. This creates suspicion not only the intent but also the reasons for which entry and seizure has taken place. The Respondents have repeatedly referred to default in paying sales tax which for the purpose of Section 175 of the Ordinance is irrelevant and it cannot be used as a reason to enter into the premises of a taxpayer. Furthermore, the Respondents reliance on notice issued under Section 122(9) read with Section 122(5) of the Ordinance is also misleading as the said notice do not explain the reason for carrying out entry and search of the Petitioner's business premises as in both the notices the allegations is with respect to some property which was not disclosed in the wealth tax return for the tax year 2015 for which the Petitioner has provided relevant information and for which proceedings were dropped. Therefore in this case, the Respondents have not been able to justify the action taken under

Section 175 of the Ordinance. Learned counsel for the Respondents has not been able to satisfy the Court as to the compelling reasons to initiate proceedings under Section 175 of the Ordinance.

8. Under the circumstances, this petition is allowed and the proceedings initiated by the Respondents in terms of authorization letter dated 21.02.2019 are set aside. The Respondents are directed to hand over all the material seized from the business premises of the Petitioner i.e. record, accounts, documents, computer etc to the Petitioner immediately.

MWA/K-11/L Petition allowe

2019 C L D 626
[Lahore]
Before Ayesha A. Malik, J
LAHORE STOCK EXCHANGE---Appellant
Versus
DIRECTOR (ICW) SECP and others---Respondents
Commercial Appeal No. 3 of 2015, heard on 9th April, 2019.

(a) Securities and Exchange Ordinance (XVII of 1969)---

----Ss. 22(c) & 34---Brokers and Agents Registration Rules, 2001, R. 7---Unified Trading System Regulations, Reglns. 6.1.1 & 6.1.2---Broker trading on stock exchange without renewal of registration---Penalty imposed on stock exchange---Securities and Exchange Commission of Pakistan ('the Commission') imposed a penalty of Rs. 1 million on (Lahore) Stock Exchange for allowing a broker to continue trading without renewal of its registration in violation of Reglns. 6.1.1 & 6.1.2 of the Unified Trading System Regulations ("Regulations")---Plea of Stock Exchange (appellant) that the broker in question forwarded its application for renewal of registration to the Stock Exchange who then forwarded it to the Commission; that the matter was delayed considerably by the Commission and in the meantime show cause notice was issued to Stock Exchange to show as to why penalty should not be imposed on it; that role of the Stock Exchange was that of a post office, as it was merely to forward the request of the broker for renewal of registration to the Commission, and in fact it was the responsibility of the Commission to renew the registration of the broker, that too within time; that in the event the Commission was unable to renew the registration in time, it must intimate to the Stock Exchange and the broker that the registration had not been renewed or it was still pending---Held, that Regln. 6.1.2 of the Regulations clearly provided that the Stock Exchange or the COMMISSION could suspend use of the terminal immediately if a member or broker did not meet the criteria given under Regln. 6.1.1 of the Regulations---Stock Exchange's contention that it was the responsibility of the Commission to suspend the operation of a member at its terminal was totally misplaced as the Regulations clearly placed this responsibility on Stock Exchange as well as on the Commission---Brokers and Agents Registration Rules, 2001 ('the Rules') provided that the application for renewal of registration was to be forwarded through the Stock Exchange, however the intent of such rule was to enable the Stock Exchange to monitor the eligibility of its broker---Stock Exchange could not exonerate itself from its fundamental responsibility to ensure that every broker was duly registered with the Commission and was operating under a valid registration certificate---Purpose of moving the renewal application through the Stock Exchange was so that the Stock Exchange became aware of the fact that a broker's registration certificate was due to expire within a specified period, hence it could pursue the matter to ensure that the registration certificate was renewed within time---Issue of whether there is a delay on the part of the Commission was totally irrelevant for the purposes of the Stock Exchange, as its primary responsibility as a frontline regulator was to ensure that only registered brokers operated through the Exchange on the

Unified Trading System---Basic function of a Stock Exchange was to promote and protect all investors who operated through it for which registration of a broker was a vital requirement---Stock Exchange was found responsible for neglecting its functions and also for violating the Regulations against the interest of the investors, hence a penalty of Rs.1 million was appropriate---Appeal was dismissed in circumstances and the penalty imposed by the Commission was maintained.

(b) Securities and Exchange Ordinance (XVII of 1969)---

----S. 22---Penalty for certain refusal or failure---Quantum---Quantum of penalty was based on the circumstances of each case such that it was appropriate and a proportionate amount of penalty, not exceeding the upper limit---Basic objective to impose penalty was to ensure compliance by creating an effective deterrence---In order for the deterrent to be effective it should be of an amount which hurt the offender---Amount of penalty reflected on the seriousness of the infringement, the duration of the infringement, the degree of harm caused, if any, whether actual or potential---Penalty would also reflect on whether the contravention was deliberate or reckless and whether any effort was made to prevent the wrong from continuing---Past history was also relevant along with any precedents on the issue---Penalty was imposed in each case depending on its facts and context and in proportion to the infringement and its impact.

Anwaar Hussain and Mehr Muhammad Iqbal for Appellant.
M. Usman Ghani Rashid Cheema for Respondents.
Date of hearing: 9th April, 2019.

JUDGMENT

AYESHA A. MALIK, J.---This appeal has been filed by the Appellant, Lahore Stock Exchange Limited ("LSE") under Section 34 of the Securities and Exchange Commission of Pakistan Act, 1997 ("Act") against the order dated 06.02.2015 issued by Respondent No.2, Appellate Bench-1, Securities and Exchange Commission of Pakistan ("SECP").

2. The Appellant is aggrieved by the penalty imposed by Respondent No.2, SECP for allowing a broker to continue trading without renewal of its registration in violation of Regulations 6.1.1 and 6.1.2 of the Unified Trading System Regulations ("Regulations"). Learned counsel for the Appellant stated that the Universal Equities (Pvt.) Limited ("UEL") a broker registered under the Broker and Agents Registration Rules, 2001 ("Rules") forwarded its application for renewal of registration to the Appellant who then forwarded it to the Respondent SECP. The matter was delayed considerably by the SECP and in the meantime show cause notice dated 17.11.2009 was issued to LSE to show as to why penalty should not be imposed as provided under section 22(c) of SECP Ordinance, 1969 for violation of Regulations 6.1.1 and 6.1.2 of the Regulations made under section 34 of the Securities and Exchange Ordinance, 1969 ("Ordinance").

3. The main allegation contained in the show cause notice was that the Appellant allowed UEL to continue trading at its terminal despite the fact that its registration had expired. The Appellant was asked to explain why the trading terminal was not switched off after the expiry of the broker's registration. The Appellant filed its reply on 23.11.2009 primarily explaining its role and function and elaborating that it is not the mandate of the Appellant to register UEL as a broker and the delay if any cannot be attributed to the Appellant especially since the matter was pending with the SECP. The case was heard in detail and ultimately order dated 10.12.2009 was passed by the Director (ICW) SMD SECP holding the Appellant liable to penalty in the amount of Rs.1 Million for being negligent of its duties. Against the said order, the Appellant filed an appeal before Respondent No.2 which was dismissed and the penalty was upheld.

4. In terms of the impugned order, the Appellant was held responsible to monitor the activities of brokers, to ensure that they are duly registered with the SECP and in the event that the registration expires they should not allow them for trading on terminals. The impugned order has relied upon Regulations 6.1.1 and 6.1.2 of the Regulations and maintained penalty in the amount of Rs.1 Million against the Appellant.

5. Learned counsel for the Appellant argued that the impugned order has failed to consider that the role of the Appellant is that of a post office; it is merely to forward the request of the broker for renewal of registration to the SECP and in fact it is the responsibility of the SECP to renew the registration of the broker, that too within time. And in the event it is unable to renew the registration in time, it must intimate to the LSE and the broker that the registration has not been renewed or it is still pending. Hence the terminal should be shut down. Learned counsel also argued that in the absence of such intimation, the Appellant cannot be held responsible for willful contravention under section 22(c) of the Ordinance as well as the Regulations. Learned counsel further argued that in terms of the Rules no time has been specified with respect to renewal of registration and there is no consequence provided in the Rules in the event of a delay for renewal of registration. Learned counsel also argued that when the terminal was shut down by the Appellant, UEL filed W.P. No.23719/2009 before this Court in which a direction was issued to SECP to hear the matter and pass an order immediately meaning thereby that the responsibility lies with the SECP and not with the Appellant.

6. Parawise comments have been filed by the Respondents. Learned counsel for the Respondents states that the Appellant is a frontline regulator and is responsible to ensure that every broker operating a terminal at the LSE is duly registered by the SECP. Learned counsel argued that the contention of the Appellant that it is simply a post office is totally against the mandate of the law as its role is to ensure compliance of all Rules and Regulations and suspend operation of any broker who is acting in contravention of the Rules and Regulations. In this case UEL was operating its terminal without registration as a broker meaning thereby that the Appellant kept the market and its investors at risk by allowing an unregistered

broker to operate through its terminal for more than a year. Learned counsel further argued that this is an admitted fact which the Appellant itself acknowledged through letter dated 04.11.2009 wherein it has specially stated that due to restructuring of management of human resource this issue was inadvertently missed out by the Appellant. Learned counsel further argued that the Appellant failure to stop UEL from operating as a registered broker without any registration from 24.07.2008 to 16.06.2009 and without submission of any application until 21.05.2009 which is in gross violation of the Regulations. Consequently, the Appellant has to be made responsible as it is a violation of public trust.

7. The Appellant has relied upon the Rules to show that a member desirous of acting as a broker shall make an application to the Commission in Form A as set out in the First Schedule for grant of a certificate of registration, through the stock exchange in which he is a member. This application is to be forwarded by the relevant stock exchange to the Commission within fourteen days from the date of its receipt. Thereafter it is the SECP, which is to determine eligibility for certificate of registration as a broker under the law. In the event of renewal of registration Rule 7 of the Rules prescribes that the certificate of registration shall be renewable on payment of fee on the same Rules for eligibility as at the time of initial registration. They have also relied upon the fact that the suspension of registration lies within the jurisdiction of SECP for contravention of the Rules and Regulations showing that if a broker was to operate a terminal of LSE without registration, the Commission can take necessary action against the broker and impose any penalty or fine as under the Rules. The Respondents have relied upon the Regulations, which have been made in exercise of power under section 34 of the Ordinance. These Regulations are relevant to the Unified Trading System ("UTS") in terms of which LSE is a frontline regulator with respect to its members and the companies/securities listed on the LSE. The trading on UTS shall only be done by eligible members which clearly shows that a member must be registered with the SECP as per Regulation 6.1.1 of the Regulations. If at any time a member seizes to fulfil the criteria given under Regulation 6.1.1 of the Regulations, Regulation 6.1.2 comes into force which provides that membership should be immediately suspended either by the stock exchange or by the Commission. In this case it is the Regulations which are relevant and not the Rules as the Regulation clearly address the issue of operating on the UTS without a registration. Regulation 6.1.2 of the Regulations clearly provides that the stock exchange or the Commission can suspend use of the terminal immediately if a member or broker does not meet the criteria given under Regulation 6.1.1 of the Regulations. Therefore, the Appellant's contention that it is the responsibility of the SECP to suspend the operation of a member at its terminal is totally misplaced as the Regulations clearly places this responsibility on stock exchange as well as on the Commission.

8. The Appellant has also argued that it had no knowledge of the pendency of the renewal application and that it operates merely as a post office for the purposes of forwarding the application of renewal. In this regard the Rules provide that the application is to be forwarded through the stock exchange, however the intent of

such a rule is to enable the stock exchange to monitor the eligibility of its broker. The Appellant cannot exonerate itself from its fundamental responsibility to ensure that every broker is duly registered with the Commission and is operating under a valid registration certificate. The purpose of moving the renewal application through the stock exchange is so that the stock exchange becomes aware of the fact that a brokers registration certificate is due to expire within a specified period, hence it can pursue the matter to ensure that the registration certificate is renewed within time. The issue of whether there is a delay on the part of the Commission is totally irrelevant for the purposes of the stock exchange, in this case the LSE, as its primary responsibility as a frontline regulator is to ensure that only registered brokers operate through the LSE on the UTS. In this regard, it is important to note that the stock exchange is a frontline regulator to monitor brokers so as to protect the interest of the investors. It is the stock exchanges basic function to promote and protect all investors who operate through it for which registration of a broker is a vital requirement. In this regard the stock exchange cannot shy away from its responsibility to ensure that a broker is registered with the SECP nor can it shy away from the responsibility of shutting down the terminal, since in this case UEL was operating on LSEs UTS system. Hence LSE has to ensure that only a registered broker can operate on UTS. The Commission can also suspend operation, however, primary responsibility is of the LSE.

9. The Appellant has also questioned the penalty imposed of Rs.1 Million on the ground that it is excessive and the infringement was not willful. It was argued that SECP is at much at fault as LSE hence the punishment should have been lenient and further no loss was reported on account of this inadvertent mistake. Section 22 of the Ordinance provides for penalties where a person contravenes or fails to comply with the Ordinance or the Rules and Regulations made thereunder. As per the Section the penalty cannot exceed Rs.50 Million. Regulatory penalty, as the Section clearly provides, is for compliance of the law the violation of which results in punishment in the form of a penalty. The quantum of penalty is based on the circumstances of each case such that it is appropriate and a proportionate amount of penalty, not exceeding the upper limit of Rs.50 Million. The basic objective to impose penalty is to ensure compliance by creating an effective deterrence. The amount of penalty reflects on the seriousness of the infringement, the duration of the infringement, the degree of harm caused if any, whether actual or potential. It will also reflect on whether the contravention was deliberate or reckless and whether any effort was made to prevent the wrong from continuing. Of course past history is also relevant along with any precedents on the issue. Penalty is imposed in each case depending on its facts and context and in proportion to the infringement and its impact. In this case there is no justification for the Appellant to claim leniency or a notional punishment as the Appellant has totally abdicated itself from its role as a frontline regulator. The Appellant's case was considered and the gravity of the infringement was also considered. The penalty is well within the statutory limit and does not reflect upon any random quantum. The Appellant has been held responsible for neglecting its functions and also for violating the Regulations against the interest of the investors. In order for the deterrent to be effective it

should be of an amount which hurts the offender. Therefore, in this case no illegality is made out.

10. In view of the aforesaid, the contention of the Appellant that it is not responsible to ensure the registration of UEL is totally misplaced as in terms of the record the application for renewal of registration was filed by the UEL on 21.05.2009 after a delay of 10 months, which should have been in the knowledge of the Appellant and called for immediate action. Under the circumstances, no case for interference is made out as Respondent No.2 has rightly imposed penalty on the Appellant. Resultantly, the instant appeal is dismissed and the order impugned dated 06.02.2015 is maintained.

MWA/L-5/L Appeal dismisse

2019 C L D 707
[Lahore]
Before Ayesha A. Malik and Jawad Hassan, JJ
Syed OMAR NAZAR SHAH---Petitioner
Versus
BANK OF PUNJAB and others---Respondents
W.P. No. 36365 of 2017, decided on 2nd April, 2018.

Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----Ss. 20 & 9---Suit for recovery---Application for leave to defend---Denial of customer as to availing of finance proceedings---Criminal proceedings under section 20 of Financial Institutions (Recovery of Finances) Ordinance, 2001 for such denial---Scope---Petitioner impugned order of Banking Court whereby complaint of plaintiff Bank to initiate criminal proceedings against defendant on account of defendant's denial of availing finance facility was allowed---Contention of defendant, inter alia, was that it was entitled to raise its defence in the suit and said denial in his application for leave to defend did not constitute an offence under S. 20 of the Financial Institutions (Recovery of Finances) Ordinance, 2001---Validity---Suit of the plaintiff Bank was still pending at the stage of application for leave to defend, and Banking Court had yet to decide the same and had not yet considered plea of defendant with respect to denials made in defendant's application for leave to defend---In such circumstances, Banking Court could not have initiated proceedings under S. 20 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 as the entire complaint of plaintiff Bank was presumptive---Question of whether finance was obtained by defendant or not, had not been conclusively adjudicated and if at present stage Banking Court proceeded with the complaint, it would prejudice the case of the defendant in the suit for recovery---Criminal complaint filed by plaintiff Bank was therefore misconceived and Banking Court could not have proceeded with the same---Impugned order was set aside---Constitutional petition was allowed, accordingly.

Shahid Ikram Siddiqui for Petitioner.
Rana Zeeshan Ahmad Khan for Respondent/Bank.

ORDER

Through this petition, the Petitioner has impugned order dated 29.4.2017 passed by Respondent No.2, Judge Banking Court-II, Lahore.

2. The basic grievance of the Petitioner is that the Respondent Bank filed a recovery suit against the Petitioner in which the Petitioner filed Leave Application ("PLA"). In the PLA he denied execution of documents which as per the contentions of the learned counsel is the right of the Petitioner while defending his position in the suit. On the basis of the denials made in the PLA, the Respondent Bank filed a complaint under section 20 of the Financial Institutions (Recovery of Finances) Ordinance,

2001 ("FIO") on 30.1.2016 before Respondent No.2 and on 29.4.2017 the impugned order was passed wherein the respondents were summoned for 30.5.2017 to face trial in the complaint.

3. Learned counsel for the Petitioner submitted that the only allegation in the criminal complaint is that in the PLA filed in COS No.71/2015, the Petitioner has falsely stated that he did not avail the letter of credit facility, hence he has committed an offence under section 20 of the FIO. Learned counsel further submitted that the Petitioner is entitled to raise his defence in the suit and that by raising his defence in the PLA, an offence is not made out under section 20 of the FIO. Learned counsel further stated that no offence is made out under section 20 of the FIO as the matter is still subjudice before the Banking Court and it is yet to be determined whether or not the suit of the Bank can be decreed. Until then the Bank cannot presume that a criminal offence has been made out under section 20 of the FIO on the basis of the PLA.

4. Learned counsel for the Respondent Bank submitted that the Petitioner has misstated before the court in the PLA by denying the relationship with the Bank and by denying the availment of the facilities from the Bank. Learned counsel further submitted that in terms thereof an offence has been committed under sections 20(b) and 20(2) of the FIO, hence the Petitioner is liable to be prosecuted and punished in terms of section 20(5) of the FIO. Learned counsel further argued that the Respondent Bank is entitled to pursue the matter by way of filing a banking suit as well as lodging a criminal complaint against the Petitioner for making false statements.

5. The basic dispute before the Court is the order of 29.4.2017 passed by Respondent No.2 wherein summons were issued for the purposes of proceeding on the complaint filed by the Respondent Bank under section 20 of the FIO. The question therefore is whether the summons are illegal and in excess of jurisdiction. As per the contents of the complaint, the main grievance of the Respondent Bank is that the Petitioner has wrongfully denied its relationship with the Bank, which means denial of the execution and availment of finance facilities, the creation of charge documents and mortgages along with restructuring of the finance facilities. The complaint states that the Petitioner has knowingly made a false statement by denying his signatures on the documents. Section 20(b) of the FIO provides that:
whoever makes fraudulent mis-representation or commits a breach of an obligation or representation made to a Financial Institutions on the basis of which the Financial Institution has granted a finance.
Section 20(2) of the FIO provides that:
whoever knowingly makes a statement which is false in material respects in an application for finance and obtain a finance on the basis thereof, or applies the amount of the finance towards a purpose other than that for which the finance was obtained by him, or furnishes a false statement of stocks in violation of the terms of the agreement with the Financial Institutions or falsely denies his signatures on any banking document before the Banking Court, shall be guilty of an offence

punishable with imprisonment of either description for a term which may extend to three years, or with fine, or with both.
In terms of the aforementioned sections an offence is made out if fraud and misrepresentation is made or if a person denies his signatures on any banking document. The Respondent Bank filed its complaint on the assumption that finance facilities were availed and -utilized by the Petitioner, hence denying the same in the PLA amounts to fraud and misrepresentation by the Petitioner in terms of section 20(b) of the FIO and denial of the signatures is an offence under section 20(2) of the FIO. Admittedly the suit of the Bank is still pending, at the stage of PLA and the Banking Court, which is the competent forum, has yet to decide whether or not a case of recovery has been made out. Hence the Court has yet to consider the plea of the Petitioner with respect to the denials made, especially whether he executed the documents or availed any facility from the Bank. In such circumstances where the matter is still pending before the court of competent jurisdiction, the Banking Court cannot initiate proceedings under section 20 of the FIO and the entire complaint of the Bank at this stage is presumptive. The question of whether or not the Petitioner availed the finance facility and signed the documents is subjudice before Respondent No.2 and has not conclusively been adjudicated upon. Under the circumstances, in case the Banking Court proceeds in the complaint and finds that the Petitioner has made a false statement it will prejudice the case of the Petitioner before Respondent No.2.

6. Furthermore the impugned order states that ex-facie an offence is made out without considering the fact that the matter is still subjudice and has not been determined as yet. Section 20 of the FIO provides for the powers of the Banking Court to punish an accused or culprit with imprisonment or fine where an offence is made out. At this stage it cannot be said that an offence is made out and the Bank will have to wait until the matter is decided by the Banking Court. Under the circumstances, we are of the opinion that the criminal complaint filed by the Bank against the Petitioner is misconceived and at this stage the Banking Court could not have proceeded on the basis of the complaint.

7. In view of the aforesaid, the instant petition is allowed and the impugned order dated 29.4.2017 passed by Respondent No.2 is set aside.

KMZ/O-1/L Petition allowed.

2019 P T D 1565
[Lahore High Court]
Before Ayesha A. Malik, J
E-VISION MANUFACTURING LTD.
Versus
FEDERATION OF PAKISTAN and others
Writ Petition No. 233352 of 2018, decided on 7th November, 2018.

Income Tax Ordinance (XLIX of 2001)---

----S. 65-D---Tax credit, claim of---Taxpayer was income tax assessee who claimed tax credit under S. 65-D of Income Tax Ordinance, 2001 for tax period 01-09-2014 till 31-08-2019---Authorities denied such tax credit on grounds that there was no provision in Income Tax Ordinance, 2001 to grant exemption certificate for purposes of tax exemption---Validity---Such matter had already been settled by High Court and there was no merits in plea raised by authorities as taxpayer was entitled for tax exemption under S. 65-D of Income Tax Ordinance, 2001, it could be considered for such benefit at beginning of year rather than wait for adjustment at end of year---Commissioner had to convey entitlement for tax exemption under S. 65-D of Income Tax Ordinance, 2001 and to issue certificate accordingly---High Court directed the authorities to consider case of taxpayer for issuance of exemption certificate on merits and decide accordingly---Constitutional petition was allowed accordingly.

Messrs Nishat Diary (Pvt.) Ltd through Company Secretary v. Commissioner Inland Revenue and 4 others 2013 PTD 1883 and Commissioner Inland Revenue v. Nishat Dairy (Pvt.) Ltd. I.C.A. No.799 of 2013 rel.
Kh. Farooq Saeed for Petitioner.
Mustehsan Raza Awan for Respondents.
Date of hearing: 7th November, 2018.

JUDGMENT

AYESHA A. MALIK, J.---Through this petition, the petitioner has impugned the rejection of its application filed under Section 159(I) of the Income Tax Ordinance, 2001, ("Ordinance") for issuance of exemption certificate.

2. Learned counsel for the Petitioner states that the Petitioner claimed tax credit under Section 65D of the Ordinance for the tax period 01.09.2014 till 31.08.2019. This request was denied on the ground that there is no provision in the Ordinance to grant exemption certificate for the purposes of tax exemption. Learned counsel for the Petitioner argued that this matter has already been decided by this Court in "Messrs Nishat Diary (Pvt.) Ltd through Company Secretary v. Commissioner Inland Revenue and 4 others" (2013 PTD 1883) and in I.C.A. No.799/2013 dated 18.03.2014 titled "Commissioner Inland Revenue v. Nishat Dairy (Pvt.) Ltd." Wherein it was held that for the purposes of grant of exemption certificate, tax

credit and tax exemption are the same as benefits available to the taxpayer to reduce their tax liability. Hence the Petitioner is entitled to the tax exemption under Section 65D of the Ordinance.

3. Report and parawise comments have been filed by the Respondents. It is stated by the learned counsel for the Respondents Nos. 5 and 6 that since the law does not provide for tax exemption under Section 65D of the Ordinance, hence the application of the Petitioner has been rightly rejected.

4. At the very outset, it its noted that this matter has been settled by this Court in 2013 PTD 1883 (supra) and in I.C.A. No.799/2013 dated 18.03.2014 titled "Commissioner Inland Revenue v. Nishat Dairy (Pvt.) Ltd". Therefore, there is no merit in the arguments of the learned counsel for Respondents. As per the judgment of this Court, since the Petitioner is entitled for tax exemption under Section 65D of the Ordinance it may be considered for this benefit at the beginning of the year rather than wait for adjustment at the end of the year. Furthermore, the Commissioner has to convey the entitlement for tax exemption under Section 65D of the Ordinance and issue a certificate accordingly. Consequently, this petition is allowed and Respondent No.6 is directed to consider its case for issuance of exemption certificate on merit and decide it accordingly.

MH/E-2/L Petition allowed.

PLJ 2019 Lahore (Note) 52

Present: **MRS. AYESHA A. MALIK, J.**

SUB-DIVISIONAL OFFICER (OP) FESCO--Petitioner

versus

MUHAMMAD SARWAR GONDAL and 2 others--Respondents

W.P. No. 100762 of 2017, decided on 11.9.2018.

National Electric Power Regulatory Authority Act, 1997--

----S. 38--Application regarding detection bill--Rejected--Deposit of 60% amount under protest--Appeal--Dismissed--M&T checking report--Slow meter--Concurrent findings--Challenge to--Counsel for Petitioner was confronted with clause 4.4(e) of Consume Service Manual ("CSM"), which clearly provides that a consumer could be charged maximum for two billing cycles due to slowness of meter whereas in instant case respondent was charged detection bill of Rs. 388,053/- for 40,900 units for five months by petitioner--Respondent rightly analyzed in impugned decision that billing meter of Respondent No. 1 was working correctly till February 2012 and it became 33% slow with effect from March 2012--Petition was dismissed. [Para 4] A & B

Dr. Muhammad Irtiza Awan, Advocate for Petitioner.

Date of hearing: 11.9.2018.

ORDER

Through this petition, the Petitioner has impugned the orders dated 29.11.2013 issued by Respondent No. 3 and 10.5.2017 issued by Respondent No. 2.

2. Facts of the case are that Respondent No. 1 filed an application on 31.12.2013 before Respondent No. 3 under Section 38 of NEPRA Act, 1997 stating that he received detection bill amounting to Rs. 388,053/- in the month of 6/2012. He contacted to the Petitioner but his grievance was not redressed, therefore he deposited 60% disputed amount under protest and after that the Petitioner charged Rs. 155,221/- adding in the bill for the month of 11/12. The Petitioner submitted its reply and refuted the allegations. However, Respondent No. 3 issued the impugned order dated 29.11.2013 in favour of Respondent No. 1. Aggrieved of said order, the Petitioner filed appeal before Respondent No. 2 which was also dismissed *vide* order dated 10.5.2017. Hence this petition.

3. Admittedly both the billing and backup meters of Respondent No. 1 were found 33% slow during M&T checking dated 12.3.2012, therefore, the dispute to be ascertained may be relevant for the relevant period. Due to 33% slowness of the meter, detection bill of Rs. 388,053/- for 40,900 units/86 kW for the period October 2011 to February 2012 (5 months) was charged by the Petitioner from Respondent No. 1.

4. At the very outset, learned counsel for the Petitioner was confronted with clause 4.4(e) of Consume Service Manual ("CSM"), which clearly provides that a consumer could be charged maximum for two billing cycles due to slowness of the meter whereas in the instant case Respondent No. 1 was charged the detection bill of Rs. 388,053/- for 40,900 units for five months by the Petitioner. Learned counsel for the Petitioner has no plausible explanation to offer. Furthermore, Respondent No. 2 stated that Respondent No. 3 rightly analyzed in the impugned decision that the billing meter of Respondent No. 1 was working correctly till February 2012 and it became 33% slow with effect from March 2012. Furthermore there are concurrent findings made by Respondents No .3 and 4 against which no illegality has been pointed out by the learned counsel for the Petitioner.

5. In view of the aforesaid, no case for interference is made out. Petition is dismissed.

(Y.A.) Petition dismissed

PLJ 2019 Lahore (Note) 54

Present: **MRS. AYESHA. A. MALIK, J.**

SUB-DIVISIONAL OFFICER (OP) FESCO--Petitioner

versus

ZUBAIDA BEGUM and 2 others--Respondents

W.P. No. 99893 of 2017, decided on 11.9.2018.

National Electric Power Regulatory Authority Act, 1997--

----S. 38--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Defective meter--Male functioning--Replacement of meter--Application regarding arrears--Rejected--Appeal--Dismissed--Concurrent findings--Challenge to--FESCO has charged bills with effect from 8/2011 to 1/2012 on DEF-EST basis--Impugned order further finds that new healthy meter was installed in place of disputed energy meter which has recorded correct consumption as was being utilized by Respondent No. 1, therefore FESCO is liable to charge as per readings on meter--There are concurrent findings made by Respondents No. 2 and 3 against which no illegality has been pointed out by learned counsel for Petitioner--Petition was dismissed.

[Para 3] A & B

Dr. Muhammad Irtiza Awan, Advocate for Petitioner.

Date of hearing: 11.9.2018.

ORDER

Through this petition, the Petitioner has impugned the orders dated 21.8.2014 issued by Respondent No. 3 and 8.8.2017 issued by Respondent No. 2.

2. Facts of the case are that Respondent No. 1 filed an application on 2.1.2013 before Respondent No. 3 under Section 38 of NEPRA Act, 1997 stating that she was running a business of power looms under the name of Rimsha Weaving Factory and were running 36 auto power looms of size 112 inches. She received a bill for 8/2011 amounting to Rs. 646,128/- with DEF-EST code in which an amount of Rs. 219,959/- was current bill and Rs. 426,169/-were declared as arrears. She agitated the matter before the Petitioner about the arrears. Whereupon she was told that checking team checked her meter on 23.8.2011 and declared meter as defective, therefore, impugned bill for the month of 8/2011 is prepared on DEF-EST basis. Respondent No. 1 deposited the billing amount under protest to avoid disconnection. The meter was replaced without intimation to Respondent No. 1. The Petitioner submitted its reply and refuted the allegations. However, Respondent No. 3 issued the impugned order dated 21.8.2014 in favour of Respondent No. 1. Aggrieved of said order, the Petitioner filed appeal before Respondent No. 2 which was also dismissed *vide* order dated 8.8.2017. Hence this petition.

3. The impugned order dated 21.8.2014 issued by Respondent No. 3 found that if the meter was defective, the Petitioner will charge on the basis of previous

corresponding months consumption or average of previous eleven months consumption without any previous charging. As the meter was checked by FESCO M&T checking team on 23.8.2011 and were declared as mal-functioning which was replaced in the billing month of 2/2012. Therefore prior to this, FESCO has charged the bills with effect from 8/2011 to 1/2012 on DEF-EST basis. The impugned order further finds that new healthy meter was installed in place of the disputed energy meter which has recorded correct. consumption as was being utilized by Respondent No. 1, therefore FESCO is liable to charge as per the readings on meter. The impugned order dated 8.8.2017 issued by Respondent No. 2 held that in terms of clause 4.4(e) of Consumer Service Manual, the consumer is liable to be charged on DEF-EST code due to a defective meter, which provides that the basis of charging will be 100% consumption recorded in the same month of previous year or average of the last 11 months whichever is higher. There are concurrent findings made by Respondents No. 2 and 3 against which no illegality has been pointed out by the learned counsel for the Petitioner.

4. In view of the aforesaid, no case for interference is made out. Petition is **dismissed**.

(Y.A.) Petition dismissed

2019 P T D 1628
[Lahore High Court]
Before Ayesha A. Malik, J
QAISAR ABBAS
Versus
The MEMBER (TAXES), BOARD OF REVENUE, PUNJAB, LAHORE and 3 others
Writ Petition No. 25557 of 2019, decided on 12th July, 2019.

(a) Punjab Agricultural Income Tax Act (I of 1997)---

----Ss. 4(4) & 3---Charge of agricultural income tax on basis of income tax return---Assessment and collection of agricultural income tax---Limitation period for recovery of agricultural income tax---Question before the High Court was whether notice for recovery of agricultural tax under Punjab Agricultural Income Tax Act, 1997 pertaining to years 2012 and 2013, was recoverable under notice served upon taxpayers in the year 2019, which was identical to a notice served upon said taxpayers in the year 2014---Held, that data contained in impugned notice was identical to notice served upon taxpayers in the year 2014, and therefore it was not barred by limitation and agricultural income tax was recoverable under the impugned notice, however any such recovery would be subject to right to appeal for taxpayer under S. 7 of the Punjab Agricultural Income Tax Act, 1997.
Member (Taxes), Board of Revenue, Punjab, Lahore and others v. Qaisar Abbas and others 2019 SCMR 446 rel.

(b) Punjab Agricultural Income Tax Act (I of 1997)---

----Ss. 3B, 3, 4A & 7---Charge of agricultural income tax on the basis of income tax return---Application of S.3B of the Punjab Agricultural Income Tax Act, 1997---Computation of agricultural income---Right of appeal under S.7 of the Punjab Agricultural Income Tax Act, 1997---Determination of substantial issues before charging of agricultural income tax---Due process---Scope----Assessment order was not required under S. 3B of the Punjab Agricultural Income Tax Act, 1997 and recovery could be initiated on basis of declaration made in an income tax return---Such process did not however curtail right of appeal under S.7 of the Punjab Agricultural Income Tax Act, 1997 nor did it allow Department to ignore procedure prescribed under the Punjab Agricultural Income Tax Act, 1997 and Rules framed thereunder, especially with reference to computation of tax----Assessment order was not mandatory under S.3B of the Punjab Agricultural Income Tax Act, 1997 however any assessment order could be challenged under S.7 of the Punjab Agricultural Income Tax Act, 1997---Calculations must be provided of tax levied and Department was required to disclose information taken from Federal Board of Revenue, rate applied and tax sought to be recovered in recovery notices under Punjab Agricultural Income Tax Act, 1997 so that taxpayer was clear on what amount was due against agricultural income tax---Objections with regard to limitation; jurisdiction, amount sought to be recovered, ownership and exemptions

offered by Government itself required due deliberation and entitled the taxpayer due process under the Punjab Agricultural Income Tax Act, 1997.
Member (Taxes), Board of Revenue, Punjab, Lahore and others v. Qaisar Abbas and others 2019 SCMR 446 rel.

(c) Interpretation of statutes---

----Taxing statutes---Nature of statutory appeal provided for in a taxing statute---Scope---In any taxing scheme, right of appeal was provided under law to resolve disputes of liability to pay tax and such right of appeal was a statutory right under a taxing statute, which meant that any recovery under such statute was subject to said right of appeal---Assessment order was necessary in a taxing statute in order to support demand raised and to ensure that taxing officer had taxed a person as per the confines of law----Such assessment order ensured uniformity and equality in demand raised in absence of which doubt was raised and arbitrary exercise of jurisdiction was possible, as there existed no check on a taxing officer, and a citizen was substantially without protection from unequal and unjust demands.

Rai Muhammad Yaseen, Ch. Muhammad Mohsin Virk, Mrs. Samia Khalid, Sayyid Ali Imran Rizvi, Masood Ahmad Wahla, Rana Sajid Rasool, Malik Muhammad Shahbaz Awan, Malik Rizwan Khalid Awan, Masood Ahmad Zafar, Sh. Muhammad Akram, Ch. Rehmat Ali, Muhammad Saleem Chaudhary, Touqeer Khalil, Muhammad Akram Awan, Ch. Imtiaz Ahmad Kamboh, Wajahat Abbas Khan, Imtiaz Hussain Khan Baloch, Shahjahan Khan, Salman Faisal, M.A. Ghaffar-ul-Haq, Shan Saeed Ghumman, Shamshad Ahmad Bajwa, Ms. Sufia Qazi, Hassan Majeed, Rana Salman Intizar, Imdad Ali Nekokara, Mian Subah Sadiq Klasoon, Ghulam Murtaza, Mughees Ahmad Khokhar, Mian Shahid Ali Shakir, Mian Faisal Naseer, Muhammad Ozair Chughtai, Ch. Shakeel Gondal, Rana Sarfraz Ahmad, Khalid Mehmood Khan, Rana Kashif Iqbal, Rana Muhammad Afzaal, Mian Nasir Mehmood Wattoo, Niaz Ahmad Phularwan, Mian Khuram Sadiq, Rana Mushtaq Ahmad Toor, Muhammad Anas Bin Ghazi, Muhammad Arif Malhi, Javed Iqbal Kahloon, Muhammad Ishnaq Saho, Zia Haider Rizvi, Sajjad Haider Rizvi, Syed Qasim Ali Kasuri, M. Aurangzeb Khan Daha, Farhan Shahzad, Ch. Shahid Hanif Jatt, Mian Shahzad Siraj Chabay, Waqar Mushtaq, Ch. Muhammad Imran Rafique, Ehsan Ullah Ranjha, Inaam ul Haq Faiz Bhatti, Hammad ul Hassan Hanjra, Nauman Aziz, Rana Sohail Ashraf, Muhammad Ajmal Khan, Babar Niaz Dhaddar, Muhammad Zafar Iqbal Mian, Waseem Ahmad Malik, Muhammad Ahmad Bhatti, Muhammad Naeem Munawar, Rana Tasgheer Ahmad Khan, Ch. Shoukat Ali, Muhammad Akram Sheikh, Muhammad Shabbir Sanpal, Rana Kashif Iqbal, Muhammad Waqar Akram, Ch. Qamar-uz-Zaman, Hashim Aslam Butt, Rasheed Ahmad Sheikh, Muhammad Rehan Sarwar, Muhammad Shabbir Sial, Muhammad Saqib Sheikh, M. Safdar Abbas Khan, Shakeel Ahmad Basra, Mian Mansoor Ahmad, Muhammad Ayyub Aheer, Rai Amer Ijaz Kharal, Pir Muhammad Asharf Chishti, Ch. Muhammad Jehangir Wahla, Abdul Khaliq Safrani, Touseef Riaz Ghumman, Ghulam Mustafa Khan, Abdul Waheed Habib, Abdul Rauf Chaudhary, Muhammad Farooq Sheikh, Sardar Muhammad Ramzan, Sardar Muhammad Sadiq

Tahir, Sajid Hussain Chaudhary, Farid Adil Chaudhary, Abdul Razzaq, Saleem Raza Asim, Sagheer Ahmad, Muhammad Imran Khan, Rabeel Qader, Muhammad Naveed Shabbir Goraya, A.S. Arieen, Ijaz Ali Bhatti, Muhammad Waqas Latif, Javed Anwar Janjua, Hafiz Ansar ul Haq, Muhammad Younas Khalid, Ali Husnain Buttar, Hamza Shahid Buttar, Ch. Muhammad Shakeel, Rai Akhtar Suleman, Mian Haseeb ul Hassan, Ch. Shabbir Hussain, Rai Muhammad Shahbaz Bhatti, Aurangzeb Chaudhry, Shahid Mehmood Khan Khilji, Ch. Basharat Ali, Mian Mansoor Ahmad, Ms. Nargis Naheed, Mian Muhammad Javed, Nasir Ahmad Awan, Muhammad Ahmad Pansota, Syed Zeeshan Haider Zaidi, Azeem Hafeez, Muhammad Younas Khalid, Shahzad Mansoor Khan, Muhammad Aamir Qadeer, Mian Shahid Ali Shakir, Muhammad Imran, Ch. Muhammad Shakeel Gondal, Ch. Nayyar Jamal, Abdul Razzaq, Saad Rasool, Sh. Sakhawat Ali, Zahid Imran Gondal and Farrukh Ilyas Cheema, Malik Muhammad Azam Awan, Mian Muhammad Hussain Chotiya, Barrister Aon Abbas Khan Sial, Malik Muhammad Riaz Tabassum, Najam ul Hassan, M. Zafar Iqbal, Malik Muhammad Nadeem, Malik Bashir Ahmad Khalid, Ch. Khalid Masood, Muhammad Yousaf Lurka, Mehar Mohsin Ali, Fida Hussain Matta, Jamil Akhtar Baig, Malik Muhammad Arshad Kundi, Syed Waqar Hussain Naqvi, Pir Muhammad Asad Shah for Petitioners.

Akhtar Javed, Additional Advocate General, Punjab along with Nadeem Abbas Bhangu, Secretary (Taxes), Board of Revenue, Lahore, Ijaz Bhutta, Deputy Secretary (Recovery), Board of Revenue, Lahore, Muhammad Haroon Rasheed, Tehsildar, Kot Radha Kishan, District Kasur, Azam Shaigan, Tehsildar Cantt. Lahore, Ahmad Raza Sultan, Tehsildar, Renala, Mian Aslam, Tehsildar, Pir Mahal, Ghulam Abbas, Naib Tehsildar, Jhang, Muhammad Ashraf, Naib Tehsildar, Pakpattan, Rana Amjad Mehmood, Tehsildar Depalpur, Ghulam Rasool, Naib Tehsildar, Pindi Bhattian for Respondents

Sarfraz Ahmad Cheema for Respondent, FBR (in W.P. No.34464 of 2019).

Mrs. Kausar Parveen for Respondent FBR in (W.P. No.32452 of 2019 and 38264 of 2019).

Shahzad Ahmad Cheema for Respondent FBR (in W.P. No.38264 of 2019).

Muhammad Akram Awan for Respondent FBR (in W.P. No.31707 of 2019).

Javed Athar for Respondent Commissioner Inland Revenue, Lahore for Respondents (in W.P. No.30455 of 2019).

Date of Hearing: 27th June, 2019.

JUDGMENT

AYESHA A. MALIK, J.---This common judgment decides upon the issues raised in the petitions detailed in Schedule "A" appended with the judgment as all petitions raise common questions of law and facts. The Petitioners have challenged notices issued under Section 3B of the Punjab Agricultural Income Tax Act, 1997 ("Act") by the Respondents for recovery of agricultural income tax.

2. The basic case of the Petitioners is the same. They have received notices of recovery of agricultural income tax for the assessment years 2012, 2013, 2014, 2015, 2016, 2017 and 2018. The Petitioners' contention is that these notices are

barred by time as the Respondents cannot recover agricultural income tax beyond the two year limit prescribed, meaning thereby that if notices are issued in the year 2019, the Respondents can only recover agricultural income tax for the assessment years 2016-17 and 2017-18. It is also their contention that the Respondents have issued recovery notices on the basis of which they seek immediate recovery which denies the Petitioners the right to appeal as prescribed under the law. It is also their case that the amount sought to be recovered is not in accordance with law and the Respondents have failed to take into consideration factors such as that the Petitioners have not declared agriculture income tax in the returns filed by them or that they have not filed any income tax return; exemptions granted to the Petitioners by the Government of Punjab on account of flood and drought have not been considered; the fact that the Petitioners to whom the notices have been issued are not the owners of the property, hence not liable to pay the agricultural income tax; that the tax has already been paid or simply that the amounts sought to be collected have been miscalculated and are excessive amounts than the actual liability, if any, of the Petitioners. Some of the petitions have also alleged lack of jurisdiction of the Respondents as the subject land is not located in the Province of Punjab or the district. It is their contention that under the Act, the Petitioners are entitled to the right of appeal in terms of Section 7 of the Act which right cannot be exercised if the Respondents issue recovery notices without passing an assessment order. It is also their case that in the very least, the Respondents must hear the objections of the Petitioners with respect to the amounts sought to be recovered so as to ensure that if at all there is any liability for any assessment year, then the Petitioners are made liable to pay amounts that are due from them and not otherwise.

3. Report and parawise comments have been filed on behalf of the Respondents. Learned Law Officer stated that report and parawise comments filed in some of the petitions may be read into all the petitions as the grounds stated in the petitions are essentially the same. He stated that the Deputy Secretary (Recovery), Board of Revenue, Punjab vide letter dated 19.2.2019 and the Secretary (Taxes), Board of Revenue, Punjab vide letter dated 20.3.2019 brought to the notice of all Assistant Commissioners in Punjab that the august Supreme Court of Pakistan vide judgment dated 8.1.2019 titled Member (Taxes), Board of Revenue, Punjab, Lahore and others v. Qaisar Abbas and others (2019 SCMR 446) has allowed Assistant Commissioners to collect agricultural income tax from the persons who have declared agricultural income in their returns filed under the Income Tax Ordinance, 2001 ("Ordinance") in terms of Section 3B of the Act. As per their understanding, Section 3B read with Section 4(4) of the Act allows the Respondents to recover agricultural income tax for the assessment year 2012 onwards. Learned Law Officer argued that in terms of the dicta laid down by the august Supreme Court of Pakistan in 2019 SCMR 446 (supra) the Respondents are not required to levy or assess agricultural income tax rather they can issue notices for direct recovery against income declared. Hence notices were issued for payment within 15 days. He further argued that after the expiry of 15 days amounts can be recovered as arrears of land revenue as provided under the Punjab Agricultural Income Rules, 2001 ("Rules"). In order to facilitate the objective to recover all amounts due as agricultural income

tax, the Board of Revenue obtained a list of persons who have declared agricultural income in their returns for the tax years 2012-13 and 2013-14 onwards. The lists were consulted and on the basis of the data provided, district-wise lists were issued to the field formations for issuance of recovery notices. Hence he stated that the data provided in the notices is correct and as per the declarations made by the Petitioners in their income tax returns with respect to agricultural income tax. Therefore, the notices are not barred by time as the matter has just been decided by the august Supreme Court of Pakistan in 2019 SCMR 446 (supra). The learned Law Officer argued that in terms thereof, the Respondents are entitled to recover agricultural income tax for the year 2012 onwards.

4. In terms of the arguments made from both sides, there are two issues which need adjudication. The first issue is whether the recovery notices issued are barred by time and secondly whether as a consequence of the recovery notices issued under Section 3B of the Act, the Petitioners are entitled to file an appeal/objections against the amounts sought to be recovered. With respect to the first issue, the august Supreme Court of Pakistan in 2019 SCMR 446 (supra) considered whether notices issued for the assessment year 2014 for recovery of agricultural income tax under Section 3B of the Act could have been issued at that time, given that Section 3B was inserted through the Finance Act on 29.6.2013 and came into force on 1.7.2013. As per the judgment the relevant assessment year began on 1.7.2014, in terms of the definition of the assessment year given in Section 2(ac) of the Act. The august Supreme Court of Pakistan concluded that the Respondents could recover agricultural income tax for the past two years, being the assessment years 2012 and 2013. Hence in terms of the decision of the august Supreme Court of Pakistan, the Respondents are entitled to recover, as arrears of agricultural income tax for the assessment years 2012 and 2013. In this regard, it is noted that earlier notices were issued to the Petitioners including the Petitioner Qaisar Abbas in the instant petition, which were challenged before this Court in W.P. No.15628/ 2015 and ultimately the order of this Court dated 26.10.2015 was modified by the august Supreme Court of Pakistan to the extent that recovery for the years 2012 and 2013 was allowed. Hence it is clear that in terms of the decision of the august Supreme Court of Pakistan, the Respondents are entitled to recover agricultural income tax for the assessment years 2012 and 2013.

5. The dispute before the Court is due to the fact that the Respondents initiated a fresh process to recover agricultural income tax on the basis of which fresh notices were issued in 2019 for recovery of agricultural income tax for the years 2012 and 2013. Hence the Petitioners before the Court have raised the objection of limitation. Essentially the Respondents were required to issue recovery notices for the years 2012 and 2013 based on the original notices issued in the year 2014 for the assessment years 2012 and 2013 which were challenged in W.P. No. 15628/2015 and connected petitions and by referring to the decision of the august Supreme Court of Pakistan, notifying the Petitioners that they are now liable to pay the said amounts as the august Supreme Court of Pakistan has decided in favour of the Revenue Department. The fact that the Respondents did not mention the decision of

the august Supreme Court of Pakistan in the notices issued in 2019 nor have they mentioned that the demand raised is as per the original demand raised in 2014, has led to confusion consequent to which so many petitions have been filed before the Court.

6. On this issue, the learned Law Officer was confronted with the notices issued in 2019 and was asked to explain whether the data contained in these notices are identical to the data contained in the original notices issued in 2014 for the assessment years 2012 and 2013. In terms of the detailed reply and list provided, he states that the data is the same and it is based on the information provided by the Petitioners in their income tax returns as obtained from the Federal Board of Revenue. Therefore it is his contention that for the purposes of the petitions before the Court, the Respondents are entitled to recover agricultural income tax for the assessment years 2012 and 2013 on the strength of the decision of the august Supreme Court of Pakistan. To this extent, the contention of the learned Law Officer is correct and the Respondents are entitled to recover agricultural income tax based on the original notices issued in 2014. However any recovery will be subject to the right of appeal under Section 7 of the Act. So far as to the recovery notices issued for the assessment years 2014, 2015 and 2016 the question of limitation has to be looked into in the first instance before any recovery can be made. It is also noted that since right of appeal is available under the Act, propriety demands that the objection of limitation be decided by the competent authority under the Act in order to streamline the process of recovering agricultural tax. Hence the second issue becomes relevant on whether the Petitioners can file objections/appeal against the recovery notices.

7. The Petitioners have a right of appeal against the amounts sought to be recovered under Section 7 of the Act which provides that for the purposes of appeal, review or revision, an order passed under this Act shall be deemed to be an order of a Revenue Officer within the meanings of Sections 161, 162, 163 and 164 of the Punjab Land Revenue Act, 1967, provided that proceedings of suo motu, review or revision of an order in respect of any income year shall not be initiated after the expiration of two years from the end of the assessment year in which the total agricultural income of the said income year was first assessable. In any taxing scheme the right of appeal is provided under the law to resolve disputes of liability to pay tax. The right of appeal is a statutory right under the Act which means that any recovery is subject to the right of appeal.

8. In the cases before the Court several objections have been raised with respect to jurisdiction being that the notices issued have not been issued from the Assistant Commissioner of the relevant district where the agricultural property is located. By way of example in W.P. No.34758/19, the Petitioner is resident of District Sheikhupura whereas the notice has been issued by Assistant Commissioner, Lahore. In W.P. No.39480/19, the Petitioner is resident of District Narowal whereas the agriculture land is situated in North Wazirastan. In other cases objections have been raised that the Petitioners do not own any agricultural land nor have the

Petitioners declared any agricultural income or that the Petitioner has never filed any income tax return. By way of example in W.P. No.40004/19, the Petitioner claims that she is a housewife with no source of income except for foreign remittance from a family member; that she has never filed any income tax return nor declared any agricultural income yet she has been served with a recovery notice. In another set of cases, the Petitioners claim exemption on the basis of notification issued by the Disaster Management Department declaring their area exempt from agricultural income tax for the relevant years 2012, 2013, 2014, 2015 and 2016. Hence on the strength of the notifications they claim that they are not liable to pay agricultural income tax. By way of example, the Petitioner in W.P. No.39556/19 states that he is entitled to exemption from agricultural income tax on the basis of notification dated 23.5.2012, 28.7.2016, 2.6.2017 and 21.1.2019. In another set of petitions, the Petitioners claim that they are not the owners of any agricultural land nor have they declared any agricultural income in their income tax returns yet they have been served with recovery notices. In W.P. No.36974/2019, the Petitioner claims that he has never filed any income tax returns, hence the question of applying Section 3B of the Act is totally without jurisdiction. In other cases, the Petitioners claim that they have already paid the total agricultural income tax yet notices have been issued. By way of example in W.P. No.36709/2019, the Petitioner claims that he has paid the total agricultural income tax for the years 2015, 2016, 2017 and 2018, hence he is not required to pay any amount. In another set of petitions, the Petitioners' claim that they took the benefit of amnesty scheme, 2018, hence they are not liable to pay agricultural income tax. These are all substantive issues which need resolution under the Act before any recovery can be initiated.

9. On the basis of the aforesaid, it is evident that notwithstanding the statement made by the learned Law Officer, that all amounts were correctly taken from the data provided by the Federal Board of Revenue is correct, there are discrepancies in the recovery notices that have been issued. The question is what is the effect of Section 7 of the Act when recovery notices are issued under Section 3B of the Act. In this regard, the august Supreme Court of Pakistan in its decision 2019 SCMR 446 (supra) held that for the purposes of Section 3B of the Act, where an assessee has declared agricultural income in its income tax returns, the Respondents can issue recovery notices directly and are not required to levy and assess agricultural income tax in terms of Section 3 of the Act. Essentially the august Supreme Court of Pakistan has held that the Respondents are entitled to recover agricultural income tax on the basis of the declaration given in the income tax returns, as per Section 3B of the Act. In a taxing statute an assessment order is necessary in order to support the demand raised and to ensure that the taxing officer has taxed a person as per the confines of the law. It ensures uniformity and equality in the demand raised in the absence of which doubt is raised and arbitrary exercise of jurisdiction is possible as there is no check on the taxing officer, and a citizen is substantially without protection from unequal and unjust demands. Under the Act Section 3 is the charging section which calls for the levy, assessment and collection of tax. Three important steps on the basis of which agricultural income tax can be recovered. In this regard Section 3B of the Act merely provides that a person is liable to pay

agricultural income tax on the basis of agricultural income declared in the income tax return. Hence it imposes a liability to pay tax on the basis of an admission of earning agricultural income. Sections 3 and 3B of the Act are the charging sections of the taxing statute which have to be enforced through the procedure prescribed under the Act. The procedural machinery is provided for under Sections 4, 4A, 4B, 4C and 4D read with the Rules. These sections set out the process on the basis of which the taxing officer will compute and collect agricultural income tax and the recovery notice is the final step that has to be taken once tax has been charged. A recovery notice means that the liability to pay tax has been determined, in this case based on the declaration given under Section 3B of the Act. However it does not mean that the taxing officer cannot assess and levy agricultural income tax on the basis of the revenue record before it. Hence a recovery notice is premised on an assessment order which sets out the details of the tax liability. In the cases of agricultural income tax the august Supreme Court of Pakistan has held that an assessment order is not required under Section 3B of the Act and that the Respondents can initiate recovery on the basis of the declaration made in the income tax return. However it has not curtailed the right of appeal under Section 7 of the Act nor has it allowed the Respondents to ignore the procedure prescribed under the Act and the Rules especially with reference to computation of tax. In terms of the decision of the august Supreme Court of Pakistan, the judgment of this Court in W.P. No. 15628/2015 was modified to the extent that an assessment order is not mandatory under Section 3B of the Act, however at the same time the august Supreme Court of Pakistan upheld the findings that the assessment order can be challenged under Section 7 of the Act which gives the right of appeal to the taxpayer and it has also upheld the findings that calculations must be provided of the tax levied. Therefore the Respondents are required to disclose the information taken from the Federal Board of Revenue, the rate applied and the tax sought to be recovered in the recovery notices so that the taxpayer is clear on what amount is due against agricultural income tax.

10. It is further noted that the Respondents must follow the procedure under the Act and the Rules to ensure that the rights of the land owners are protected and that the obligation to pay tax follows due process. There is a complete procedure provided under the Act and the Rules to collect agricultural income tax which requires the Respondents to issue notice to the taxpayer calling for payment and requires, as of right that the taxpayer be given time to file an appeal, review or revision against the order of Revenue Officer. It appears that the Respondents failed to bring these facts into the notice of the august Supreme Court of Pakistan while arguing in the case 2019 SCMR 446 (supra) and are now misinterpreting the judgment of the august Supreme Court of Pakistan by ignoring the statutory right of appeal, review or revision available under Section 7 of the Act.

11. The thrust of the Respondents' case before the Court is that they can make direct recovery on the strength of the agricultural income declared under Section 3B of the Act. There is no cavil to the statement because the law itself provides that the Respondents can recover agricultural income tax on the basis of declared

agricultural income in the income tax returns for any assessment year filed under the Act in terms of the rates specified in the second schedule. However the taxpayer has a right to appeal against the amount sought to be recovered even if it is based on a declaration in the income tax return and direct recovery inflicted by the Respondents adversely affects the Petitioners' right of appeal under Section 7 of the Act. Furthermore the objections raised before this Court are substantive issues and necessitate a decision by the competent authority before agricultural income tax is recovered. In the cases before the Court objections with regard to limitation; objections with regard to jurisdiction; with regard to amount sought to be recovered; with regard to ownership and with regard to exemptions offered by the Government itself require due deliberation and entitle the Petitioners due process under the Act.

12. Under the circumstances, the recovery notices issued under Section 3B of the Act shall be deemed as assessment orders which are liable to appeal under Section 7 of the Act. The Respondents are obligated to hear the objections and decide the same in accordance with law. For the purposes of the cases pending before this Court and the recovery undertaken by the Respondents for agricultural income tax, the Petitioners should be granted thirty days' time to file their appeals/objections, if at all under Section 7 of the Act after which the cases shall be decided in accordance with law and subsequently if any amount is due the Respondents may recover the same under the Act and the Rules.

13. In view of the aforesaid, while partly allowing the Petitions, this Court finds as follows:
(i) The Petitioners' contention that demand for agricultural income tax for the years 2012 and 2013 is barred by time is without any merit given that the august Supreme Court of Pakistan has allowed recovery of agricultural income tax for that period. However, the amount sought to be recovered as agricultural income tax for the period 2012 and 2013 is subject to right of appeal/objections which may be availed by the Petitioners within 30 days' time from the date of release of this judgment.
(ii) It is also held that against the recovery notices issued under Section 3B of the Act, remedy of appeal is available to the Petitioners under Section 7 of the Act. In this regard, the recovery notices can be challenged within 30 days' time from the date of release of this judgment under Section 7 of the Act before the competent authority, who is directed to decide the appeals filed by the Petitioners within 30 days' time after which the Respondents can recover agricultural income tax from the Petitioners as per law.
SCHEDULE-A
Details of Writ Petitions mentioned in judgment
Dated 27.6.2019 passed in W.P. No. 25557/2019

Sr. No.	WP No.	Parties Name
1.	25557/19	Qaisar Abbas v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
2.	36000/19	Shahid Mahmood v. Government of Punjab through Secretary

Finance etc.

3. 36125/19 Sheikh Muhammad Nassar Javaid v. Federation of Pakistan etc.
4. 36132/19 Malik Mureed Hussain v. Federation of Pakistan etc.
5. 36138/19 Shaikh Marije Javaid v. Federation of Pakistan etc.
6. 36158/19 Nadeem Mumtaz v. Government of Punjab through its Chief Secretary etc.
7. 36140/19 Muhammad Saqib Javaid v. Federation of Pakistan etc.
8. 36159/19 Zia ur Rehman Shakir v. The Member (Taxes) Board of Revenue, Punjab Lahore etc.
9. 36175/19 Abid Hussain Bhatti v. Government of Punjab through Chief Secretary etc.
10. 36177/19 Javaid Iqbal v. Federation of Pakistan etc.
11. 36269/19 Syed Muhammad Raza v. Government of Punjab through Chief Secretary etc.
12. 36270/19 Rehan Nawaz etc. v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
13. 36284/19 Ijaz Ahmad Hashmi v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
14. 36441/19 Altaf Ezid Khan v. Federation of Pakistan etc.
15. 36344/19 Akhlaq Ahmad Hashmi v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
16. 36416/19 Muhammad Yousaf v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
17. 36466/19 Mian Muhammad Farooq etc. v. Federation of Pakistan etc.
18. 36526/19 Safdar Saleem v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
19. 36604/19 Sana Ullah Qamar Bajwa v. Federation of Pakistan etc.
20. 36613/19 Ansar Abbas Khan v. Federation of Pakistan etc.
21. 36698/19 Ch. Pervaiz Akhtar v. Chairman Federal Board of Revenue, Islamabad etc.
22. 36709/19 Asif Mahmood v. Federation of Pakistan etc.
23. 36760/19 Muhammad Bilal Virk v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
24. 36794/19 Mian M. Ashraf v. Federation of Pakistan etc.
25. 36798/19 Zafar Alam Chaudhry v. Government of Punjab through Chief Secretary etc.
26. 36824/19 Syed Muhammad Raza v. Government of Punjab through Chief Secretary etc.
27. 36934/19 Muhammad Ayub Khan v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

28.	36966/19	Dost Muhammad v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
29.	36969/19	Junaid Fareed Dah v. The Assistant Commissioner / Collector City Lahore etc.
30.	36972/19	Mehr Muhammad Ashraf v. Federation of Pakistan etc.
31.	36974/19	Naeem Akhtar v. Federation of Pakistan etc.
32.	36981/19	Javed Hussain v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
33.	37020/19	Muhammad Iqbal v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
34.	37021/19	Manzoor Ahmad v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
35.	37048/19	Mian Shahzad Ahmad v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
36.	37062/19	Sadia Waqar v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
37.	37064/19	Syed Ali Kazim v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
38.	37065/19	Syed Afzal Hussain Shah v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
39.	37091/19	Mian Muhammad Waqar Ahmad v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
40.	37108/19	Ghazanfar Abbas v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
41.	37111/19	Sikandar Khan v. The Assistant Commissioner/Collector, Lahore etc.
42.	37150/19	Faisal Mehmood Khan v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
43.	37222/19	Areeb Burhan v. Member (Taxes) Board of Revenue Punjab Lahore etc.
44.	37226/19	Muhammad Omer Khan v. Federation of Pakistan etc.
45.	37227/19	Muhammad Farooq Khan v. Federation of Pakistan etc.
46.	37228/19	Dr. Nasir Mumtaz Gorya v. Federation of Pakistan etc.
47.	37229/19	Mehar Ghulam Farid v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
48.	37239/19	Arfan Saddique v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
49.	37240/19	Malik Iftikhar Sarwar v. Federation of Pakistan etc.
50.	37259/19	Rana Habib v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

51. 37260/19 Rana Awais Tauseef v. Secretary/Member (Taxes) (Agriculture Income Tax) Board of Revenue, Punjab Lahore etc.
52. 37591/19 Muhammad Sabir Ali v. Government of Punjab through its Secretary Ministry of Finance etc.
53. 37598/19 Irfan Mumtaz v. Government of Punjab through its Chief Secretary etc.
54. 37625/19 Manzoor Hussain v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
55. 37628/19 Qamar Zaman v. Federation of Pakistan etc.
56. 37629/19 Ahmed Sultan Cheema v. Federation of Pakistan etc.
57. 37644/19 Zia ud Din v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
58. 37645/19 Syed Safdar Huissain Gillani v. Federation of Pakistan etc.
59. 37756/19 Syed Tayyab Hussain Rizvi v. Government of Punjab through its Chief Secretary etc.
60. 37668/19 Haji Muhammad Younis v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
61. 37778/19 Syed Yousaf Jamil Hussain Rizvi v. Government of Punjab through its Chief Secretary etc.
62. 37805/19 Nazir Ahmed Qamar v. Federation of Pakistan etc.
63. 37864/19 Omer Pasha Chaudhry v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
64. 37874/19 Haji Fayyaz Ahmed etc v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
65. 37879/19 Muhammad Arif Liaqat v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
66. 37894/19 Abid Rasheed v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
67. 37920/19 Rab Nawaz v. Federation of Pakistan etc.
68. 37966/19 Sardar Bahadar Khan Maken v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
69. 37967/19 Ijaz Ahmed v. Federation of Pakistan etc.
70. 37210/19 Akhtar Umar Hayat Lalika v. Federation of Pakistan etc.
71. 38264/19 Mehar Muhammad Iqbal v. Federation of Pakistan etc.
72. 31207/19 Muhammad Saeed Akhtar v. Government of Punjab through its Chief Secretary etc.
73. 31973/19 Amjad Tofique v. Government of Punjab through its Chief Secretary etc.
74. 32072/19 Muhammad Afzaal Shah v. Federation of Pakistan etc.
75. 32073/19 Muhammad Amin Shah v. Federation of Pakistan etc.

76. 32075/19 Muhammad Akram Shah Hashmi v. Federation of Pakistan etc.
77. 32423/19 Muhammad Naseem Tahir v. Federation of Pakistan etc.
78. 32450/19 Tasneem Akhtar v. Federation of Pakistan etc.
79. 32452/19 Ghulam Dastgir Lak v. Federation of Pakistan etc.
80. 32919/19 Malik Saeed Ahmad v. Federation of Pakistan etc.
81. 33009/19 Aftab Iqbal Dillon v. Federation of Pakistan etc.
82. 33245/19 Zafar Iqbal v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
83. 33279/19 Usman Khalid v. Federation of Pakistan etc.
84. 33778/19 Wali Muhammad Chaudhry v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
85. 33780/19 Tariq Javid v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
86. 33940/19 Faiza Ahmad Malik v. Federation of Pakistan etc.
87. 34014/19 Asif Manzoor Ahmad etc. v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
88. 34084/19 Muhammad Nazir v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
89. 34088/19 Noor Muhammad v. Federation of Pakistan etc.
90. 34120/19 Rana Tahseen Ikhlaq v. Federal Board of Revenue through its Chairman etc.
91. 34140/19 Salim Shahid Sattar v. Federation of Pakistan etc.
92. 34146/19 Mian Zahid Hussain Khan v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
93. 34148/19 Abu Bakar Sarfraz v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
94. 34174/19 Babar Sibtain v. Federal Board of Revenue through its Chairman etc.
95. 34378/19 Sheharyar Ali v. Federation of Pakistan etc.
96. 34464/19 Wasif Ali Khan v. Federation of Pakistan etc.
97. 34614/19 Ghulam Sarwar v. Federation of Pakistan etc.
98. 34691/19 Azhar Abbas v. Federation of Pakistan etc.
99. 34697/19 Muhammad Ramzan v. Federation of Pakistan etc.
100. 34736/19 Faiz Rasool v. Government of Punjab through its Chief Secretary etc.
101. 34742/19 Shahid Rasool v. Goverment of Punjab through its Chief Secretary etc.
102. 34744/19 Muhammad Naeem v. Government of Punjab through its Chief Secretary etc.

103. 34754/19 Malik Muhammad Akhtar Awan v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

104 34758/19 Zubair Rasool v. Government of Punjab through its Chief Secretary etc.

105. 34831/19 Ch. Muhammad Saleem v. Federation of Pakistan etc.

106. 35073/19 Allah Nawaz Khan v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

107. 35074/19 Allah Nawaz Khan v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

108. 35082/19 Ahmad Ijaz Khan v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

109. 35085/19 Muhammad Faheem Khalid v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

110. 35095/19 Muhammad Khalid v. Federation of Pakistan etc.

111. 35096/19 Chaudhry Muhammad Ashraf v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

112. 35265/19 Ijaz Hussain v. Federation of Pakistan etc.

113. 35270/19 Ch. Qamar uz Zaman v. Federation of Pakistan etc.

114. 35274/19 Shah Nawaz Zulfiqar v. Federation of Pakistan etc.

115. 35309/19 Khuram Munawar Manj v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

116. 35311/19 M. Bilal Virk v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

117. 35330/19 Tahseen Rana v. Government of Punjab through its Chief Secretary etc.

118. 35350/19 Ali Raza v. Federation of Pakistan etc.

119. 35357/19 Zulfiqar Ali v. Federation of Pakistan etc.

120. 35359/19 Muhammad Iqbal v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

121. 35384/19 Salman Nasir Khan v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

122. 35658/19 Mehar Liaqat Ali Chaudhry v. Federation of Pakistan etc

123. 35686/19 Rana Naveed Afzal Khan v. Federal Board of Revenue through its Chairman etc.

124. 35799/19 Muhammad Imran v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

125. 35836/19 Muhammad Zul Sabtain Amir v. Federal Board of Revenue through its Chairman etc.

126. 35862/19 Muhammad Ajmal Aziz v. Government of Punjab through its Chief Secretary etc.

127. 35965/19 Faisal Rasheed Chaudhry v. Federation of Pakistan etc.
128. 35974/19 Abdul Rauf v. Federation of Pakistan etc
129. 35976/19 Farooq Rasheed v. Federation of Pakistan etc.
130. 35987/19 Maqbool Qadir v. Federal Board of Revenue through its Chairman etc.
131. 35354/19 Muhammad Omar Hayat v. Federation of Pakistan etc.
132. 35072/19 Allah Nawaz Khan v. Member (Taxes) Board of Revenue, Punjab Lahore etc
133. 35310/19 Munawar Hussain Manj v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
134. 35468/19 Rana Noraiz Bashir Ahmad Khan v. Federal Board of Revenue through its Chairman etc.
135. 35594/19 Muhammad Ishfaq v. Federation of Pakistan etc.
136. 35596/19 Rukhsana Naseem v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
137. 35650/19 Muhammad Aslam Khan v. Member (Taxes) Board of Revenue, Punjab Lahore etc
138. 35688/19 Rana Mujeeb Afzal Khan v. Federal Board of Revenue through its Chairman etc
139. 37523/19 Tahir Mehmood v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
140. 37623/19 Javed Qayyum v. Member (Taxes) Board of Revenue, Punjab, Lahore etc.
141. 37635/19 Farrukh Hayat Pannoun v. Government of Punjab through its Chief Secretary etc.
142. 37709/19 Syed Zia Haider Rizvi v. Government of Punjab through its Chief Secretary etc.
143 37717/19 Muhammad Zahid v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
144. 37735/19 Sarfraz Hussain Abadi v. Federation of Pakistan etc.
145. 37737/19 Khaqan Khawar v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
146. 37740/19 Rai Muhammad Yasin Khawar v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
147. 37781/19 Syed Sajjad Haider Rizvi v. Government of Punjab through its Chief Secretary etc.
148. 37811/19 Belum Husnain v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
149. 37863/19 Hamid Mehmood Cheema v. Federation of Pakistan etc.
150. 37867/19 Sikandar Hayat v. Member (Taxes) Board of Revenue, Punjab

Lahore etc.

151. 37869/19 Iftikhar Ahmad v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

152. 37880/19 Rana Waseem Liaqat v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

153. 37881/19 Salah ud Din Khan v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

154. 37893/19 Majid Rasheed v. Member (Taxes) Board of Revenue, Punjab Lahore etc

155. 37922/19 Khuda Dad v. Federation of Pakistan etc.

156. 37935/19 Tasneem Akhtar v. Federation of Pakistan etc.

157. 37955/19 Khan Muhammad through M. Waqas v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

158. 37956/19 Zaigham Abbas Asghar v. Federation of Pakistan etc.

159. 37965/19 Rehan Ajmal v. Federation of Pakistan etc.

160. 38034/19 Dr. Noreen Akmal v. Federation of Pakistan etc.

161 38064/19 Manzoor Qadir v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

162. 38066/19 Muhammad Riaz v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

163. 38085/19 Khalid Rehan v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

164. 38113/19 Muhammad Ayub v. Member (Taxes) Board of Revenue, Punjab, Lahore etc.

165. 38115/19 Sikandar Khan v. The Assistant Commissioner, etc.

166. 38137/19 Fahmida Akbar v. Member (Taxes) Board of Revenue, Punjab, Lahore etc.

167. 38136/19 Malik Anis Akbar v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

168. 38138/19 Asim Akbar v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

169. 38141/19 Nisar Ahmad Hayat Malik v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

170. 38143/19 Sardar Khalid Nawaz Maken v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

171. 38163/19 Imran Khan v. Federation of Pakistan etc.

172. 38164/19 Noman Ali v. Federation of Pakistan etc.

173. 38165/19 Muhammad Nazir v. Federation of Pakistan etc.

174. 38171/19 Zulfiqar Ali v. Government of Punjab through its Chief Secretary etc.

175. 38172/19 Ijaz Hussain Minhas v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
176. 38251/19 Ghulam Serwar v. Federation of Pakistan etc.
177. 38306/19 Muhammad Boota v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
178. 38350/19 Mazhar Fareed Wattoo v. Federation of Pakistan etc.
179. 38353/19 Muhammad Akhtar Waseem v. Federation of Pakistan etc.
180. 38355/19 Mushtaq Ahmad Shah v. Federation of Pakistan etc.
181. 38356/19 Sikandar Hayat v. Federation of Pakistan etc.
182. 38406/19 Muhammad Sarwar v. Federation of Pakistan etc.
183. 38407/19 Mumtaz Ali v. Federation of Pakistan etc.
184. 38408/19 Ch. Muhammad Ashraf v. Federation of Pakistan etc.
185. 38409/19 Ahmad Mansoor Kamal v. Federation of Pakistan etc.
186. 38411/19 Zarina Kamal v. Federation of Pakistan etc.
187. 38412/19 Kamal Ahmad v. Federation of Pakistan etc.
188. 38413/19 Saeed Ahmir Awan v. Federation of Pakistan etc.
189. 38420/19 Muhammad Shauja Sadozai v. Federation of Pakistan etc.
190. 38544/19 Ahmad Unsar Zaman Khan Butt v. Federation of Pakistan etc.
191. 38549/19 Muhammad Shabbir v. Federation of Pakistan etc.
192. 38611/19 Muhammad Mushtaq Butt v. Federation of Pakistan etc.
193. 26170/19 Ali Gohar Khan v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
194. 26933/19 Syeda Maimanat Mohsin v. Government of Punjab through its Chief Secretary etc.
195. 28046/19 Mazhar Hussain Shah v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
196. 28051/19 Sardar Hassan Mehmood v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
197. 28054/19 Sardar Hassan Mehmood v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
198. 28619/19 Muhammad Ashraf Gondal v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
199. 28838/19 Abdul Razzaq v. Federation of Pakistan etc.
200 29652/19 Ch. Mehmood Akhtar v. Federation of Pakistan etc.
201. 29653/19 Ch. Muhammad Asghar v. Federation of Pakistan etc.
202. 29654/19 Tanveer Ahmad Qureshi v. Federation of Pakistan etc.
203. 29656/19 Shah Nawaz v. Federation of Pakistan etc.
204. 29987/19 Abid Ansar v. Federation of Pakistan etc.

205. 30455/19 Sohail Sarwar v. Federation of Pakistan etc.

206. 30119/19 Syed Muhammad Zahid Gillani v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

207. 30302/19 Muhammad Hayat v. Federation of Pakistan etc.

208. 30845/19 Syed Ijaz Ali Shah Gillani v. Federation of Pakistan etc.

209. 31077/19 Muhammad Saeed Khan v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

210. 31080/19 Fahad Ahmed v. Federation of Pakistan etc.

211. 31426/19 Badar uz Zaman v. Member (Taxes) Board of Revenue,Punnab Lahore etc.

212. 31427/19 Badar uz Zaman v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

213. 31667/19 Abdul Jabbar v. Federation of Pakistan etc.

214. 31701/19 Muhammad Aslam v. Federation of Pakistan etc.

215. 31705/19 Abdul Rehman v. Federation of Pakistan etc.

216. 31707/19 Azmat Hayat Malik v. Federation of Pakistan etc.

217. 31708/19 Adnan Rehmat v. Federation of Pakistan etc.

218. 31710/19 Ch. Mubarak Ali v. Federation of Pakistan etc.

219. 31839/19 Mirza Muhammad Mubeen Baig v. Federation of Pakistan etc.

220. 31969/19 Syed Shahid Raza Bokhari v. Government of Punjab through its Chief Secretary etc.

221. 32481/19 Ghulam Sarwar v. Federation of Pakistan etc.

222. 32632/19 Waseem Zafar Bajwa v. Government of Punjab through its Chief Secretary etc.

223. 32653/19 Tanveer Ahmad v. Federation of Pakistan etc.

224. 32669/19 Manzoor Hussain v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

225. 33617/19 Rana Ishfaq Ahmad v. Federation of Pakistan etc.

226. 33682/19 Shoukat Ali v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

227. 33683/19 Shoukat Ali v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

228. 33687/19 Syed Safdar Hassan Gillani v. Federation of Pakistan etc.

229. 33771/19 Muhammad Ghareeb Alam v. Government of Punjab through its Chief Secretary etc.

230. 33776/19 Ibnan Javid v. Member (Taxes) Board of Revenue,Punjab Lahore etc.

231. 33779/19 Muhammad Tariq Wali v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

232. 33943/19 Zahid Hafeez v. Federation of Pakistan etc.
233. 33945/19 Samreen Yahya v. Federation of Pakistan etc.
234. 33947/19 Nazir Ahmad v. Federation of Pakistan etc.
235. 33961/19 Muhammad Awais v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
236. 34051/19 Nuzhat Jabeen v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
237. 34053/19 Muhammad Ahmad etc. v. Federation of Pakistan etc.
238. 34119/19 Rana Shaheen Ikhlaq v. Federal Board of Revenue through its Chairman etc.
239. 34121/19 Babar Sattar v. Federation of Pakistan etc.
240. 34123/19 Muhammad Iftikhar Rana v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
241. 34127/19 Ch. Mudassar lqbal v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
242. 34142/19 Muhammad Fayyaz v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
243. 34143/19 Mian Shahid Hussain Khan v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
244. 34145/19 Nadeem Safdar Bhatti v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
245. 34147/19 Malik Zaheer Abbas v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
246. 34151/19 Muhammad Akhtar Chaudhry v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
247. 34152/19 Zubair ul Hassan v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
248. 34154/19 Javid Sattar v. Federation of Pakistan etc.
249. 34162/19 Ahsan Raza Khan v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
250. 34165/19 Ambreen Haider v. Federation of Pakistan etc.
251. 34175/19 Mehar Ahmad Ali Gull v. The Assistant Commissioner etc.
252. 34177/19 Barak Nauman Tarar v. Federation of Pakistan etc.
253. 34178/19 Muhammad Ziyad v. Government of Punjab through its Chief Secretary etc.
254. 34235/19 Muhammad Younas v. Federation of Pakistan etc.
255. 34315/19 Altaf Hussain Awan v. Federation of Pakistan etc.
256. 34318/19 Sajjad Hussain Awan v. Federation of Pakistan etc.
257. 34383/19 Umar Hayat v. Federation of Pakistan etc.

258. 34443/19 Khalid Manzur v. Federation of Pakistan etc.
259. 34535/19 Muhammad Zubair Alamgir v. Federation of Pakistan etc.
260. 34715/19 Muhammad Salman Babar etc. v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
261. 34738/19 Muhammad Nadeem v. Government of Punjab through its Chief Secretary etc.
262. 34748/19 Muhammad Saleem v. Government of Punjab through its Chief Secretary etc.
263. 34759/19 Ijaz Sehole v. Government of Punjab through its Chief Secretary etc.
264. 34761/19 Muhammad Akhtar v. Government of Punjab through its Chief Secretary etc.
265. 34926/19 Shujah Haider etc. v. Assistant Commissioner etc.
266. 35383/19 Mian Sarfraz Ahmad v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
267. 35463/19 Mian Muhammad Ashraf v. Federation of Pakistan etc.
268. 35539/19 Muhammad Nafees v. Federation of Pakistan etc.
269. 35597/19 Muhammad Naseem v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
270. 35645/19 Muhammad Razzaq v. Federation of Pakistan etc.
271. 35647/19 Fakhar ud Din v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
272 35655/19 Maqsood Alam v. Federation of Pakistan etc.
273. 35683/19 Rana Muhammad Afzal v. Federal Board of Revenue through its Chairman etc.
274. 35719/19 Arshad Malik v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
275. 38351/19 Muhammad Amin Shad v. Federation of Pakistan etc.
276. 38803/19 Muhammad Ameer v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
277. 38805/19 Abdul Majeed v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
278. 38766/19 Muhammad Amin Khan v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
279. 33265/19 Asif Ali v. Federation of Pakistan etc.
280. 38746/19 Madho Lal Hussain v. Federation of Pakistan etc.
281. 38924/19 Asad Javid Khan etc. v. Member (Taxes) Board of Revenue, Punjab Lahore etc.
282. 38860/19 Malik Fayyaz Ahmad v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

283. 39004/19 Hussain Siddique v. Government of Punjab through its Chief Secretary etc.

284. 39016/19 Javaid lqbal Warraich v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

285. 38993/19 Riffat Siddique v. Government of Punjab through its Chief Secretary etc.

286. 39005/19 Hassan Siddique v. Government of Punjab through its Chief Secretary etc.

287. 39323/19 Muhammad Saleem through Legal Heirs v. Federation of Pakistan etc.

288. 39293/19 Essa Bin Moeen v. Federation of Pakistan etc

289. 39292/19 Muhammad Ayub v. Federation of Pakistan etc

290. 39186/19 Waqar Ahmad Khan v. Federation of Pakistan etc.

291. 39167/19 Raja Javed Mujtaba v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

292. 39168/19 Raja Javed Mujtaba v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

293. 39099/19 Syed Shaheryar Raza v. Federal Board of Revenue through its Chairman etc.

294. 39182/19 Syed Gul Muhammad Shah v. Federation of Pakistan etc.

295. 39184/19 Essa Bin Moeen v. Federation of Pakistan etc.

296. 31645/19 Niaz Ahmad Phularwan v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

297. 30647/19 Zulfiqar Ali v. Government of Punjab through its Chief Secretary etc.

298. 26167/19 Ayesha Rajab Ali v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

299. 31120/19 Zulfiqar Ali Wattoo v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

300. 34442/19 Muhammad Amjad v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

301. 33743/19 Malik Allah Bakhsh v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

302. 39480/19 Wali Rehman v. Government of Punjab through its Chief Secretary etc.

303. 39556/19 Nazar Abbas Khan v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

304. 39492/19 Rashid Tufail v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

305. 39519/19 Muhammad Mustafa v. Member (Taxes) Board of Revenue, Punjab

Lahore etc.

306. 39631/19 Mian Muhammad Ilyas v. Federation of Pakistan etc.

307. 39634/19 Huma Muhammad Din v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

308. 39635/19 Raja Javed Mujtaba v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

309. 39865/19 Hammad Zafar v. Federation of Pakistan etc.

310. 39867/19 Muhammad Habib Ullah Anjum v. Federation of Pakistan etc.

311. 39868/19 Sajid Ali v. Federation of Pakistan etc.

312 39822/19 Malik Naseer Ibne Rajjad v. Federation of Pakistan etc.

313. 40853/19 Mushtaq Ahmad Shad v. Federation of Pakistan etc.

314 40856/19 Muhammad Nazir Ahmad v. Federation of Pakistan etc.

315. 40920/19 Muhammad Samar Abbas v. Federation of Pakistan etc.

316. 40921/19 Muhammad Zahid Khan v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

317. 40923/19 Muhammad Arif Khan v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

318. 40927/19 Asif Khan v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

319. 40929/19 Zafar Ullah Khan v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

320. 40931/19 Qasim Ali v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

321. 40932/19 Sakhawat Ali etc v. Member (Taxes) Board of Revenue, Punjab Lahore etc.

322. 40933/19 Muhammad Shafqat Abbas v. Federation of Pakistan etc.

323. 40945/19 Raja Muhammad Afzaal v. Government of Punjab through its Chief Secretary etc.

324. 40946/19 Raja Muhammad Afzaal v. Government of Punjab through its Chief Secretary etc.

325. 40949/19 Raja Muhammad Afzaal v. Government of Punjab through its Chief Secretary etc.

326. 40950/19 Raja Muhammad Afzaal v. Government of Punjab through its Chief Secretary etc.

327. 40956/19 Mubashir Ahmed Korotana v. Federation of Pakistan etc.

328. 33655/19 Muhammad Ahmad Samar Saleem v. Federation of Pakistan etc.

329. 28356/19 Imran Ali Bhatti v. Federation of Pakistan etc.

KMZ/Q-3/L Order accordingly.

2019 P T D 1674
[Lahore High Court]
Before Ayesha A. Malik, J
TAYYAB PAPER MILLS
Versus
FEDERATION OF PAKISTAN through Secretary Finance, Division, Islamabad and others
Writ Petition No. 155515 of 2018, heard on 14th May, 2019.

(a) Sales Tax Act (VII of 1990)---

----Ss. 57 & 45-B---Constitution of Pakistan, Art. 199---Constitutional petition---Maintainability--- Non-availability of alternate remedy---Effect---Appealable orders under the Sales Tax Act, 1990---Rectification of mistake---Appeal under S.45-B of the Sales Tax Act, 1990---Question before the High Court was whether Constitutional petition against an order for rectification made under S.57 of the Sales Tax Act, 1990 was maintainable---Held, that order under S.57 of the Sales Tax Act, 1990 was not an appealable order under S.45-B of the Sales Tax Act, 1990, therefore no alternate remedy against the same was available---Constitutional petition was maintainable, in circumstances.

(b) Sales Tax Act (VII of 1990)---

----S. 57---Rectification of mistake----Order for rectification under S.57 of Sales Tax Act, 1990; nature of---Clerical and arithmetical errors---Exercise of powers under S.57 of the Sales Tax Act, 1990---Application for rectification under S.57 Sales Tax Act, 1990 could only be made after issuing notice to the concerned party---Clerical errors and arithmetical errors were essentially typing errors which were apparent from face of record and the same did not mean errors of findings on facts or on law---Rectification application under S.57 of the Sales Tax Act, 1990 allowed a competent officer of the Department to correct a mistake which was apparent on face of the record but did not allow for re-assessment of a case or compilation of a different opinion from one that was taken earlier---Liability of an assessee could not be changed under S.57 of Sales Tax Act, 1990 and matters which were not part of the original adjudicatory process could not be introduced in the rectification process.

Commissioner of Income Tax, Karachi v. Messrs Shadman Cotton Mills Ltd., Karachi through Director 2008 PTD 253 rel.

(c) Administration of justice---

----"Clerical errors" and "arithmetical errors"---Meaning and concept of---Clerical errors and arithmetical errors were essentially typing errors which were apparent from face of record and the same did not mean errors of findings on facts or on the law.

(d) Administration of justice---

----"Rectification", concept and meaning of---Concept of rectification was simply to correct an error committed which was floating on record, being arithmetical or clerical in nature and rectification could not bring material change to an order or change its complexion.
Commissioner of Income Tax, Karachi v. Messrs Shadman Cotton Mills Ltd., Karachi through Director 2008 PTD 253 rel.
Muhammad Ajmal Khan for Petitioner.
Chaudhary Muhammad Yasin Zahid for Respondents.
Date of hearing: 14th May, 2019.

JUDGMENT

AYESHA A. MALIK, J.---Through this petition, the Petitioner has challenged order dated 14.11.2017 issued by Respondent No.3, Commissioner Inland Revenue Appeals-IV, Lahore on an application for rectification of order dated 5.6.2017 under Section 57 of the Sales Tax Act, 1990 ("Act").

2. At the very outset, learned counsel for the Respondents raised a preliminary objection on the maintainability of the instant petition on account of the fact that remedy of appeal is provided to the Petitioner in terms of Section 45-B of the Act. However it is noted that the order dated 14.11.2017 impugned before this Court under Section 57 of the Act is not an appealable order under Section 45-B of the Act. Hence the objection is repelled.

3. Learned counsel for the Petitioner argued that in terms of the appellate order under Section 45-B of the Act dated 5.6.2017, the Commissioner Inland Revenue Appeals-IV, Lahore held that action initiated by the department against the taxpayer was barred by limitation in terms of Section 11(5) of the Act. In terms of the order, she found that even though the Commissioner, has the power to extend the period by recording reasons in writing but no order of extension was available on the record nor produced before her. Further that the parawise comments submitted by the department also did not provide for any extension order. Consequently she concluded that there was no such order available for extension, hence show-cause notice was issued beyond the period of limitation. Consequently the appeal of the taxpayer was disposed of vide order dated 5.6.2017. Against this order, the department filed a rectification application under Section 57 of the Act and the Commissioner Inland Revenue Appeals-IV, Lahore changed her findings with respect to the notice under Section 11(5) of the Act being barred by time. In terms of the rectification order dated 14.11.2017, the Commissioner concluded that in fact extension was granted by the Commissioner and that the order was well within the prescribed time. Consequently calling this a mistake apparent on the record, she restored the appeal to its original number and fixed it for hearing. Learned counsel argued that the power of rectification under the Act does not authorize the Commissioner to change her legal opinion as issued in the original order dated

5.6.2017. Learned counsel further submitted that the power of rectification is limited to clerical errors or arithmetical errors in any assessment, adjudication order or decision but does not mean that the entire decision is changed and the appeal which was originally disposed of is restored for hearing. Learned counsel has placed reliance on Commissioner of Income Tax, Karachi v. Messrs Shadman Cotton Mills Ltd., Karachi through Director (2008 PTD 253).

4. Report and parawise comments have been filed on behalf of Respondents Nos.1 and 2. Learned counsel for the Respondents argued that the rectification application was given to correct the error made with respect to the findings on the point of limitation. Learned counsel argued that the order was passed in accordance with law after following due process and is well within the mandate of Section 57 of the Act.

5. The basic issue before the Court is with reference to scope of Section 57 of the Act which is reproduced hereunder:
Correction of clerical errors etc. Clerical or arithmetical errors in any assessment, adjudication, order or decision may, at any time, be corrected by the officer of Inland Revenue who made the assessment or adjudication or passed such order or decision or by his successor in office;
Provided that before such correction, a notice shall be given to the registered person or to a person effected by such correction.

6. In terms of this Section, an application for correction of clerical or arithmetical error can be made after issuing notice to the concerned party. It is settled law that clerical errors and arithmetical errors are essentially typing errors which are apparent from the face of the record but they do not mean errors of finding on facts or on the law. A rectification application allows the competent officer to correct a mistake which is apparent on the face of the record but does not allow re-assessment of the case or the compilation of a different opinion from one that was taken earlier. For this purpose remedy of appeal is available and in this case the department if aggrieved by the finding of the Commissioner could have availed its remedy of appeal. Instead they chose to move a rectification application on the basis of which Respondent No.3 changed her opinion from saying that the show-cause notice was barred by time to finding that it was not barred by time. This change of opinion is not a clerical or arithmetical error and does not fall within the scope of Section 57 of the Act. If this were to be allowed then all kinds of opinions could be changed under the garb of being a mistake or error on the face of the record. Hence it is against the spirit of Section 57 of the Act.

7. Respondent No.3 could not have changed her opinion under the rectification application and consequently could not have restored the appeal that she had originally disposed of. In fact she has reviewed her own order, changed her opinion and decided to re-hear the case that she originally thought was barred by limitation. In terms of the dicta laid down by the august Supreme Court of Pakistan in 2008 PTD 253 (supra), the liability of an assessee cannot be changed and the matters which were not part of the original adjudicatory process cannot be introduced in the

rectification process. The concept of rectification is simply to correct error committed which is floating on the record being arithmetic or clerical but cannot be one which brings the material change to the order and change its complexion.

8. Under the circumstances, the instant petition is allowed, impugned order dated 14.11.2017 issued by Respondent No.3 is set aside, thereby declaring the action of the stated Respondent for being without jurisdiction.

KMZ/T-12/L Petition allowed.

2019 P T D 1882
[Lahore High Court]
Before Ayesha A. Malik, J
Rana FAHAD HUSSAIN
Versus
The FEDERATION OF PAKISTAN through Secretary, Revenue Division/Chairman Federal Board of Revenue, Islamabad and 2 others
Writ Petition No. 21099 of 2019, heard on 13th June, 2019.

Voluntary Declaration of Domestic Assets Act (XI of 2018)--

----Ss. 5 & 8---Declaration of domestic assets in Pakistan---Payment of tax---Finality of proceedings---Scope---Petitioner had sought benefit under S. 5 of Voluntary Declaration of Domestic Assets Act, 2018 and had filed declaration accordingly---Deputy Commissioner Inland Revenue rejected the declaration so filed on the ground that the recovery notice had been issued against the petitioner after passing of assessment order on the basis of which the petitioner was liable to pay certain amount---Validity---Explanation included in S. 8 of Voluntary Declaration of Domestic Assets Act, 2018 clarified that declaration could even be made in respect of undisclosed income or assets which were pending proceedings under Income Tax Ordinance, 2001 until same had attained finality---Basic purpose of the explanation was to clarify that even where proceedings pending under Income Tax Ordinance, 2001 related to assessment or otherwise, the taxpayer could make a declaration of undisclosed income or assets uptil the point when those proceedings had attained finality---Proceedings under Income Tax Ordinance, 2001 attained finality when the taxpayer exhausted the right of appeal and order was passed thereon by the appellate forum---Order of assessment was not a final order for the reasons that it could be challenged in an appeal or revision as the case might be and it only became final when it went through all the forums and remedies available under the law---Taxpayer was entitled to pursue the remedy of appeal or second appeal as such remedies reopened the assessment, meaning that it was not final unless it crossed all forums under that law in which it could be challenged and the order of the last forum would be final---High Court held that petitioner was entitled to file a declaration under

S. 5 of Voluntary Declaration of Domestic Assets Act, 2018---Constitutional petition was accepted
Central Board of Revenue and others v. Chanda Motors 1992 PTD 1681 ref.
Rana Zahid Atteq Chaudhry and Rashid Khan for Petitioner.
Ibrar Ahmad for Respondents.
Date of hearing: 13th June, 2019.

JUDGMENT
AYESHA A. MALIK, J.---Through this petition, the Petitioner has impugned notice dated 03.04.2019 issued by Respondent No.3, Deputy Commissioner Inland Revenue, Lahore.

2. The basic contention of the Petitioner is that in terms of the Voluntary Declaration of Domestic Assets Act, 2018 ("Act"), the Petitioner is entitled to avail the benefit of the said Act under Section 5 read with Section 8 of the Act as amended through Ordinance XI of 2018 notified in the gazette dated 30.06.2018. Learned counsel argued that in terms of Section 8(2) of the Act an explanation was added which clarified that where proceedings under the Income Tax Ordinance, 2001 ("Ordinance") in respect of undisclosed income or assets have attained finality, declaration cannot be filed under Section 5 of the Act. However, if they have not attained finality then a declaration can be filed. Learned counsel argued that finality with respect to the proceedings under the Ordinance is attained once the complete hierarchy is accessed meaning that the right of appeal is availed against the assessment order. In this regard, learned counsel has placed reliance on "Central Board of Revenue and others v. Chanda Motors" (1992 PTD 1681). Learned counsel argued that the order passed in original proceedings is not final unless it crosses all rights of appeal available under the law and it becomes a final order once the right of appeal has been fully availed by the taxpayer. Learned counsel states that in this case even though the proceedings were pending through an assessment order yet the Petitioner sought to avail the benefit of Section 5 of the Act and filed his declaration under the stated section. However, this was rejected on the ground that the recovery notices have been issued against the Petitioner after passing of assessment order on the basis of which the Petitioner is liable to pay the amount.

3. Report and parawise comments have been filed by the Respondents. Learned counsel for the Respondents argued that Tax Amnesty Scheme 2018 is not applicable on the proceedings which have been finalized under Section 122 of the Ordinance. Learned counsel further argued that recovery notices have been issued to the Petitioner and he is liable to pay the assessed amount and cannot offer a voluntarily declaration under Section 5 of the Act.

4. The basic issue before the Court is with reference to the interpretation of Section 8(2) of the Act. The purpose of the Act is to give effect to the proposal of the Federal Government to offer Voluntarily Declaration of Domestic Assets in order to encourage the payment of tax as well as to increase the number of taxpayers. In terms of Section 5 of the Act any person can make a declaration of undisclosed income and domestic assets before 10.04.2018 subject to the provisions of the Act. The meaning of the declaration is provided in Section 5 of the Act. Once the declaration is made, the domestic assets so declared are chargeable to tax rate specified under Section 7 of the Act. In terms of Section 8 of the Act the due tax must be paid when the declaration is made. Section 8 was amended through Ordinance XI of 2018 notified in the gazette dated 30.06.2018 to include an explanation such that now Section 8 reads as follows:--

8. Payment of tax. (1) The due date for payment of the tax chargeable under section 7 shall be the date on which declaration is made under section 6.

(2) No tax shall be payable by the declarant under any law for the time being in force including the Income Tax Ordinance, 2001 (XLIX of 2001) declared where

tax has been paid under subsection (1) in respect of the undisclosed income and domestic assets under section 5.

"Explanation.---For the removal of doubt it is clarified that where proceedings under Income Tax Ordinance, 2001 (XLIX), in respect of undisclosed income or assets have attained finality, no declaration shall be filed under section 5 in respect of such income or asset and the tax payable under the said Ordinance shall continue to be payable."

In terms of the explanation it has been clarified that a declaration can be made even in respect of undisclosed income or assets which are pending in proceedings under the Ordinance until they have attained finality. The basic purpose of the explanation is to clarify that even where proceedings are pending under the Ordinance, related to assessment or otherwise the taxpayer can make a declaration of undisclosed income or assets uptil the point when those proceedings attained finality. There is no cavil to the contention that proceedings under the Ordinance attain finality when the right of appeal has been exhausted by the taxpayer and an order has been passed by the appellate forum. The taxpayer case does not attain finality until it has exhausted all remedies of appeal available under the Ordinance. For the purposes of challenging the assessment order, the case relied upon by the Petitioner clarified that an order of assessment is not a final order for the reasons that it can be challenged in an appeal or revision as the case may be as it only becomes final when it goes through all the forums and remedies available under the law. Hence a taxpayer is entitled to pursue the remedy of appeal or second appeal as such remedies reopen the assessment, meaning that it is not final unless it crosses all forums under that law in which it can be challenged and the order of the last forum is final. Therefore, under the circumstances, the contention of the petitioner is in accordance with law and the rejection made by the respondents is without any legal basis. In this case assessment order was passed by respondent No.3, Deputy Commissioner Inland Revenue, which has not attained finality as it is subject to an appeal irrespective of the recovery proceedings. Since the order has not attained finality, the petitioner can file a declaration under section 5 of the Act.

5. Under the circumstances, this petition is accepted and the impugned notice dated 03.04.2019 passed by Respondent No.3 is set aside.

SA/F-15/L Petition accepted.

P L D 2019 Lahore 607
Before Ayesha A. Malik and Shahid Jamil Khan, JJ
ORIENT POWER COMPANY (PRIVATE) LIMITED---Appellant
Versus
SUI NORTHERN GAS PIPELINES LIMITED through Managing Director, Lahore---Respondent
I.C.A. No.210640 of 2018, decided on 1st August, 2019.

(a) Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act (XVII of 2011)---

----Ss. 3, 2(d) & 4---Arbitration Act (X of 1940), Ss.14, 30 & 33---Enforcement of foreign arbitral award---Exclusive jurisdiction of High Court under Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011---Ouster to jurisdiction of Arbitration Act, 1940 by Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral Awards) Act, 2011---Scope---Question before the High Court was whether there existed any concurrent jurisdiction between High Court under the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 and the civil court under the Arbitration Act, 1940; on enforcement of a foreign arbitration award---Held, that allowing a party to seek enforcement of a foreign arbitral award before High Court under Recognition and Enforcement (Arbitration Agreements and Foreign Arbi tral Awards) Act, 2011 while at the same time to allow such parties remedy before civil court to enforce the same award under Arbitration Act, 1940 was totally impractical---High Court held further that per S.3 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011, there was no doubt that High Court had exclusive jurisdiction to recognize and enforce foreign arbitral awards.
Taisei Corporation v. A.M. Construction Company (Pvt) Ltd. PLD 2012 Lah. 455 distinguished.
Hitachi Limited and another v. Rupali Polyester and others 1998 SCMR 1618; Taisei Corporation v. A.M. Construction Company (Pvt) Ltd. 2018 MLD 2058; G.M. Pfaff A.G. v. Sartaj Engineering Co. Ltd., Lahore and 3 others PLD 1970 Lah. 184), Nan Fung Textiles Ltd. v. Sadiq Traders Ltd. PLD 1982 Kar. 619 and Marines Limited v. Aegus Shipping Co. Ltd and 4 others 1987 CLC 1299 ref.

(b) Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act (XVII of 2011)---

----Ss. 4, 6 & 7---Enforcement of foreign arbitral award---Commercial contracts---Gas Supply Agreement ("GSA")---Arbitration Clause of the GSA---Separate Payment Agreement between the parties to the GSA---Applicability of Arbitration clause of the GSA on the Payment Agreement---Scope---Question before the High Court was whether an Arbitrator appointed under a Gas Supply Agreement between the parties, could also adjudicate/arbitrate and subsequently issue an award on matters arising on a separate Payment Agreement between the said parties---Held,

that in the present case, perusal of agreements revealed that the settlement recorded in the Payment Agreement was part and parcel of the obligations under the Supply Agreement and obligation to pay arose out of the Supply Agreement and not the Payment Agreement was which was entered into essentially to facilitate the parties---Fact that Payment Agreement did not contain an arbitration clause or the fact that the same did not make specific reference to arbitration clause in the Supply Agreement; did not mean that Arbitrator under the Supply Agreement lacked jurisdiction on issues under the Payment Agreement as the said Payment Agreement was not an independent contract outside the Supply Agreement and the same was an agreement to make payment pursuant to the obligations under the Supply Agreement on account of one party's default---High Court held that dispute resolution mechanism under the Supply Agreement was applicable to the Payment Agreement and that Arbitrator under the Supply Agreement was well within jurisdiction to make determination in terms thereof.
Messrs MacDonald Layton & Company Limited v. Messrs Association Electrical Enterprises Limited and another PLD 1982 Kar. 786; Syed Arshad Ali v. Sarwat Ali Abbasi 1988 CLC 1350 and Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 57 ref.

(c) Contract---

----Contractual terms--- Commercial contracts--- Gas Supply Agreement---"Take or pay", clause---Meaning, rationale and scope---Take or pay clause was a common term in gas supply agreements which gave buyer an option to take supply of gas or else pay for it but defer taking of gas supply---Rationale behind said clause was to allocate risk over long term contracts as it acted as a risk-sharing mechanism between supplier and buyer where buyer sought stability in supply and some flexibility in prices and seller sought assurance for guaranteed income and the same also provided comfort to investors of natural gas projects that their investments were secure over duration of a contract, as risks were divided between parties and not borne by any one party---Essential feature of "take or pay" clause was the right to take "make up gas" and buyer had the right to take such gas in the succeeding year or any defined period and not at time when payment was due---Take or pay clause was activated when the buyer did not take delivery of the agreed quantity of gas but had paid for it.

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

----S. 74---Compensation for breach of contract where penalty stipulated for---Commercial contracts---Gas Supply Agreement---"Take or pay" clause, nature of---Question before High Court was whether a "take or pay" clause in a gas supply agreement was enforceable as a penalty clause in terms of S.74 of the Contract Act, 1872---Held, that due to a "take or pay clause"; a breach could not be triggered on account of failure to take supply under a Gas Supply Agreement as a buyer under such an agreement had right to exercise option to take gas or invoke the "take or pay" clause---Exercise of either option was valid under a Gas Supply Agreement

containing a "take or pay" clause, therefore the same would not constitute a breach thereof---"Take or pay" payment under such an agreement was not due because of a breach or default rather it flowed from a contracting party's valid choice to invoke the right to invoke the take or pay clause---High Court held that "take or pay" clause being a common provision in commercial contracts, especially gas purchase agreements, was valid and enforceable and could not be considered as a penalty provision and did not offend S. 74 of the Contract Act, 1872.
Province of West Pakistan v. Messrs Mistri Patel & Co. and another PLD 1969 SC 80; Syed Sibte Raza and another v. Habib Bank Ltd. PLD 1971 SC 743; Saudi-Pak Industrial and Agricultural Investment Company (Pvt.) Ltd., Islamabad v. Messrs Allied Bank of Pakistan and another 2003 CLD 596; The Bank of Punjab v. Dewan Farooque Motors Limited 2015 CLD 1756 and Atlas Cables (Pvt.) Limited v. Islamabad Electric Supply Company Limited and another 2016 CLC 1833 ref.
Port of Tilbury (London) Ltd. v. Store Enso Transport and Distribution Ltd. (2009) EWCA Civ 16; M&J Polymers Ltd. Imerys Minerals Ltd. (2008) EWHC 344 (Comm); Cavendish Square Holding BV v. Talat EL Makdessi 2016 SCMR 296; Philips Hong Kong Ltd. v. Attoney General of Hong Kong (1993) 61 BLR 41; Prenalta Corporation v. Colorado Interstate Gas Company 944 F.2d 677 (199); Universal Resources Corporation v. Panhandle Eastern Piple Line Company 813 F.2d 77 (1997); Miraka Limited v. Milk New Zealand (Shanghai) Co. Limited [2017] NZHC 2163 and Churchill Falls (Labrador) Corporation Limited v. Hydro Quebec 2019 SCMR 454 rel.

(e) Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act (XVII of 2011)---

----Ss. 7, 6 , 3 & Article V of Sched.---United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York on I0th June, 1958 (the "New York Convention"), Art. V(2)(b)---Refusal to recognition or enforcement of an award contrary to the public policy of a Contracting State under the New York Convention---Meaning and scope of term "public policy"---Interpretation of Article V(2)(b) of the New York Convention---Non-interference or pro-enforcement policy of the New York Convention---Construction of the "public policy exception" to enforcement of foreign arbitral awards under the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011---Scope---Non-interference or pro-enforcement policy was in itself a policy of Contracting States which was not easily persuaded by public policy exception argument---Defining public policy under Art. (V)(2)(b) of the New York Convention was prerogative of each of Contracting State and was based on the public policy of a State where enforcement was sought---Application of public policy exception was restrictive and limited to exceptional circumstances that affected most fundamental values of a State---Public policy exception had been kept fluid and adaptive and could be invoked in cases of patent illegality and allowed a Contracting State to safeguard its core values and fundamental notions of morality and justice which may change over time---Public policy exception acted as a safeguard of fundamental notions of morality and justice, such that enforcement of a

foreign award may offend these fundamentals---Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 encouraged parties to an alternate dispute resolution mechanism for quicker and less costly resolution of disputes and made foreign arbitral award binding on the parties and prima facie as of right, called for recognition and enforcement of foreign arbitral awards---Public policy exception should not therefore become a backdoor to review the merits of a foreign arbitral award or to create grounds which were not available under Art.V of the New York Convention as same would negate obligation to recognize and enforce foreign arbitral awards and such interference would essentially nullify the need for arbitration clauses as parties would be encouraged to challenge foreign awards on the public policy ground knowing that there is room to have the Court set aside the award.

Arbitration and Public Policy in Hong Kong; The Court and the World (2015); International Arbitration: The Coming of a New Age for Asia (and Elsewhere) (2012); Oil and Natural Gas Corporation Ltd. v. Saw Piples Ltd. (2003) 5 SCC 705; Oil and Natural Gas Corporation Ltd. v. Western Geco International Limited (2014) 9 SCC 263; UNCITRAL Guide;Nan Fung Textiles Ltd. v. Sadiq Traders Ltd. PLD 1982 Kar. 619; Haji Abdul Karim and others v. Sh. Ali Muhammad and others PLD 1959 SC 167; Maulana Abdul Haque Baloch and others v. Government of Balochistan through Secretary Industries and Mineral Development and others PLD 2013 SC 641; Shri Lal Mahal Ltd. v. Progetto Granto Spa (2014) 2 SCC 433 at 449 and Phulchand Exports Ltd. v. O.O.O. Patriot (2011) 10 SCC 300 ref.

Parsons and Whittemore Overseas Co. Inc. v. Societe Generals de l'Industrie du Papier PAKTA and Bank of Americal (508 F.2d 969, 974 (2d Cir. 1974); Polytek Engineering Co.Ltd. v. Hebei Import and Export Corp., (23 Y.B. COMM. ARB 666, 666-84); Deutsche Schachtbau-und Tiefbohrgesellschaft m.b.H. v. Ras Ali Khaimah National Oil Co., Shell International Petroleum Co. Ltd. Court of Appeal, Not indicated, 24 March 1987 (13 Y.B. COMM.ARB. 522, 534-35 (1988); Limited v. Nigerian Nat'l Petroleum Corp., (31 YB COMM. Arb. 853, 856); Allsop Automatic Inc. v. Tecnoski snc, Corte di Appello, 22 Y.B.COMM.ARB, 725, 725-26; Ansell S.A. v. OOO Med Bus, Serv., Ruling No.VAS-8786/10, at 2 (2010) and Sultan Textile Mills (Karachi) Ltd. Karachi v. Muhammad Yousuf Shamsi PLD 1972 Kar. 226 rel.

Salman Akram Raja, Faisal Islam, Umer Akram Chaudhary, Ahsan Mahmood, Usman Ali Bhoon, Majid Jehangir, Mian Ahmad Hammad, Shabbir Hussain and Mehrunissa Sajjad for Appellant.

Khawaja Ahmad Hosain, Chaudhry Muhammad Usman, Ms. Faryal Nazir, Zaheer Cheema, Minam Karim along with Imran Javed, Senior Law Officer in the Office of respondent SNGPL for Respondent.

Date of hearing: 17th June, 2019.

JUDGMENT

AYESHA A. MALIK J.---The Appellant has impugned order dated 4.4.2018 passed by the learned Single Judge in COS No.16/2017 as the suit filed for the recognition and enforcement of a foreign arbitral award was allowed by the Court on 4.4.2018 in favour of the Respondent.

2. The basic facts of the case are that the Respondent filed COS No.16/2017 before the learned Single Judge of this Court under Section 6 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 ('Act') for the recognition of award dated 27.2.2017 and 13.6.2017('the Award'). The Appellant was given several opportunities to file objections against the Award, failing which the right to file objections was closed on 21.3.2018. On 4.4.2018, an application under Section 6 of the Act, filed by the Respondent was allowed, such that the Award was recognized and enforced as the Court declared the Award binding on the parties. The matter is now pending in proceedings for execution of the Award.

Arguments on the preliminary objection of jurisdiction of the High Court

3. The Appellant has impugned the order of 4.4.2018 as it was an ex-parte order. The Appellant contends that it has been denied a fair hearing in the case. Mr. Sal man Akram Raja, on behalf of the Appellant argued that the Appellant's counsel was on an approved general adjournment from 12.3.2018 to 7.4.2018 during which dates the case should not have been fixed for hearing, yet the case was fixed for 21.3.2018 on which date the learned Single Judge closed the Appellant's right to file written objections against the Award. The case was then fixed for 4.4.2018, again during the general adjournment period when the impugned order was passed. Consequently the Appellant is aggrieved as the case proceeded without giving the Appellant a fair hearing or an opportunity to raise objections against the Award. Learned counsel further argued that the Appellant has a right to file objections under the Act and also has a right to invoke remedy under the Arbitration Act, 1940 ('1940 Act'). As per the Counsel arguments, this right has been recognized in the case cited at Taisei Corporation v. A.M. Construction Company (Pvt.) Ltd. (PLD 2012 Lahore 455) ('Taisei Case'), however the learned Single Judge without considering the aforementioned case held that the Court has no discretion in its power to recognize and enforce foreign arbitral awards under the Act except if a ground is made out under Article V of the Schedule of the Act, which basically means Act V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated 10.6.1958 ('the Convention'). Learned counsel further argued that by doing so, the learned Single Judge proceeded with the matter without considering the issue of concurrent jurisdiction as decided in the Taisei Case in which it is held that 1940 Act is also applicable to foreign arbitral awards as there are no provisions equivalent to Sections 14, 30 and 33 of the 1940 Act under the Act. Mr. Salman Akram Raja argued that the Court must harmoniously construe both the laws to ensure that the Appellants are not denied any right that is available under the law. It was also argued that the findings of the learned Single Judge that the Award is enforceable under the Act and objections should be filed in accordance with Article V of the Schedule to the Act is contrary to the earlier view taken in the Taisei Case. Under the circumstances, it is the case of the Appellant that the learned Single Judge could not have deviated from the earlier view and should have at least discussed the Taisei Case and explained why he disagreed with the findings, if at all, before proceeding to enforce the Award under Section 6 of the Act.

4. Learned counsel for the Respondent SNGPL, Khawaja Ahmad Hosain argued that the Award is a foreign arbitral award and this fact has been conceded to and accepted by the learned counsel for the Appellant during his arguments. He argued that in terms thereof the High Court has exclusive jurisdiction to recognize and enforce foreign arbitral awards under the Act. He also argued that under the Act, foreign arbitral award is defined in Section 2(e) to be an award made in a Contracting State, in this case being London which was the seat of the arbitration. Hence the relevant Court for enforcement is the High Court and as per Section 6 of the Act, the enforcement of foreign arbitral award is such that it is to be recognized and enforced in the same manner as a judgment or order of the Court. He argued that in terms of Section 7 of the Act, the recognition and enforcement of foreign arbitral award must be in accordance with Article V of the Convention and further that in terms of Section 8 of the Act, in the event of any inconsistency between the Act, the law or any Judgment of the Court, Article V of the Convention shall prevail to the extent of the inconsistency. Therefore, as per the arguments of the counsel for the Respondent, the Act is the relevant law and that the 1940 Act is totally irrelevant for the purposes of enforcement of the Award. Learned counsel also argued that reliance on the Taisei Case is totally misconceived because in that case the Court found that the award in question was a domestic award while relying on the "Hitachi Limited and another v. Rupali Polyester and others" (1998 SCMR 1618) whereas in this case it is a foreign arbitral award. Khawaja Ahmad Hosain argued that the learned Single Judge in the Taisei Case failed to take into consideration the fact that the law laid down in 1998 SCM R 1618 (supra) was based on the interpretation of Section 9 of the Arbitration (Protocol and Convention) Act, 1937 ('1937 Act'), which specifically provided that where an agreement is governed by the laws of Pakistan then for the purposes of the 1937 Act such an award is not a foreign award. He explained that the 1937 Act specifically provided that if the governing law of a contract was Pakistan then an award under such a contract would not be a foreign award and in such cases the award would be enforced as a domestic award. However, as per his contentions the 1937 Act is not relevant, the relevant law is the Act and there is no such provision under this Act. Further that the definition of foreign arbitral award under the Act has specifically provided that a foreign award is one made in a Contracting State meaning thereby that the governing law of contract is not relevant. Hence, the only law that is applicable for the purposes of recognition and enforcement of the Award is the Act. Learned counsel also addressed arguments related to requiring a harmonious construction whereby he stated that no such construction is required because no provision of the Act has been challenged by the Appellant nor is there any ambiguity in the law. As per his contentions, the 1940 Act caters to domestic awards and there is no right available to Appellant to raise objections under the 1940 Act. He further argued that simultaneous remedies where one party seeks enforcement under the Act and the other party files objections under the 1940 Act before different forums totally defeats the mandate of the Act.

5. We have heard the learned counsel for the parties and have also gone through the record. The preliminary objection raised is with respect to the jurisdiction of the

High Court to recognize and enforce foreign awards. The basic question before the Court is whether the High Court has exclusive jurisdiction to recognize and enforce a foreign arbitral award under the Act and whether for the purposes of raising objections against the enforcement of a foreign arbitral award, the 1940 Act is relevant giving the civil courts concurrent jurisdiction.
Opinion on the Preliminary Objection

6. The Act provides for the recognition and enforcement of arbitration agreements and foreign arbitral awards. It is based on the United Nation Convention on the Recognition and Enforcement of Foreign Award signed in New York on 10.6.1958 to which Pakistan is a signatory. Section 2(e) of the Act defines foreign arbitral awards to mean an award made in a Contracting State and such other State as may be notified by the Federal Government in the official gazette. In this case, both parties accept that the Award is a foreign arbitral award and the dispute is with respect to jurisdiction of the High Court and the manner in which the foreign arbitral award has to be recognized and enforced.

7. In terms of Section 3 read with Section 2(d) of the Act, the High Court has exclusive jurisdiction to adjudicate and settle matters related to or arising from this Act for the purposes of enforcement of a foreign arbitral award. Section 6 of the Act requires an application to be filed before the High Court and the Court shall recognize and enforce it as a judgment or order of a Court in Pakistan. Section 6 of the Act is subject to Section 7, wherein enforcement cannot be refused except on the grounds given in Article V of the Convention. Therefore the Court can refuse recognition and enforcement of foreign arbitral award under Section 7 of the Act in terms of the grounds available in Article V of the Convention, which is appended to the Schedule of the Act. So far as the Act is concerned, it clearly provides that the High Court has exclusive jurisdiction for recognizing and enforcing a foreign arbitral award and also provides for the grounds on which any objection can be made. The dispute on jurisdiction has arisen due to the judgment given in the Taisei Case which gives concurrent jurisdiction to the civil court.

8. In the Taisei Case the basic facts were that a dispute arose under the contract and the matter was referred to arbitration. The governing law of the contract was Pakistan. It was an ICC arbitration and the seat of the arbitration was Singapore. The award was delivered on 9.9.2011 in favour of Taisei. The respondents moved an application under Section 14 of the 1940 Act before the Civil Judge to challenge the award and also filed objections under the 1940 Act. Taisei moved an application under Order VII, Rule 10 of the Civil Procedure Code, 1908 on the ground that the civil court lacked jurisdiction as the award is a foreign award for which the Act has exclusive jurisdiction. The civil court rejected the application filed by Taisei and the order was challenged before the High Court in a civil revision. The question addressed by the High Court was with reference to the provisions of the 1940 Act, which as per the judgment have not been specifically repealed by the Act, hence are available in cases where the arbitration agreement is governed by Pakistan law. The

Court after hearing the petition dismissed the case of Taisei and proceeded on the objections under Section 14 of the 1940 Act for the following reasons:
(i) There are no specific provisions under the 2011 Act equivalent to the remedies available under Sections 14, 30 and 33 of the 1940 Act for the respondents. Therefore the Legislature having not specifically repealed the provisions of the 1940 Act, under the 2011 Act means that the remedies under Sections 14, 30 and 33 are available to the respondents.
(ii) Any objection under Sections 14, 30 and 33 of the 1940 Act must be made before the civil court as the court constituted under Section 2(d) of the 2011 Act has been created with the limited power of giving recognition and enforcement to a foreign arbitral award. The general power conferred on the civil court under Sections 14, 30 and 33 remains available to a party affected by an award before the civil court.
(iii) The question as to whether an arbitration agreement where the governing law of the contract is Pakistan law has any implication on the determination of the question where the award is domestic or foreign, has been decided by the august Supreme Court of Pakistan in the case cited at 1998 SCMR 1618 (supra).
(iv) In the light of the judgment of the august Supreme Court of Pakistan, it was held by the Court that since in this case the governing law of the contract was Pakistan law the award in question was domestic award and could be dealt with in accordance with Pakistan law, meaning could be dealt with under the 1940 Act.
(v) Finally the moving of an application under Section 6 of the 2011 Act does not divest the civil court of its jurisdiction to entertain and adjudicate upon the controversies moved through an application under the 1940 Act which otherwise are not entertainable by the court constituted under Section 2(d) of the 2011 Act.

9. Learned counsel for the Appellant has raised the same issues before us in this case. The relevant facts of this case are that on 18.10.2016 parties entered into a Gas Supply Agreement ('GSA') for supply of gas to the Appellant for its power generation complex. Differences arose between the parties and the matter was referred to the London Court of International Arbitration ('LCIA') for arbitration in terms of Clause 18.3 of the Agreement. After hearing both the parties the Award was passed on 27.2.2017 and subsequent Award was made with respect to costs on 13.6.2017. The Appellant moved an application under Section 14(2) of the 1940 Act raising objections against the Award before the civil court whilst the Respondent filed an application under Section 6 of the Act for the recognition and enforcement of the Award before the learned Single Judge. In the meantime, proceedings before the civil court under Section 14 of the 1940 Act were stayed on 12.12.2017 by the learned Single Judge of this Court. The impugned order proceeds to recognize and enforce the Award without adverting to the issue of the pending application or objections before the civil court under the 1940 Act after finding that no objections were filed before the High Court and that the High Court has exclusive jurisdiction to enforce foreign arbitral awards.

10. The question before us is whether there is concurrent jurisdiction between the High Court and civil court to enforce a foreign arbitral award under the Act and the

1940 Act. The relevant provision of the Act is Section 3 which provides for the jurisdiction of the Court which has been defined in Section 2(d) of the Act, meaning the High Court or any other Superior Court as notified by the Federal Government in the official gazette. In this case there is no dispute with reference to the fact that the High Court is the relevant Court as per Section 2(d) of the Act. Section 3 of the Act categorically provides that the High Court shall exercise exclusive jurisdiction under the Act, leaving little room for any other interpretation. The Act was enacted to give effect to the Convention which requires international awards to be recognized and enforced expeditiously, so as to prevent undue delay in settling disputes of contracting parties. In terms of Article I of the Convention, a Contracting State is obligated to recognize awards as binding and enforce them as per the procedure laid down in Article III in order to give effect to the terms of the Convention. The Act sets out the requirements to have a foreign arbitral award recognized and enforced. The purpose of the Act is to facilitate recognition and enforcement of foreign arbitral award in order to curtail litigation related to foreign arbitral awards which in turn delays the enforcement of awards and negates the very purpose for using arbitration as a dispute resolution mechanism. The Convention is based on a pro-enforcement policy which sets out to facilitate and safeguard the enforcement of foreign arbitral awards which is the mandate of the Act. The emphasis on pro-enforcement is highlighted by the inclusion of Section 8 of the Act which provides that in the event of any inconsistency between the Act and the Convention, the Convention shall prevail to the extent of the inconsistency. Section 8 of the Act endorses the mandate of the Convention and the commitment of Contracting States to encourage enforcement of foreign arbitral awards. Hence Section 3 grants exclusive jurisdiction to the High Court to fulfill the objective of the Act and the Convention. Section 3 of the Act has also been interpreted by a learned Division Bench of the Hon'ble Sindh High Court in Taisei Corporation v. A.M. Corporation Company (Pvt.) Ltd. (2018 MLD 2058) wherein it has declared that the High Court has exclusive jurisdiction to adjudicate and settle matters related to and arising from the Act. The Court also held that these words are clear and broad enough to encompass the question whether an award is foreign arbitral award or not as well as with reference to objections under Article V of the Convention. Therefore the Court found that Section 3 of the Act leaves little room to argue that recognition and enforcement of foreign arbitral award does not fall exclusively within the jurisdiction of the High Court and that there is a concurrent jurisdiction between the High Court and the civil court. Finally the Court noted that this is not a new concept because under the 1937 Act, the High Courts in Pakistan had exclusive jurisdiction to enforce and recognize foreign arbitral awards. This issue was directly addressed in G.M. Pfaff A.G. v. Sartaj Engineering Co. Ltd., Lahore and 3 others (PLD 1970 Lahore 184), Nan Fung Textiles Ltd. v. Sadiq Traders Ltd. (PLD 1982 Karachi 619) and Marines Limited v. Aegus Shipping Co. Ltd and 4 others (1987 CLC 1299) with reference to the 1937 Act which has been repealed by the Act giving the High Court exclusive jurisdiction under the Act.

11. We are of the opinion that the Act leaves little room for interpretation on the issue of exclusivity of jurisdiction of the High Court. Section 3 of the Act is clear

and applicable to foreign arbitral awards, which has been clearly interpreted by division bench of the Sindh High Court in PLD 1982 Karachi 619 (supra). We also note that the Taisei Case relied upon 1998 SCMR 1618 (supra) which case interpreted the provisions of the 1937 Act which was repealed under Section 10 of the Act in 2011 where after for the purposes of the enforcement of a foreign award the Act is relevant, even if the arbitration takes place in a foreign country and the governing law of the agreement is of Pakistan, in such cases the 1937 Act will not apply. With the repeal of the 1937 Act, a foreign arbitral award under the Act is one made in a contracting state regardless of the governing law of the contract. The Act being the relevant law in terms thereof the High Court has exclusive jurisdiction. That being so, we find that it is totally impractical to allow a party to seek enforcement of a foreign arbitral award before the High Court while at the same time allow the parties remedy before the civil court to enforce the same award. The outcome will not only cause conflicting judgments but also create uncertainty so far as the award is concerned. For instance the High Court may decide to enforce the award whereas the civil court may decide to set it aside under the 1940 Act. It could also mean that one party invokes the jurisdiction of the civil court to file objections against the foreign award, whilst the other party invokes the jurisdiction of the High Court for recognition and enforcement of an award, as in this case. This results in absurdity running contrary to the intent and purpose of the Act. Learned counsel for the Appellant, during the course of arguments through its partial written arguments on the issue of jurisdiction, has categorically stated that the Appellant's position is that the Award is a foreign arbitral award within the definition set out in Section 2(e) of the Act and for the purposes of the present case the Appellant accepts that the High Court has jurisdiction over the foreign arbitral award for recognition and enforcement of the award. Although this is a departure from the original arguments made before us, nonetheless the Appellant has conceded to the fact that the High Court has exclusive jurisdiction to recognize and enforce foreign arbitral awards. Therefore in view of the aforesaid, we find that the High Court has exclusive jurisdiction to recognize and enforce foreign arbitral awards which means it has exclusive jurisdiction to recognize and enforce the Award. Hence the preliminary objection is without merit.

Objections against the Award under Article V of the Schedule of the Act

12. The basic dispute before us is with respect to the recognition and enforcement of a foreign arbitral award and the procedure of the Court to hear objections filed by the Appellant under Article V of the Convention as contained in the Schedule of the Act, since they were not considered by the learned Single Judge. In terms of the impugned order, no objections were filed before the Court, hence it proceeded to recognize and enforce the Foreign Arbitral Award under Section 7 the Act. Although the manner in which the case proceeded is under dispute by the Appellant, both the Counsel ultimately agreed and requested that the case be decided on its merits. Hence we proceed to examine the objections raised by the Appellant under Section 7 of the Act read with Article V of the Schedule of the Act. Section 7 of the Act reads as follows:

Unenforceable foreign arbitral awards. The recognition and enforcement of a foreign arbitral award shall not be refused except in accordance with Article V of the Convention.

Article V of the Schedule of the Act which basically means Act V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated 10.6.1958 reads as follows:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case: or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration, can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority if the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

In terms of Section 7 of the Act, the grounds for refusing to recognize an award are given in Article V of the Act. The Appellant relies on Article V Clauses 1(c) and 2(b) as its grounds for objections to the recognition and enforcement of the Award.

The first objection against the first claim: Article V (1)(c) of the Schedule to the Act

13. The Award deals with two claims; the first claim requires payment of Rs.104,133,296/- due under the Payment Agreement dated 11.1.2010. With respect to the first claim, the case of the Appellant is that the Sole Arbitrator had no jurisdiction over this claim as there was no arbitration clause under the Payment Agreement, hence the Award deals with matters beyond the jurisdiction of the Sole Arbitrator. Learned counsel for the Appellant argued that the parties entered into the

GSA on 18.10.2006 with a dispute resolution mechanism contained in Clause 18. It was argued that the dispute resolution mechanism contained in the GSA was not applicable to or relevant for the purposes of the Payment Agreement which is a separate agreement from the GSA, with no dispute resolution clause and even if the dispute resolution mechanism of the GSA is to be made relevant, the prerequisites under the dispute resolution clause were not satisfied. He further argued that the dispute under the Payment Agreement was a fresh dispute which was not related to the findings of the Expert, Mr. Khalid Ibrahim under the GSA. Hence the first claim did not arise under or in relation to the GSA. The learned counsel argued that the Sole Arbitrator did not have jurisdiction to entertain any claim with respect to the Payment Agreement. He explained that the dispute between the parties was with respect to non-payment of Rs.104,133,296/- under the Payment Agreement which does not contain an arbitration agreement nor makes any express or specific reference to the arbitration clause in the GSA. He argued that pursuant to the laws of Pakistan, there must be a specific arbitration clause in order for the matter to be referred to the arbitration. Reliance is placed on Messrs MacDonald Layton & Company Limited v. Messrs Association Electrical Enterprises Limited and another (PLD 1982 Karachi 786), Syed Arshad Ali v. Sarwat Ali Abbasi (1988 CLC 1350) and Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 57. Therefore the basic argument of the Appellant is that there is no arbitration clause under the Payment Agreement and there is no agreement between the parties that the dispute resolution clause contained in the GSA is relevant to the Payment Agreement. Consequently the Sole Arbitrator did not have jurisdiction in this matter.

14. On behalf of the Respondents, it was argued that there was a dispute between the parties with respect to payment under Clause 3.6 of the GSA. This is the take or pay clause on the basis of which, for a given period, the Appellant is to make payment and either take the gas supplied by the Respondent or else defer the taking of the gas to a subsequent date. Consequently the Appellant is entitled to take make up gas in terms of Clause 3.6(c) of the GSA if it does not take gas in any given month. The dispute pertaining to amounts owed under Clause 3.6 of the GSA were decided in favour of the Respondent SNGPL by the Expert and payments had to be made within fifteen days. However, the Appellant was unable to make the required payments within the stipulated time, hence it sought extension of time which was ultimately resolved by executing the Payment Agreement. Learned counsel argued that the settlement is recorded in the Payment Agreement and in terms of Clause 2.2(b) of the Payment Agreement payment was to be made in three equal installments by 11.5.2010, thereby extending the fifteen day period considerably. Furthermore Khawaja Ahmad Hosain argued that the Payment Agreement in Clause 4 provides that the provisions of the GSA shall prevail and are applicable to the Payment Agreement. Hence he argued that the arbitration clause of the GSA was applicable and the Sole Arbitrator has jurisdiction in the matter. He further argued that under the GSA, the dispute was referred to the Expert under Clause 18.2 for a determination which was a binding determination as per Clause 18.2(h) of the GSA . Since the Expert's decision was binding, arbitration was no longer available to the

parties to resolve that dispute and the Appellant was to make payment as per the determination of the Expert. Learned counsel stated that once the parties had submitted to a binding decision of the Expert, they could not resubmit the matter before another expert questioning the first expert's determination. He also relied upon a decision taken in another case (appended in C.M. No.5/2018) where the parties were the same in some other arbitration as before this Court, in which the Appellant contended that the expert's determination under the GSA is not a pre-condition to any arbitration. Having argued this as the legal position, Khawaja Ahmad Hosain argued that the Appellant is now estopped from arguing a different legal position to suit its convenience.

15. In order to appreciate the issues raised by the parties with reference to the first claim, it is necessary to set out the facts on the basis of which the first claim arises:
(a) The parties executed a GSA on 18.10.2006 under which the Respondent is required to supply natural gas to the Appellant for use as fuel at the Appellant's power generation facility. As per the GSA the Respondent is obligated to supply 38 MMSCF of gas per day during the Firm Delivery Period. The Appellant can take the delivery of the gas or can invoke the take or pay clause and defer delivery of the gas.
(b) Differences arose between the parties with respect to the Commissioning Period start date ('CPSD') the Commercial Operating Date ('COD') and the Appellant's obligation to take or pay under clause 3.6 of the GSA during the CPSD and COD.
(c) Vide letter dated 1.7.2009, the parties agreed to appoint Mr. Khal id S. Ibrahim as the Expert under clause 18.2(g) of the GSA to resolve the dispute.
(d) The Expert heard the matter and issued his Determination on 19.12.2009 holding that some amounts are due from the Appellant to the Respondents in terms of the take or pay clause calculated on the basis of the declared CPSD and COD. The Appellant was directed to make payment in fifteen days.
(e) On 11.1.2010 the parties executed the Payment Agreement on the basis of which the Appellant was to make payment in three installments. The dispute pertaining to payment of Rs.104,133,296/- arises under the Payment Agreement specifically and is not related to the Expert's Determination as the parties agreed under the Payment Agreement that late payment surcharge shall be paid until full payment is made under the Agreement.
Hence the first claim relates to the demand for late payment surcharge under the Payment Agreement. The controversy revolves around the jurisdiction of the Sole Arbitrator with respect to amounts stated to be due under the Payment Agreement. In terms of the dispute referred to the Expert, Mr. Khalid Ibrahim, the CPSD was an issue, hence the Expert was required to decide on what date CPSD occurred or when will it occur. The Expert concluded that CPSD occurred on 30.9.2008. The Expert was also required to decide on what date does Orient (the Buyer) have an obligation under Clause 3.6(b) of the GSA to ensure that the take or pay quantity is 15% of the Daily Contract Quantity. The Expert concluded that there is no obligation on SNGPL to supply gas during the As Available Period and no obligation on Orient to take or pay 15% during the As Available Period as there is no guaranteed delivery during the As Available period. The take or pay clause was

applied on the months of November 2008 and March 2009 for 61 days and Rs.88,486,671.43 was stated to be payable by Orient for this period along with late payment surcharge. Another issue before the Expert was the date on which Orient was obligated to ensure that the take or pay quantity is 50% of the Daily Contract Quantity as per Clause 3.6(a) of the GSA. The Expert gave his findings on this issue calculating the obligation to pay from the COD being 1 st April 2009 in the amount of Rs.1,218,408,469/- along with late payment surcharge. Amounts were calculated for April, May, June, July and for the month of November, 2009 amounts were not calculated as the Expert did not have the required data. Therefore as per the Appellant's contention, the first claim does not arise from the Expert's Determination as it pertains to late payment surcharge as agreed between the parties under the Payment Agreement.

16. At the heart of the dispute is the Payment Agreement which was executed on 11. 1.2010 in the following terms:
THIS PAYMENT AGREEMENT (this 'Agreement') is made at Lahore this 11th day of January 2010:
BETWEEN
Sui Northern Gas Pipelines Limited, a company existing under the laws of Pakistan, with its principal office located at 21 Kashmir Road, Lahore (hereinafter referred to as the 'Seller' which expression shall, where the context permits, be deemed to mean and include its successors-in-interest and permitted assigns) of the one part;
AND
Orient Power Company (Private) Limited, a company existing under the laws of Pakistan, with its principal office located at 10 Ali Block, New Garden Town, Lahore (hereinafter referred to as the 'Buyer' which expression shall, where the context permits, be deemed to mean and include its successors-in-interest and permitted assigns) of the other part.
Each a 'Party' and collectively the 'Parties'.
WHEREAS
(1) The parties entered into a Gas Supply Agreement dated 18 October 2006 ("the "GSA").
(2) Dispute arose on certain issues (the "Issues") between the Parties with regards to interpretation of occurrence of Commissioning Period Start Date, applicability of 15% and 50% Take or Pay, Force Maj eure claim by the Buyer and applicability of surcharge on late payments, in accordance with the executed GSA and the Parties vide side letter dated 01.07.2009 agreed appointment of local Expert for determination on the Issues and it was mutually agreed between the Parties that the determination of the Expert shall be binding on both the Parties.
(3) The Parties, by mutual consent vide side letter dated 01.07.2009, referred the Issues to a jointly appointed Expert, Mr. Khalid Ibrahim (the 'Expert'), for determination pursuant to the provisions of the GSA.
(4) The Expert delivered his determination on the Issues on 19 December 2009 (the 'Determination').
(5) The Parties as per side letter dated 01.07.2009 are bound by the Expert's Determination and shall implement the same in letter and spirit as follows.

NOW, THEREFORE, the Parties hereby agree as follows:
1. Definition: For the purposes of this Agreement, the definitions and the capitalized terms not otherwise defined herein (including Recitals) shall have the respective meanings set forth in the GSA and the Determination.
2. Settlement: The Parties acknowledge and agree as follows:
2.1 CPSD:
(i) The Commissioning Period has started on 1 October 2008 and ended on 31 March 2009 for purposes of payment of Take or Pay Quantity equal to fifteen percent (15%) of the Daily Contract Quantity as provided in Section 3.6(b) of the GSA; (ii) no payment regarding fifteen percent (15%) Take or Pay Quantity as per Section 3.6(b) of the GSA is required to be made by the Buyer to the Seller during the As-Available Period of December 2008 and January and February 2009; (iii) The Buyer is only required to pay fifteen percent (15%) Take or Pay Quantity as per Section 3.6(b) of the GSA for the months of November, 2008 and March 2009 in the amount of Rupees Forty Million, Seven thousand One Hundred Ninety Seven only (Rs.40,007,197.00) (for the month of November 2008) and Rupees Forty Eight Million Four Hundred Eighty Five Thousand Seven Hundred Seventy Five only (Rs.48,485,775.00) (for the month of March 2009), (collectively, the 'Commissioning Period Payment'); and (iv) the Buyer is required to pay compensation for late payment of the Commissioning Period Payment in the amount of Rupees Nine Million One Hundred Forty Two Thousand Nine Hundred Twenty Four Only (Rs.9,142,924) upto 31.12.2009 together with interest from 31.12.2009 upto 03.01.2010 (the date on which the payment had to be made in accordance with side letter dated 01.07.2009 i.e 15 days from Expert's determination) (the ―Compensation‖) and late payment surcharge at Delayed Payment Rate from 04.01.2010 till date. The Parties agree that the Commissioning Period Payment shall be paid immediately on execution of this Agreement.
2.2 COD:
(a)(i) the COD has already commenced as of 1 April 2009 for purposes of payment of Take or Pay Quantity equal to fifty percent (50%) of the Daily Contract Quantity as provided in Section 3.6(a) of the GSA; (ii) no payment regarding fifty percent (50%) Take or Pay Quantity as per Section 3.6(a) of the GSA is required to be made by the Buyer to the Seller during the As-Available Period of December 2009, January 2010 and February 2010; (iii) The Buyer is required to pay fifty percent (50%) Take or Pay Quantity as per Section 3.6(a) of the GSA for the months of April 2009 to November 2009 in the amount of Rupees One Billion Two Hundred Eighteen Million Four Hundred Eight Thousand Four Hundred Sixty Nine Only (Rs.1,218,408,469) (the "COD Payment"; and (iv) the Buyer is required to pay compensation on late payment of the COD Payment as per Expert's determination upto 03.01.2010 (the date on which the payment had to be mae in acfordance with side letter dated 01.07.2009 i.e. 15 days from Expert's determination) (the 'Compensation') and late payment surcharge at Delayed Payment Rate from 04.01.2010 upto the date of full payment.
(b) The Parties agree that payment against 50% Take or Pay (the 'COD Payment') shall be paid in three equal installments: 1st installment equal to 50% of the COD Payment not later than 11.03.2010, the 2nd installment on or before 11.04.2010 and

the 3rd installment one month following the 2nd installment i.e on or before 11.05.2010. However, Delayed Payment Rate shall apply on outstanding amount of COD Payment till its full payment is received by the Seller.
3. Make up Gas: The Parties acknowledge that the Buyer can take the Make up gas against the COD Payment in any month as per the GSA until 31.03.2011 based on the COD determined by the Expert.
4. Effectiveness: This Agreement shall come into effect from upon its execution and after settlement of the Issues as per Agreement; the provisions of the GSA shall prevail and stand applicable.
IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first written above.

17. In terms of Clauses 1 and 4 of the Payment Agreement, the parties agreed that the definitions set forth in the GSA are applicable to the Payment Agreement and that the provisions of the GSA shall not only apply but shall prevail, meaning that the settlement recorded in the Payment Agreement is part and parcel of the obligations under the GSA. The terms of the Payment Agreement establish that the parties intended to remain within the confines of the GSA as the purpose of the Payment Agreement was to give effect to the Expert's Determination. The Recitals to the Payment Agreement clarify this purpose. The Payment Agreement was executed as the Appellant was unable to make the required payments within the fifteen day directed by the Expert, hence they settled their payments under the Payment Agreement. Since the payment schedule was changed the Appellant was required to make late payment surcharge until full and final payment. The Appellant's contention that the parties deviated from the Experts binding determination, hence created an independent new arrangement by way of the Payment Agreement is totally without force as the intent of the Payment Agreement was to give effect to the Expert Determination which held the Appellant liable to certain payments. Under the GSA, we note that in pith and substance the Payment Agreement reflects the Appellant's acknowledgement that amounts are due to SNGPL under the GSA, however since payments could not be made at the prescribed time as per the GSA, the parties agreed to make the payments as per the Payment Agreement. The obligation to pay arises under the GSA and not under the Payment Agreement which agreement was entered into essentially to facilitate the Appellant. The Appellant has relied on letter dated 1.7.2009 on the basis of which the parties agreed to appoint a local expert. The said letter also establishes the fact that the Appellant intended to resolves a dispute pertaining to obligation under the GSA as the list of issues annexed with the letter are all related to the Appellant's obligation under the GSA which required resolution. Through this letter the parties agreed that the decision of the local expert shall be binding on the parties and that the Appellant shall pay any amount within fifteen days failing which the Respondent SNGPL can draw on the security amounts deposited under the GSA. Hence the Experts Determination was related to disputes under the GSA and consequently the Payment Agreement gave effect to the enforcement of the Expert's Determination keeping the parties compliant of their obligations under the GSA.

18. We are fortified with our view by the fact that as per the findings of the Expert, Mr. Khalid Ibrahim both parties acknowledged that they will continue to perform under the GSA, pending resolution of the dispute referred to the Expert. Hence they never intended to enter into a new or fresh agreement. Neither party showed any intent to deviate from the GSA and the statement to continue under the GSA pending a resolution on the dispute amplifies this point. The Appellant has also contended that Payment Agreement does not contain an arbitration clause nor does it make specific reference to the arbitration clause in the GSA, hence the dispute under the Payment Agreement could not be referred to arbitration as the Sole Arbitrator lacked jurisdiction on the issues under the Payment Agreement. In this regard, we are not in agreement with the contentions raised by the Appellant's counsel. The Payment Agreement was not an independent contract outside of the GSA. It was an agreement to make payment pursuant to obligations under the GSA, that too on account of the Appellant's default of making payments within the fifteen days mandated by the Expert Mr. Khalid Ibrahim. In this regard, the judgments relied upon are distinguishable and not relevant to the facts of the case. In the case 1988 CLC 1350 (supra), the court held that by mere implication an arbitration clause cannot be incorporated in another agreement and there must be specific mention of the arbitration clause. This judgment does not help the Appellant because the Payment Agreement specifically provides in Clause 4 that the provisions of the GSA shall apply and prevail. Hence not only is there a specific mention of the provisions of the GSA but they have been made applicable by the parties. Consequently the arbitration clause in the GSA is applicable to the parties.

19. Clause 18.3 in the GSA covers disputes, disagreements or default of the seller and buyer in connection with or arising out of this Agreement. The Respondent argued that the arbitration clause covers all disputes in connection with the GSA and since the Payment Agreement is a consequence of obligations under the GSA, hence it is in connection with and arises out of the GSA. This is why the parties agreed in Clause 1 of the Payment Agreement that the definition and capitalized terms shall have same meaning set forth in the GSA and that the provisions of the GSA are to prevail and be applicable. In our opinion the parties never intended to move out of the contractual obligations under the GSA. A dispute arose which was ultimately referred to the Expert under Clause 1.1 of the GSA. Once the Expert gave his binding determination the Appellant was obligated to comply with the Determination. However, it failed to do so, hence settled the matter by essentially acknowledging its obligations under the GSA and taking some time to make payment. In essence the parties never intended to go outside the GSA and the Payment Agreement reflects upon a settlement pursuant to the obligations under the GSA. The entire purpose of the Payment Agreement was to ensure that the parties fulfill their obligations under the GSA. Therefore we conclude that the dispute resolution mechanism under the GSA was applicable to the Payment Agreement and that the Sole Arbitrator was well within his jurisdiction to make determination in terms thereof.

The second objection against the second claim: Article V(2)(b) of the Schedule to the Act

20. The second claim of the Appellant against the Award is that the amount of Rs.603,202,083/- stated to be due against six invoices, for the period May to October 2011, under Clause 3.6 of the GSA is against the provisions of Section 74 of the Contract Act, 1872 ('Contract Act') and the public policy of Pakistan. The Appellant's case as argued by Mr. Sal man Akram Raja is that the Respondent is not entitled to this amount because the Appellant was under an obligation to take gas from the Respondent under Clause 3.6(a) of the GSA for the relevant period. By not taking gas, the Appellant is in breach of Clause 3.6(a) of the GSA, for which the Respondent is entitled to reasonable compensation and not Rs.603,202,083/. Section 74 of the Contract Act provides that a party complaining of breach of contract can only claim reasonable compensation not exceeding the amount stipulated in the contract. Consequently reasonable compensation requires a finding on the facts of the case to establish actual loss suffered. The Appellant relies on cases decided by the Superior Courts of Pakistan to urge the point that the Respondent SNGPL has to establish the loss it suffered on account of breach of Clause 3.6(a) by the Appellant before it is awarded any amounts. It is his case that the Sole Arbitrator failed to consider the laws of Pakistan on reasonable compensation and also failed to consider the admitted loss of Rs.356,104,346.25/- suffered by the Respondent. Hence in this case, since the loss is admitted the Respondent could not be awarded an amount greater than Rs.356,104,346.25/-. In support of this argument, the Appellant has relied upon law laid down by the Superior Courts on Section 74 of the Contract Act being Province of West Pakistan v. Messrs Mistri Patel & Co. and another (PLD 1969 SC 80), Syed Sibte Raza and another v. Habib Bank Ltd. (PLD 1971 SC 743), Saudi-Pak Industrial and Agricultural Investment Company (Pvt.) Ltd., Islamabad v. Messrs Allied Bank of Pakistan and another (2003 CLD 596), The Bank of Punjab v. Dewan Farooque Motors Limited (2015 CLD 1756) and Atlas Cables (Pvt.) Limited v. Islamabad Electric Supply Company Limited and another (2016 CLC 1833) . Mr. Salman Raja argued that the Sole Arbitrator failed to consider the law of damages in Pakistan and in doing so defeated the purpose of Section 74 of the Contract Act and awarded amounts which run contrary to the laws of Pakistan.

21. The Sole Arbitrator's findings on the second claim are that Pakistani case law does not address the manner in which the take or pay clause should be interpreted and that there is a lacunae in Pakistani Law with regards to interpretation and validity of take or pay clause. However as per international cases the take or pay clause creates an obligation for payment against making the gas available but does not create an actual obligation to take the gas. He concluded that the parties entered into a contract and are bound by their commitment even if the terms of their agreement are deemed harsh by the Appellant. The Sole Arbitrator held that at best this situation calls for intervention by the Government of Pakistan but does not suggest that it is against Pakistan's public policy. The Appellant is aggrieved by these findings and has raised two issues before us with respect to the second claim. First being whether the take or pay clause is governed by the law of damages under Section 74 of the Contract Act and second, whether the award of Rs.603,202,083/- is against the public policy of Pakistan.

22. The facts leading up to this dispute are that the Appellant made payments of around Rs. 1478 Million under the take or pay clause for April to November 2009, March to April 2010 and March 2011. Payments were to be made only for the Firm Delivery Period being March to November and not for December, January and February. The Appellant made payments in April, May, June, July and August 2009 which were adjusted as per the take or pay clause. However, payments made in September, October and November 2009 and March to April, 2010 were not adjusted under the take or pay clause, meaning that even though payment was made Make Up Gas was never taken by the Appellant under Clause 3.6(c) of the GSA. As per the Respondent's contention the cutoff date for taking Make Up Gas was before March, 2011. Learned counsel for the Appellant argued that since the price of gas is paid for, the Respondent's forfeiture of paid amounts, without supply of gas offends Section 74 of the Contract Act and unjustly enriches the Respondent. The thrust of the dispute therefore is whether Make Up Gas could be taken for the period May to October 2011 being the period after the cutoff date of March, 2011 for exercising make up gas rights. SNGPL's position is that Orient is entitled to take Make Up Gas under Clause 3.6(c) of the GSA till the next agreement year which in this case expired on March 2011. Consequently SNGPL was not obligated to provide Make Up Gas after March 2011. The Appellant did not pay for gas received May to October 2011 and instead called for adjustment against lapsed Make Up Gas entitlement. The Sole Arbitrator accepted this argument and awarded Rs. 603,202,083/- as amounts due for May to October 2011 and did not agree with the Appellant's contentions that the Respondent had unjustly received payment from the Appellant without providing any Make Up Gas.

23. In this context, Mr. Salman Akram Raja argued that amounts demanded under the six invoices are not due to the Respondent because the Respondent has received excess amounts from the Appellant for the months in which payment was made but gas was not supplied. Mr. Raja argued that the Respondent admits that gas was not supplied to the Appellant during this period and that it was delivered and sold to other consumers, hence the Respondent suffered minimum loss so far as consumption of gas is concerned. He argued that as a result of this diversion and sale, the loss suffered by SNGPL is limited to the cost of diversion of gas and to the default in the applicable tariff. In this regard, the learned counsel relied upon the statement of the Chief Billing Officer Mr. Liaqat Ali Nehra who admitted that the actual loss suffered is Rs.356,104,346.25 for the period April to November 2009 and March to April 2010 and March 2011. Hence he argued that the Respondent is entitled to Rs.356,104,346.25 and no more and any amounts over and above this amount would unjustly enrich the Respondent and is not reasonable compensation as mandated in Section 74 of the Contract Act.

24. Essentially the dispute between the parties is with respect to the taking of Make Up Gas. On behalf of the Appellant it is argued that when the price of gas has been paid for, the Respondent must supply the gas and the Appellant must take the gas. If the supply is deferred to a later date and the Appellant does not take the gas, even within the make up gas period, it is in breach of its obligation to take gas under the

GSA. In the event of breach caused by the Appellant, the Respondent SNGPL is entitled to reasonable compensation and cannot forfeit the amounts paid. Hence Mr. Raja argued that the take or pay clause is in fact a penalty clause which entitles the seller, SNGPL to a greater sum of money than reasonable compensation without establishing the loss incurred by SNGPL. Learned counsel also argued that the Appellant's conduct of not taking gas from the Respondent tantamounts to breach under Clause 3.6(a) of the GSA. This breach of the GSA does not automatically lead to termination of the contract and may allow the innocent party to recover damages for the breach. Accordingly it is the Appellant's case that the breach caused by the Appellant by not taking gas does not ipso facto result in termination of the GSA but gives the Respondent the right to choose either to terminate the contract or to recover damages for the loss suffered. The Appellant has relied upon the Determination dated 11 .6.2014 made by Mr. Justice Khalil-ur-Rehman Ramday in which the expert held that the Appellant's default in not taking gas from the Respondent amounts to breach under Clause 3.6(a) of the GSA because Clause 3.6(a) of the GSA imposes an obligation on the Appellant to take minimum quantity of gas from the Respondent in the relevant period. The Appellant's conduct in not taking that minimum quantity of gas amounts to breach for which, in terms of Section 74 of the Contract Act, the party complaining of breach is entitled to reasonable compensation, not exceeding the amount stipulated in the contract. In support of their contention, the Appellant has also relied upon PLD 1969 SC 80 (supra) in which it is held that in the case of a penalty, the court shall grant reasonable compensation which is dependent upon the facts and circumstances of the case subject to proof and the aggrieved party can only recover reasonable compensation and no more. The Appellant has also relied upon 2016 CLC 1833 (supra) in which the Court has held that damages require evidence on details of loss actually suffered. Liquidated damages as a rule requires positive evidence to show the actual loss suffered by the parties claiming charges. The Court also held that if the fixed amount is stipulated in a contract as liquidated damages, it cannot be recovered until the actual loss suffered is not proven through sufficient evidence. The Appellant Counsel therefore argued that the Respondent has admitted a loss of Rs.356,104,346.25/- on account of Appellant's breach of Clause 3.6(a) of the GSA, hence they are not entitled to, in the first instance any amount without proving reasonable loss and secondly at best the amount they have admitted and no more. Consequently the Sole Arbitrator's award of Rs.603,202,083/- is in disregard of the provisions of Section 74 of the Contract Act and the law settled by the Superior Courts of Pakistan. It is their contention that the take or pay provisions are governed by the general law of damages as embodied in Section 74 of the Contract Act and it is a case of unjust enrichment which is against the public policy.

25. On behalf of the Respondent, Khawaja Ahmad Hosain argued that the take or pay clause is the contractual mechanism agreed to between the parties with respect to payment for gas and the delivery and supply of gas. As per his arguments, the take or pay clause gives the buyer two options, either to pay and take the gas or else to pay and defer taking the gas. The exercise of either option is valid under the GSA and will not be considered as a breach. He argued that breach can only occur if a

party fails to comply with its obligation under either of the two options. So far as the Appellant is concerned, the take or pay clause obligates the Appellant to pay for the gas. The taking of gas is not an obligation rather entitles the Appellant to choose taking gas or deferring the taking of gas. Therefore the take or pay clause is not a penalty clause and the question of being entitled to reasonable compensation as per Section 74 of the Contract Act does not arise. Learned counsel for the Respondent argued that courts of many common law jurisdictions have found the take or pay clause to be a valid and enforceable clause and have found that the take or pay clause is not a penalty clause. He further argued that the parties negotiated and agreed to the terms of the GSA and the Appellant now, at its own convenience has declared breach and on the basis thereof built a case that amounts due to the Respondent under the GSA are contrary to public policy as they are excessive and harsh. He further argued that the take or pay clause is a common clause in energy sector agreements and both parties are well aware of this provision, its rationale and the fact that it is part and parcel of the terms of a gas supply agreement whether executed in Pakistan or internationally. Learned counsel argued that if the contention of the Appellant is accepted, it would lead to undoing the contractual arrangement between the parties and would have a serious impact on all take or pay clauses which exists in every gas supply agreement. He explained that such an interpretation would be contrary to the terms agreed upon between the parties and would adversely impact the commercial interest where such agreements are executed. Khawaja Ahmad Hosain argued that there is no question of unjust enrichment given that the payment due to the Respondent is under the agreed terms of the GSA. He argued that the take or pay payment is not intended to be payable as a penal consequence of failure of the buyer to take delivery of the given quantity of gas rather it is a commitment to pay for the gas with the option to take delivery of gas at a later date. Consequently not taking delivery of the gas is not breach of the terms of the GSA and does not fall within the ambit of a penalty clause nor does it result in unjust enrichment.

26. This issue was referred to an expert by the parties being Mr. Justice (Retd) Khalil-ur-Rehman Ramday in an effort to resolve the matter pertaining to Make Up Gas. The specific issue before the expert was that if the entire Make Up Gas has not been taken by the buyer under Clause 3.6(c) of the GSA, can the seller retain payments made by the buyer as of right, without any obligation to provide gas and if the seller has the right to keep the payment made with no obligation to provide gas, whether this is in fact a penalty. The expert discussed the wisdom of the take or pay clause and concluded that it was a penalty clause for the following reasons:
A reading of this provision would reveal that the opening part thereof casts an obligation on the Buyer to take the stipulated minimum quantity of Gas every day during every month in the FDP. If the Buyer does not take the said minimum quantity and does not comply with this obligation, then obviously it commits a breach of this provision (the contract). The later part of the said opening sentence talking about paying for the said quantity of Gas if not taken, only tells us of the consequences of the said breach. Therefore, to say that no breach of the contract had occurred if the minimum quantity of Gas was not taken and paid for by the Buyer,

would not be sustainable in law. In such a situation, the contract does get broken and the provisions of section 74 would come into play.
It may be clarified at the outset, as mentioned above, that section 74 of the Contract Act does not inter-ali a, recognize any distinction between a sum of money named as payable on account of a breach of the contract (liquidated damages) or the forfeiture of an already paid amount of money by way of penalty (as in the present case). Both these situations have to be treated alike and what the aggrieved party is entitled to receive from the other party, in both these cases, is only a reasonable compensation with the named amount as the outer limit. Therefore, the question whether the TOP amount is retainable by the Seller as penalty or otherwise, is not really relevant in this country.
Thus the question whether the amount in question of the un-taken M.U. Gas could be retained by the Seller or had to be returned to the Buyer, would have to be answered in the light of the applicable provisions of sections 10, 14, 16 and 74 of the Contract Act as interpreted, explained and elucidated by our Superior Courts through their judgments which have been discussed, in some detail, above. Through the said judgments, the Superior Court have been pleased to identify some basic standards, and norms to determine the enforceability of the provisions like the one in hand and the resultant determination of a reasonable compensation and the further determination of its payability or otherwise to the aggrieved party.
The Sole Arbitrator also considered this issue and concluded that:
Take or pay clauses (with or without the provision for Make-Up Gas) are recognized and utilised internationally and are to be found most commonly in large scale energy projects because of the heavy cost of infrastructure involved and the cost of financing undertaken by the Seller and a need to have some certainty with regards to a minimum purchase of the commodity. The Buyer too 'commits' to pay for a minimum quantity to guarantee a regular but flexible supply.
Having considered the case law with regards to take or pay clauses (which is predominantly English and US), I find that one of the key reasons why most courts in these jurisdictions have found take or pay clauses to be valid and enforceable when a buyer challenges the clause as being an unenforceable penalty is that the take or pay payment is not due as a result of a contract breach or default but rather, it flows from the Buyer's valid choice/decision not to take the take or pay quantity. The Courts having come to that finding have then gone on to conclude that where there is no breach there can be no penalty.
He also held that:
I agree with this save that I find that the word "shall' imposes on the Respondent the obligation to take a minimum quantity of gas and the obligation, if the gas is not taken, to pay for that minimum quantity of Gas, that is, the Take or Pay Quantity. The Respondent has a choice: 'take or pay'. It is when the Respondent fails to take and then fails to pay for the Take or Pay Quantity that a breach occurs. The GSA does not provide for any damages to be paid in this instance.
A take or pay clause in essence thus requires the Buyer to pay for a minimum quantity of the commodity whether or not the Buyer exercises its right to take the commodity either then or later.

The obligation to pay for this minimum quantity of the commodity is not a secondary obligation triggered by a breach but is a primary obligation.
The Take or Pay clause (with the attendant Make-Up Gas provision) was agreed upon by the parties. The Claimant was obliged to provide the Gas to the extent of the Daily Contract Quantity on each day during the Firm Delivery Period. This would have entailed initially the construction and thereafter the regular maintenance of the transmission lines an undoubtedly huge infrastructure exercise. The Respondent on the other hand was obliged to pay for a minimum quantity (50% of the Daily Contract Quantity) if it chose not to take the Daily Contract Quantity that the Claimant was obliged to provide on a daily basis during the Firm Delivery Period. Both parties had their respective guarantees: The Claimant, the payment of a minimum amount and the Respondent, the provision of a daily supply of Gas. The payment of the minimum amount by the Respondent still entitled the Respondent to Gas for that minimum amount paid, the only condition being that it had to be taken-up within a given period of time. The question of time was a matter for negotiation between the parties before the GSA was signed.
For the reasons outlined above and having construed the Take-or-Pay clause in the GSA with the attendant Make-Up Gas provision I hold that a breach does not occur when the Respondent fails to take the Take or Pay Quantity.
I also hold that the obligation to make the Take or Pay payment flows from the Buyer's decision not to take the Take or Pay Quantity of Gas. The Respondent thereafter has the period stipulated in Section 3.6(c) of the GSA to Make-Up Gas for which it has paid. The minimum amount paid by the Respondent thus cannot be a penalty as it could be effectively reduced (to nothing) by the Respondent's taking of the Make-Up Gas. I thus do not find the Take or Pay clause to be a clause in terrorem.
Effectively he concluded that there was no breach by the Appellant hence the provisions of Section 74 of the Contract Act are not attracted.

27. Learned counsel for the Appellant argued that since the take or pay clause is a penalty clause, the Respondent is not entitled to amounts over and above reasonable compensation that too which need to be proven by way of evidence. Hence the amount of Rs.603,202,083/- is against the laws of Pakistan and contrary to the public policy of Pakistan. The public policy exception is found in Article V (2) (b) of the Convention which provides that recognition and enforcement of an arbitral award may be refused in Pakistan if that award is contrary to the public policy. Therefore one of the grounds on which recognition and enforcement of a foreign arbitral award can be refused is where the award is against public policy. The term public policy is not a defined term under the Act or the Convention, hence the Appellant's counsel has relied upon various different cases and some literature from different jurisdictions to highlight the view taken by the courts and experts on the interpretation of public policy. The material relied upon discusses public policy in the context of arbitration in the following manner:
Chief Justice Robert French AC of the High Court of Australia in the 2016 Goff Lecture delivered on 18 April 2016 titled Arbitration and Public Policy in Hong Kong who concluded that:

The decisions of courts applying concepts of arbitrability and public policy have sometimes been designated as pro-arbitration or anti-arbitration depending upon the outcome. It is necessary to be cautious about those designations, which can be indicative of advocacy rather than assessment. Arbitration is not like a football code attracting the rule that if you are not for us you are against us. And while healthy competition between jurisdiction is important for the development of innovative approaches to dispute resolution, public policy should not just be about attracting business. Nor can-judicial decision-making be about attracting labels such as 'pro-arbitration' or arbitration friendly and thereby attracting nonjudicial business to the jurisdiction. Clearly, there is a lot of room for movement in the public policy judgments which inform the structure and content of legal regimes supporting and governing arbitration and their interpretation and application. There is a powerful international public policy reflected in that of many countries which strongly support arbitration as a dispute resolution mechanism. In such countries there is, for the most part of a recognition that countervailing public policy considerations may properly limit the scope of the arbitral process and require a degree of supervision of it. Coupled with that is a recognition that public policy criteria in relation to arbitrability recognition and enforcement must be applied with care and restraint.

It is, of course, a responsibility of all those engaged in the practice of commercial arbitration to ensure that they and the process in which they engage not only serves its users but continues to be sensitive to and to respect the public interest. That is its greatest assurance of its long term future."

Justice Stephen Breyer of the United States Supreme Court in the book The Court and the World (2015) stated that:

Again, this case concerned a judicial order, but the same problem might have arisen with an arbitration finding, which would have behind it the weight of the New York Arbitration Convention. Signed by close to 150 nations, the convention provides that each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon. Because of this agreement, international arbitration awards are often easier to enforce in foreign nations than are judgments of ordinary courts. But it also provides that a nation may refuse to enforce an order on the grounds that it violates the nation's public policy. As with labor arbitration, courts that are too ready to deny enforcement of awards for arbitration procedures. At the same time, however, courts that pay little or no attention to their nation's public policies can create, out of arbitration, a procedural method for nullifying those policies. So what is the right balance? How much divergence among nations in appropriate? Does it matter if a party resisting arbitration can choose among three different nations with three different public policies, by (1) bringing a court action (in Nation A) to prevent arbitration from starting, (2) bringing a court action midstream (in Nation B) trying to stop the arbitration from continuing, or (3) bringing an action (in Nation C) after the arbitration trying to prevent enforcement of an award? The lower courts are already beginning to wrestle with some of these questions. And our Courts may have to confront them in due time.

Justice Sundaresh Menon of the Supreme Court of Singapore in his speech International Arbitration: The Coming of a New Age for Asia (and Elsewhere) (2012) stated that:

The second development relates the willingness of at least some courts to adopt a more expansive notion of review based on public policy. The Indian Supreme Court in ON GC v SAW Pipes extended the concept of public policy. Holding that an award would be contrary to public policy if it were "patently illegal", the Court went on to re-examine the questions of fact and law that had been considered by the arbitral tribunal. This was followed in another recent Indian decision Venture Global Engineering v Satyam Computer Services Ltd. 43 this time involving a foreign award. In similar fashion, in European Gas Turbine v Westman International Ltd, the Paris Court of Appeal said that its control over arbitration must involve in fact and in law all the elements which enable the verification of the application or not of a public policy rule, and if such a rule applies, the legality of the arbitration agreement.

In India, the ground of public policy had been extensively explored in the case of Oil and Natural Gas Corporation Ltd v. Saw Pipes Ltd (2003) 5 SCC 705 ('Saw Pipes Case'). The Supreme Court of India concluded at para 31 that:

Therefore in our view, the phrase 'Public Policy of India' used in S. 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time -to time. However, the award which is, on the face of it, patently in violation of statutory provision cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar's case 1993 Indlaw SC 1441 (supra), it is required to be held that the award could be set aside if it is patently illegal. Result would be award could be set aside if it is contrary to:

(a) Fundamental policy of Indian law; or

(b) The interest of India; or

(c) Justice or morality, or

(d) In addition, if it is patently illegal

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void.

In the subsequent case of Oil and Natural Gas Corporation limited v. Western Geco International Limited (2014) 9 SCC 263, ('Geco Case') the Supreme Court of India elaborated on the concept of the 'Fundamental policy of Indian law' and held at paras 26 and 28 in the following terms:

What then would constitute the 'Fundamental policy of Indian Law' is the question. The decision in Saw Pipes Ltd. does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression

"Fundamental Policy of Indian Law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the Fundamental Policy of Indian law. The first and foremost is the principle that in every determination whether by a Court or other authority that affects the rights of a citizen or leads to any civil consequences, the Court or authority concerned is bound to adopt what is in legal parlance called a 'judicial approach' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the Court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of Judicial approach in judicial and quasi-judicial determination lies in the fact so long as the Court, Tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a Court, Tribunal or Authority vulnerable to challenge.

Equally important and indeed fundamental to the policy of Indian law is the principle that a Court and so also a quasi -judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated 'audi alteram partem' rule one of the facets of the principles of natural justice is that the Court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the Court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian Law.

Having explained the concept of the 'Fundamental Policy of Indian Law', the Supreme Court of India proceeded to conduct a detailed factual enquiry of the case and decided to modify the arbitral award impugned before the Court to the following reasons:

It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an arbitral tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.

Inasmuch as the arbitrators clubbed the entire period between 16th October 2001 and 21st March, 2002 for purposes of holding the appellant-Corporation responsible

for the delay, they committed an error resulting in miscarriage of justice apart from the fact that they failed to appreciate and draw inferences that logically flow from such proved facts. We have, therefore, no hesitation in rejecting the contention urged on behalf of the Respondent that the arbitral award should not despite the infirmities pointed out by us be disturbed.

That brings us to the last submission that deduction on account of taxes not paid should have been allowed by the Respondent - arbitral tribunal. The Tribunal has, in our opinion, correctly held that no part of the work was undertaken outside Singapore which was to be executed on a turnkey basis for a price that was pre-determined. The arbitrators have, in our opinion, rightly held that no taxes were payable under the Indian Income Tax Act so as to entitle the Corporation to deduct any amount on that account by reason of non-payment of such taxes. The challenge to the award to that extent must fail and is, hereby rejected.

In the result, we allow this appeal but only to the extent that out of the period of 4 months and 22 days which the arbitrators have attributed to the appellant-Corporation a period of 56 days comprising 42 days of the first interval and 14 days of the second referred to in the judgment shall be reduced. Resultantly, deductions made by the appellant-Corporation for the said period of 56 days shall stand affirmed and the award made by the arbitrators modified to that extent with a proportionate reduction in the amount payable to the Respondent. No costs.

Learned counsel for the Appellant argued that in 2016, the Indian Parliament amended the Arbitration and Conciliation Act, 1996 of India ("the Indian Act") such that Section 48 of the Indian Act which is based on Article V(2)(b) of the New York Convention, was amended and an explanation was added to section 48(2)(b) of the Indian Act that excluded the grounds of patent illegality from the concept of public policy of India. However, the Indian Parliament retained the fundamental policy of Indian law as the constituent element of the public policy of India. Therefore he argued that the Geco Case, which is based on the concept of fundamental policy of Indian law, continues to be a binding precedent in India and a highly persuasive precedent for the Courts of Pakistan.

28. Further to the above Mr. Salman Akram Raja added that the UNCITRAL Secretarial Guide on the New York Convention (2016) ('UNCITRAL Guide') provides the following commentary on Article V(2)(b) of the New York Convention:

Although different jurisdictions define public policy differently, case law tends to refer to a public policy basis for refusing recognition and enforcement of an award under Article V(2)(b) of the New York Convention when the core values of a legal system have been deviated from. Invoking the public policy exception is a safety valve to be used in those exceptional circumstances when it would be impossible for a legal system to recognize an award and enforce it without abandoning the very fundaments on which it is based.

In the words of the often-quoted judgment of the Second Circuit of the United States Court of Appeals in Parsons, "[e]nforcement of foreign arbitral awards may be denied on (the basis of public policy) only where enforcement would violate the forum state's most basic notions of morality and justice". Several jurisdictions

outside the United States have relied on this passage when assessing the public policy exemption.
Similarly, the Federal Court of Australia has recently decided that "it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in [the] jurisdiction [where enforcement is sought] which enliven this particular statutory exception to enforcement". In the same vein, the Hong Kong Court of Final Appeal defined an award that violates public policy as an award that is "so fundamentally offensive to (the enforcement jurisdiction)'s notions of justice that, despite its being party to the Convention, it cannot reasonably be expected to overlook the objection.
Hence on the basis of the cases and literature relied upon learned counsel for the Appellant argued that public policy means matters of national interest related to national sovereignty. It means that the court should protect the fundamental notions of justice, fairness and morality and anything done in contravention of the same would offend public policy. In this case, learned counsel argued that the public policy concerns are that a party should not be permitted to recover more than what it has actually lost; that a public sector entity should not be allowed to unjustly enrich itself at the expense of a private person; that unjust enrichment offends the principles of economic justice as embodied in the Constitution; that Section 74 of the Contract Act does not permit the Respondent to recover more than reasonable compensation; that the Respondent, can at best only recover loss that it has actually incurred and in this case admitted the amount of Rs.356,104,346.25/-. Hence the Sole Arbitrator's award of Rs.603,202,083/- cannot be maintained.

29. Learned counsel for the Respondent, Khawaja Ahmad Hosain argued that the term public policy is not defined under the law nor has any meaning been given in the context of the New York Convention. The expression public policy has been interpreted in the context of Section 23 of the Contract Act wherein the courts have held that any element of injury to public interest would fall within the domain of public policy. In the case Nan Fung Textiles Ltd. v. Sadiq Traders Ltd (PLD 1982 Karachi 619), it has been held that:
The general head of 'Public Policy' covers a wide range of topics, such as, for example, trading with enemy in time of war, stifling prosecution, champerty and maintenance and various other matters.
Scope of public policy-Objects which on grounds of public policy invalidate contracts may, for convenience, be generally classified into five groups first, objects which are illegal by common law or by legislation; secondly, objects injurious to good Government either in the field of domestic or foreign affairs; thirdly, objects which interfere with the proper working of the machinery of justice; fourthly, objects injurious to family life and fifthly, objects economically against the public interest.
While determining whether the enforcement of a non-speaking foreign award will be against public policy it cannot be overlooked that the Legislature has recently amended Arbitration Act, 1940 which does not invalidate a non-speaking award unless it has been remitted by the Court and the arbitrators or umpire fail to resubmit it with reasons in sufficient detail. The fact remains that no such

amendment has been made in the Act of 1937. A foreign award which does not state reasons cannot be termed to violate any provision of law governing its enforcement. Any non-compliance with the provision of Arbitration Act, 1940 will not invalidate a foreign award nor can it be set aside under the provisions of Arbitration Act. The validity of a foreign award as defined by section 2 of the Act of 1937 can be challenged on the grounds specified in section 7 of the Act of 1937. The learned counsel for the respondents contended that enforcement of award is against Public Policy but did not address how Public Policy was involved. In my view the enforcement of present awards is not against Public Policy.

The argument of injury to society as an element of public policy has also been endorsed by the august Supreme Court of Pakistan in Haji Abdul Karim and others v. Sh. Ali Muhammad and others (PLD 1959 SC 167) in the following manner:

Similarly, the appellants not having proved that a licence for the working of the factory was necessary because the Chief Executive Officer had formed the opinion that the running of the factory was dangerous to life, health or property or likely to create nuisance, it cannot be held that running of the factory was opposed to public policy.

In Maulana Abdul Haque Baloch and others v. Government of Balochistan through Secretary Industries and Mineral Development and others (PLD 2013 SC 641) the august Supreme Court of Pakistan has held as under:

The processing of the matter by GOB in the above manner substantiates that public advertisements were not resorted to in the interest of transparency and to obtain the best competitive price for the disposal of public property, i.e. mineral resources in Reko Diq, and thereby denied participation to other investors of the field to the detriment of the general public, and especially the people of Balochistan. Such a handling of an issue of great public importance was against public policy as well because it certainly caused injury to the public good and, therefore, provides a basis for denying the legality of the transaction in question. It is noteworthy that section 23 of the Contract Act, 1872 provides that the consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral or opposed to public policy.

30. Khawaja Ahmad Hosain also explained that the Appellant's reliance upon the Geco Case for interpretation of the term 'public policy' as a ground of refusal to recognize foreign arbitration awards under the Convention is misplaced because unlike in the present case, the award in Geco Case was a domestic award. He explained that in India, Arbitration and Conciliation Act 1996 ("the 1996 Act") provides for an application for setting aside of a domestic award under Section 34 of the 1996 Act. The 1996 Act also provides a distinct provision of law for application of refusal of recognition of the foreign awards, which is set out in Section 48 of the 1996 Act. Therefore, the interpretation of public policy as explained in Geco Case is irrelevant for the purposes of the present case as it does not apply to foreign awards. He argued that the entire judgment in the Geco Case pertains to interpretation of 'public policy' in the context of section 34 of the 1996

Act for domestic awards which is illustrated by the relevant paragraph reproduced for reference:
It is true that none of the grounds enumerated under Section 34(2)(a) were set up before the High Court to assail the arbitral award. What was all the same urged before the High Court and also before us was that the award made by arbitrators was in conflict with the public policy of India, a ground recognized under Section 34(2)(b)(ii). The expression _public policy of India' fell for interpretation before this Court in ONGC Ltd. v. Saw Pipes Ltd. and was, after a comprehensive review of the case law on the subject, explained in para 31 of the decision in following words:
Therefore, in our view, the phrase 'public policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that concept of public policy connotes some matter which concerns public good and the public interest. What is for the public good or public interest or what would be injurious or harmful to the public good or public interest has varied from time to time.

31. The learned counsel further explained that the decision calling for a wider interpretation of public policy under Section 34 of the 1996 Act in the Saw Pipes Case relied upon by the Appellant, is also not applicable to foreign awards. This case is also related to domestic awards and the concept of patent illegality which is distinguishable from the present case. This view was expressed by the Supreme Court of India in Shri Lal Mahal Ltd. v. Progetto Granto Spa [(2014) 2 SCC 433 at 449] ('Shri Lal Mahal Case') of which the relevant paragraph is reproduced for reference:
We accordingly hold that enforcement of foreign award would be refused under Section 48(2)(b) only if such enforcement would be contrary to (1) fundamental policy of Indian law; or (2) the interest of India; or (3) justice or morality. The wider meaning given to the expression 'public policy of India' occurring in Section 34(2)(b)(ii) in Saw Pipes is not applicable where objection is raised to the enforcement of the foreign award under Section 48(2)(b).

32. He again distinguished the cases relied upon by the Appellant such that reliance on Phulchand Exports Ltd. v. O.O.O. Patriot (2011) 10 SCC 300 ("Phulchand Case") which upheld that in case of foreign awards the wider interpretation of public policy should be adopted was overruled by the Supreme Court of India in Shri Lal Mahal Case. The relevant paragraph of Shri Lal Mahal Case is reproduced:
It is true that in Phulchand Exports a two judge Bench of this Court speaking through one of us (R.M . Lodha J.) accepted the submission made on behalf of the appellant therein that the meaning given to the expression _public policy of India' in Section 34 in Saw Pipes must be applied to the same expression occurring in Section 48(2)(b) of the 1996 Act. However, in what we have discussed above it must be held that the statement in para 16 of the Report that the expression 'public policy' of India used in Section 48(2)(b) has to be given a wider meaning and the award could be set aside, if it is patently illegal does not lay down correct law and is overruled.

The Supreme Court of India in Shri Lal Mahal Case also ruled that the public policy does not allow the review of merits of the case:
Moreover, Section 48 of the 1996 Act does not give an opportunity to have a 'second look' at the foreign award in the award enforcement stage. The scope of inquiry under Section 48 does not permit review of the foreign award on merits.

33. Hence on the basis of the aforesaid, he argued that the objections raised by the Appellant do not fall within the ambit of Article V(2)(b) of the Convention. Section 74 of the Contract Act does not apply to the take or pay clause and the issues raised with respect to its interpretation, calling it a penalty clause, is incorrect and runs contrary to the understanding reached between the parties with respect to the take or pay mechanism as contemplated under the GSA. Learned counsel further argued that the public policy exception is to be narrowly construed and error of law or erroneous reasoning are not covered in its scope. The learned counsel argued that the Sole Arbitrator has reasoned his opinion in terms of the obligations under the GSA and as such has not rendered an opinion which can be set aside under Article V (2) (b) of the Convention. The learned counsel further emphasized that the objections raised by the Appellant call for a decision on the merits of the case which objection is not sustainable under the Convention and the Act. He argued that the public policy exception is triggered where there is an element of injury to the public, or public interest or where the enforcement of the Award is not possible since it violates the laws of Pakistan. In the present case none of these factors are prevalent, hence no Case is made out which calls for any interference under the public policy exception. He clarified that the take or pay clause is not a penalty clause and the Respondent is entitled to recover amounts as contemplated under clause 3.6 of the GSA.
The take or pay clause

34. In order to appreciate the arguments with respect to the take or pay clause, it is necessary to examine the said clause, its mandate and intent Clause 3.6 of the GSA is the take or pay/make up gas clause which reads as follows:
(a) From and after the Commercial Operations Date and during a Month in the Firm Delivery Period, the Buyer shall take and if not taken pay for a minimum quantity of Gas (the 'Take-or-Pay Quantity) equal to fifty percent (50%) of the Daily Contract Quantity multiplied by the difference between the number of days in that Month (or portion thereof) and (i) the number of days (or fractions thereof) of Force Majeure Events declared by the Seller or the Buyer in that Month, (ii) the number of days (or fractions thereof) of non-delivery of Gas by the Seller in that Month for any reason, including a breach or default by the Seller or maintenance undertaken by the Seller pursuant to Section 12.1, and (iii) the number of days of Scheduled outages in that Month notified to the Seller pursuant to Section 12.2.
(b) During the Commissioning Period, the Take or Pay Quantity shall be fifteen percent (15%) of the Daily Contract Quantity multiplied by (i) the number of Days in the Commissioning Period and (ii) the actual Gas Price applicable during the Commissioning Period. The Buyer shall make this payment to the Seller at the Commercial Operations Date; provided that there shall be no Make-Up Gas for such

period; provided further that if the Buyer takes Gas in excess of the fifteen percent (15%) of the Daily Contract Quantity then the Buyer shall pay to the Seller the Gas Price multiplied by the quantity of Gas actually taken by the Buyer; provided further that in no event shall the Seller's obligation to deliver Gas hereunder on any Day exceed the Daily Contract Quantity. Any reconciliation of such Take or Pay Quantity charges by the Buyer to the Seller shall be made on the Commercial Operations Date.
(c) Except for the Gas taken or paid by the Buyer pursuant to Section 3.6(b) above, any Gas paid for by the Buyer pursuant to this Section 3.6(a) above during a Contract Year but not taken prior to the time of payment ('Make Up Gas') may be taken with payment by the Buyer of the different between the Gas Price prevailing at the time the Make-up Gas is taken by the Buyer and the Gas Price used to determine the payment for the Take or Pay Quantity, using the 'first in, first out' method and any increase in taxes on the sale and purchase of Gas applicable to Gas sales hereunder, during the Firm Delivery Period of the immediately following one (1) Contract Year of the Term, provided that the Buyer shall have first taken and paid for a quantity equal to but not less than the Take or Pay Quantity in the applicable Contract Year and provided further that in no event shall the Seller's obligation to deliver Gas hereunder on any Day exceed the Daily Contract Quantity. At the end of the Gas Allocation, the Buyer shall be entitled to take the Make-up Gas during the immediately following twelve (12) Months on as available basis.
(d) Unless agreed otherwise by the Buyer, and subject to the Buyer having placed the Gas Order, the minimum amount of Gas the Seller must supply is 9.5 MMSCFD to avoid paying any charges under Section 3.7 and the Buyer shall not be obliged to take Gas, if tendered, for any quantity less than the said quantity.

35. On the basis of this clause, known as the take or pay clause, the parties have agreed that the seller being the Respondent SNGPL shall make available gas for supply to the buyer being the Appellant, Orient Power Company. As per Clause 3.6(a) of the GSA, the Appellant can either take the gas meaning that it will pay for the gas and take supply of the gas or it can pay for the gas but not take supply of the gas, meaning that it can defer the taking of the supply of gas to a later date. In terms of the take or pay clause, the buyer can pay for the gas and take it at a subsequent period as Make Up Gas under Clause 3.6(c) of the GSA. Therefore as per the GSA, where the buyer has paid for the gas but defers delivery of supply of gas the take or pay clause allows the buyer to pay for the gas and take the gas as Make Up Gas at a subsequent period. Consequently in terms of the GSA, there is an obligation on the Respondent to supply gas and there is an obligation on the Appellant to pay for the gas with the option to either take supply immediately or else defer taking supply to a later date. Clause 3.6(c) of the GSA provides that if the gas is not taken but is paid for by the buyer, then the buyer can take the gas as Make Up Gas during the immediately following twelve months on as available basis. Therefore under Clause 3.6(c) of the GSA the buyer has the option to take Make Up Gas within a specified period, after which the obligation to supply gas to the buyer finishes, meaning that the seller is no longer required to deliver gas to the buyer.

36. The take or pay clause is a common term in gas supply agreements, which gives the buyer the option to take supply of the gas or else pay for it but defer the taking of the gas supply. The rationale behind this clause is to allocate risk over long term contracts. It acts as a risk sharing mechanism between the supplier and buyer where the buyer seeks stability in supply and some flexibility in prices and the seller seeks assurance for guaranteed income. It also provides some comfort to the investors of natural gas projects that their investments are secure over the duration of the contract, as the risks are divided between the parties and not borne by any one party. An essential feature of the take or pay clause is the right to take make up gas. The buyer has the right to take the gas in the succeeding year or any defined period and not at the time when payment was due. The take or pay clause is activated when the buyer does not take delivery of the agreed quantity of gas but has paid for it. The Appellant has raised the question as to whether the take or pay clause is enforceable as a penalty clause in terms of Section 74 of the Contract Act and the second question is what happens where the buyer has paid for the gas but deferred taking it and then failed to take Make Up Gas during the twelve month period. In such cases can the seller forfeit amounts received for supply of gas.

37. There are two separate obligations in the take or pay clause. First is the obligation of the seller to supply gas during the firm delivery period and also to provide Make Up Gas under Clause 3.6(c) of the GSA on as available basis during the make up gas period. The second is the obligation of the buyer to pay for the gas. Clause 3.6(a) specifically provides that the buyer shall take and if not taken pay for a minimum quantity of gas. This means that the buyer shall either pay and take the gas or else pay and defer the taking of gas. Hence we are of the opinion that the obligation of the buyer under Clause 3.6(a) of the GSA is to pay for the gas and not take the gas. There is no obligation on the buyer to take a minimum quantity of gas at the time when payment is made. Clause 3.6(a) of the GSA gives the buyer the option to take or pay for the gas. Clause 3.6(c) of the GSA gives the buyer the make up gas right on the basis of which it can take delivery of the gas in the succeeding year. Again the supplier is obligated to make the gas available for the make up period on as available basis and correspondingly the buyer has option to exercise its make up gas right. The make up gas right is also not an obligation but a right to exercise the option to defer taking of gas at a later date. At the time if the buyer defers the taking of gas, the buyer has to satisfied its basic obligation to pay for the gas and can opt to defer taking the gas. The right to make up gas therefore is also not an obligation on the buyer but an option which can be exercised by the buyer. The period within which the make up gas right can be exercised is also stipulated in Clause 3.6(c) of the GSA. Hence the buyer has agreed to defer taking gas and has agreed to avail the option to take Make Up Gas within a stipulated period. In all situations the gas has been paid for and the buyer is left within the right to exercise its make up gas right within the stipulated period. If the buyer fails to exercise this right in a timely manner the obligation to supply gas finishes.

38. Accordingly the take or pay clause is the contractual mechanism agreed to by the parties which clearly sets out two possible options available to the Appellant

with respect to the taking of gas pursuant to the GSA. Under Clause 3.6(a) the Appellant can pay and take the gas or else pay for a minimum quantity of gas being the take or pay quantity. We again reiterate that the obligation under Clause 3.6(a) is to pay for the gas and there is no obligation to take gas since the buyer can defer taking the gas. Consequently due to take or pay clause a breach cannot be triggered on account of failure to take gas. The buyer has the right to exercise the option to take gas or invoke the take or pay clause. Hence the exercise of either option is valid under the GSA and would not constitute a breach thereof. Therefore we find that the take or pay payment is not due because of a breach or default rather it flows from the contracting party's valid choice to invoke the right to invoke the take or pay clause.

39. The commercial rationality of take or pay clauses has been addressed in the case of Port of Tilbury (London) Ltd. v. Store Enso Transport and Distribution Ltd. (2009) EWCA Civ 16) wherein the England and Wales Court of Appeal (Civil Division), observed, in the context of a contractual arrangement for a supply of paper and the investment in the supply facilities that the supplier, i .e. that appellant port, needs to make, as follows:
There is nothing absurd about a take or pay minimum obligation. Such provisions are common, and they are particularly used where, as here, one party has to expend significant sums of money for the purposes of the contract and needs to look to the contract for a secure annual income stream which will pay the ongoing financial cost of its investment. The minimum payment obligation does not override the Port's service obligations; it merely provides, together with a no set-off provision, for a situation where the investor is assured its income stream, despite disputes, on the basis of ―pay now, dispute later.

40 In the case of M&J Polymers Ltd v. Imerys Minerals Ltd (2008) EWHC 344 (Comm), which has also been cited by the Sole Arbitrator in the Award, the England and Wales High Court (Commercial Court), observed, in regards to a chemical supply contractual dispute, that a take or pay clause is a familiar provision in commercial contracts. The Court went on to observe that the parties freely entered into the contract after free negotiations and that they were aware of the arrangement that they were getting into. The Court went on to hold as follows:
On the facts of this case, I am entirely satisfied that the take or pay clause was commercially justifiable, did not amount to oppression, was negotiated and freely entered into between parties of comparable bargaining power, and did not have the predominant purpose of deterring a breach of contract nor amount to a provision 'in terrorem'. The evidence was wholly clear. The negotiations took place between extremely well qualified, able and savvy commercial men against a very significant commercial background, including a background of previous dealings. At the time when they were negotiating there was, on the one hand, an extreme scarcity of acrylic acid, a willingness on the part of the Claimant to commit supply to the Defendant, notwithstanding the requirements of their other customers, but in return expecting an absolute commitment to take a minimum quantity of the product to be manufactured with that acid, and, on the other hand, a clear recognition of the

difficult commercial position in which the Defendant found itself, a desperate need to secure supplies of the product and desire to keep the contract as short as possible; with the result that there was give and take on both sides, a shorter term than the Claimant desired and a longer one than the Defendant desired, but so far as the Defendant was concerned, the significant advantage, as it then saw it, of a get out clause via the meet or release provision in Article 5.6."
The Court concluded that the take or pay clause did not offend the rule against penalties and that the claimant in the case was entitled to recover the price of the shortfall pursuant to the said provision.

41. In the most recent case titled Cavendish Square Holding BV v. Talat El Makdessi 2016 SCMR 296, the Supreme Court of the United Kingdom discussed the issue of courts interfering in contracts freely entered into by parties and giving new meanings to the take or pay clause which is common in commercial contracts. Citing the case of Philips Hong Kong Ltd v. Attorney General of Hong Kong (1993) 61 BLR 41, where it was observed that the court has to be careful not to set too stringent a standard and bear in mind that what the parties have agreed should normally be upheld, not least because any other approach will lead to undesirable uncertainty especially in commercial contracts. The Supreme Court of the United Kingdom observed as follows:
There is a fundamental difference between a jurisdiction to review the fairness of a contractual obligation and a jurisdiction to regulate the remedy for its breach. Leaving aside challenges going to the reality of consent, such as those based on fraud, duress or undue influence, the courts do not review the fairness of men's bargains either at law or in equity. The penalty rule regulates only the remedies available for breach of a party's primary obligations, not the primary obligations themselves.
The Court observed in regards to what constitutes a penalty:
This means that in some cases the application of the penalty rule may depend on how the relevant obligation is framed in the instrument, ie whether as a conditional primary obligation or a secondary obligation providing a contractual alternative to damages at law. Thus, where a contract contains an obligation on one party to perform an act, and also provides that, if he does not perform it, he will pay the other party a specified sum of money, the obligation to pay the specified sum is a secondary obligation which is capable of being a penalty; but if the contract does not impose (expressly or impliedly) an obligation to perform the act, but simply provides that, if one party does not perform, he will pay the other party a specified sum, the obligation to pay the specified sum is a conditional primary obligation and cannot be a penalty.
The Court further observed in regards to interpreting certain clauses as 'penal' provisions, as follows:
Modern contracts contain a very great variety of contingent obligations. Many of them are contingent on the way that the parties choose to perform the contract. There are provisions for termination upon insolvency, contractual payments due on the exercise of an option to terminate, break-fees chargeable on the early repayment of a loan or the closing out of futures contracts in the financial or commodity

markets, provisions for variable payments dependent on the standard or speed of performance and "take or pay" provisions in long-term oil and gas purchase contracts, to take only some of the more familiar types of clause. The potential assimilation of all of these to clause imposing penal remedies for breach of contract would represent the expansion of the courts' supervisory jurisdiction into a new territory of uncertain boundaries, which has hitherto been treated as wholly governed by mutual agreement.
The Supreme Court of the United Kingdom held that such rules on interpretation, which are an inroad upon the freedom of contract, should not be extended by the judiciary, but by the legislature.

42. The courts of the United States of America have also upheld the validity of take or pay clauses and their industry recognized purpose and have ruled that it is not to be considered a penalty provision. In the case of Prenalta Corporation v. Colorado Interstate Gas Company, 944 F.2d 677 (199), the Tenth Circuit of the US Court of Appeals with reference to a dispute regarding payment that was due under a series of gas purchase agreements, held as follows:
We have previously recognized in International Minerals and Chem. Corp. v. Liano, Inc., 770 F.2d 879, 885 (10th Cir.1985), cert. denied, 475 U.S. 1015, 106 S.Ct. 1196, 89 L.Ed.2d 310 (1986) that a take-or-pay contract provides for performance in the alternative: Since this is a 'take or pay' contract, the buyer can perform in either of two ways. It can either (1) take the minimum purchase obligation of natural gas (and pay) or (2) pay the minimum bill. "Id. See also PGC Pipeline v. Louisiana Intrastate Gas, 79\ F.2d 338, 340 (5th Cir. 1986) : Resources Investment Corp. v. Enron Corp., 669 F.Supp. 1038, 1041 (D.Colo. 1987); Superior Oil Co. v. Transco Energy Co., 616 F.Supp. 98, 107 (IV . D . La. 1985) : Hanover Petroleum Corp. v. Tenneco, Inc., 521 So.2d 1234, 1241 (La. Ct.App.1988) , writ denied, 526 So.2d 800 (La. 1988) : Pogo Producing Co. v. Sea Robin Pipeline Co., 493 So.2d 909, 915-16 (La.Ct.App.1986), writ denied, 497 So. 2d 310 (La. 1986). Because one of the alternative performances in a take- or-pay contract is the payment of money, courts have distinguished the "pay" provision from a liquidated damages provision. Universal Resources, 813 F.2d at 80 n. 4; Sabine Corp. v. ONG Western, Inc., 725 F.Supp. 1157, 1184 (W.D.Okla. 1989); Enron, 669 F.Supp. at 1041. This distinction is particularly necessary because the payments made pursuant to the take-or-pay provision, the pay alternative of Contracts 422 and 516, are not payments for the sale of gas. Kaiser-Francis Oil Co. v. Producer's Gas Co., 870 F.2d 563, 570 (10th Cir. 1989) (quoting A N R Pipeline Co. v. Wagner & Brown, 44 FERC U 61,057, 61,158 (1988) ("[T] he take-or-pay payment for gas is not intended to be a payment for gas and is not a part of the price of gas until it is applied at the time of sale.")); Diamond Shamrock Exploration Co. v. Hodel, 853 F. 2d 1159, 1167-68 (5th Cir. 1988). The difference between alternative performance and liquidation of damages is lucidly explained in 1082 of Corbin on Contracts:
It is evident that some alternative contracts giving the power of choice between the alternatives to the promisor can easily be confused with contracts that provide for the payment of liquidated damages in case of breach, provided that one of the alternatives is the payment of a sum of money.... If, upon a proper interpretation of

the contract, it is found that the parties have agreed that either one of the two alternative performances is to be given by the promisor and received by the promisee as the agreed exchange and equivalent for the return performance rendered by the promisee, the contract is a true alternative contract. This is true even though one of the alternative performances is the payment of a liquidated sum of money; that fact does not make the contract one for the rendering of a single performance with a provision for liquidated damages in case of breach.
The Court went on to hold that in regards to the facts of the case at hand:
Under the terms of Contracts 422 and 516. CIG could elect either to purchase the contract quantity or to pay the value of the contract quantity (the "minimum bill") in exchange for Prenalta's tender of the contract quantity of gas or any make-up gas due CIG for past deficiencies. This is clearly an alternative contract which allows CIG to perform either alternative, to "take" or "pay" for the gas, in exchange for Prenalta's return performance, rather than a contract which requires CIG to "take" the contract quantity of gas with a triggering liquidated damages provision if CIG fails to do so."

43. In the case of Universal Resources Corporation v. Panhandle Eastern Pipe Line Company 813 F.2d 77 (1997), the Fifth Circuit of the US Court of Appeals, in a similar dispute over non-payment under a gas purchase and sale agreement, made the following observations in the context of take or pay clauses:
The purpose of the take-or-pay clause is to apportion the risks of natural gas production and sales between the buyer and seller. The seller bears the risk of production. To compensate seller for that risk, buyer agrees to take, or pay for if not taken, a minimum quantity of gas. The buyer bears the risk of market demand. The take-or-pay clause insures that if the, demand for gas goes down, seller will still receive the price for the Contract Quantity delivered each year.
The Court further went on to hold that the terms of the take or pay clause are unambiguous and common to the gas industry and fully enforceable.

44. The validity and enforceability of take or pay clauses in contracts is recognized in other common law jurisdictions as well, such as New Zealand. In the case of Miraka Limited v Milk New Zealand (Shanghai) Co. Limited, [2017] NZHC 2163, the High Court of New Zealand, adjudicating a dispute arising out of a milk supply contract which contained a minimum supply take or pay provision, made the following observation with reference to take or pay clause:
The rational for take or pay minimum obligations, is relatively routinely commercial. It means issues regarding quality and service do not override obligations to make payment if as much is clear from the contract terms. If a definite sum of money is required to engage the services of another then that obligations must be met within the ti meframe required. Indeed, even if service has not been provided-if a contract anticipates that outcome, and even if the provider suffered no loss if claims as to damage and mitigation of loss are clearly excluded by contract terms.

45. Take or pay clauses are also accepted as valid and enforceable in jurisdiction such as Canada. For example, in the case of Churchill Falls (Labrador) Corporation Limited v. Hydro Quebec 2019 SCMR 454, involved a dispute arising out of the interpretation of a take or pay undertaking regarding the purchase of electricity before the Supreme Court of Canada. The case itself did not revolve around the legality of take or pay provisions but rather about whether there was a price adjustment clause that was implied in the terms of the agreement. The Supreme Court held that there was no ambiguity in the contract to merit the reading in of a provision that allowed for price adjustments in light of price fluctuations. However, the reason behind mentioning this precedent, is to show that even in common law jurisdictions, such as Canada, take or pay clauses in contracts are common and considered valid.

46. After considering the foregoing cases, we are of the opinion that the take or pay clause being a common provision in commercial contracts, especially gas purchase agreements is valid and enforceable and cannot be considered as a penalty provision. Further that the take or pay clause is designed to provide the supplier of a product (i n this case gas), especially in large scale energy projects, such as the one involving the Respondent, with a guaranteed revenue stream so as to secure its significantly sizeable investment in setting up the infrastructure and facilities necessary for making the supply of the product (i .e. gas in this case) by ensuring a rate of return. It is important to clarify that 'paying' for the product is the primary obligation and taking the product is the option which can be exercised by the buyer. The take or pay provision is activated if the buyer does not take the gas. Hence not taking the gas is an option available to the Appellant and cannot form the basis of a breach. Clause 3.6(c) of the GSA provides that if the gas is not taken but is paid for by the buyer, the Appellant can take Make Up Gas during the immediately following twelve months, on as available basis. Hence under Clause 3.6(c) the buyer has the option to take Make Up Gas during a specified period, after which there is no obligation on the seller, SNGPL to provide Make UP Gas even if available. Hence not taking the gas as such cannot be considered as breach of the terms of the GSA even if the buyer has paid for the gas but deferred its delivery.

47. Furthermore the terms of the GSA were negotiated and agreed to between the parties. The Appellant has not challenged the take or pay clause nor payments made under this clause. The Appellant is aggrieved by its inability to take Make Up Gas within the stipulated time for which it claims that since it has paid for the gas and it could not be delivered then the Respondent cannot forfeit the agreed to price under the GSA, rather it can at best recover damages from the Appellant. This argument is premised on the fact that the gas is paid for yet the Respondent does not have to supply it simply because the Appellant missed the cutoff point for taking delivery. We find that the basic premise of the Appellant's argument negates the very term it agreed to in the take or pay clause. We find that not only was the Appellant aware of the fundamentals of the take or pay clause, it was also aware of the fact that this clause gave it an alternate means of performance which it has exercised repeatedly over the years. Having done so, the Appellant cannot lock in on a few invoices and

justify its attempt to set off payment obligations under the GSA. Take or pay clauses are a common feature of gas supply arrangements and both parties opted to have this clause in the GSA. Having done so the entire case of the Appellant that the mechanism agreed to under the GSA is unfair and unreasonable is without basis. Hence we find that the take or pay clause does not offend Section 74 of the Contract Act.

The Public Policy Exception

48. The second part of the objection against the Second Claim raised by Mr. Sal man A kram Raja is that even though the parties agreed to the take or pay clause, the fact that the Respondent has not supplied gas but has received payment for it, is unfair and unjust and the sum of Rs.603,202,083/- and does not reflect the loss suffered by the Respondent. As per the arguments made it amounts to unjust enrichment which offends the public policy of Pakistan. Therefore the issue is whether unjust enrichment, as argued in this case amounts to a violation of public policy under Article V(2)(b) of the Convention. Article V(2)(b) of the Convention provides that a court may refuse to enforce an arbitral award if the competent authority in the country where recognition and enforcement is sought finds that the recognition and enforcement of the award would be contrary to the public policy of that country. The term 'public policy' has not been defined in the Convention or under the Act. Both Counsel have relied upon cases from different jurisdictions to show the manner in which courts of different jurisdictions have interpreted the term public policy to give effect to the enforceability of foreign awards. In terms of the cases cited, both parties agreed that public policy means and includes moral, social or economic principles which are sacrosanct and require protection without any exception. Article V therefore gives the Contracting State the ability to decide whether a foreign arbitral award can be or should be enforced in that State by bringing the award within the ambit of the public policy exception.

49. In order to give some meaning to public policy under Article V(2)(b) of the Convention, it is important to note that the Convention does not refer to any universally accepted definition, concept or interpretation of public policy. This has been left totally at the discretion of the Contracting State in which the award is to be recognized and enforced. Consequently Contracting States are free to determine as per their own law and concepts as to what public policy should mean. In order for us to give meaning to the public policy exception we examined the Convention, which is a multilateral treaty that places an obligation on the courts of Contracting States to enforce foreign arbitral awards. Hence we are cognizant of the fact that the intent of the Convention is pro-enforceability of foreign awards and that it cannot achieve this mandate without domestic legislation. The Convention itself is not a self-executing treaty, therefore it requires implementing legislation by the Contracting States. Signatories to the Convention have promulgated their own legislation which enables the enforcement of foreign arbitral awards in terms of the general standards agreed to in the Convention. Hence the Act is the direct result of Pakistan being signatory of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. Section 6 of the Act clearly

provides that the enforcement of foreign arbitral award is binding on the parties and can only be refused if the court declares, pursuant to Section 7 that the award is unenforceable. Section 7 of the Act provides for the grounds as provided in Article V of the Convention as being the grounds for refusing to recognize and enforce a foreign arbitral award. The scope of Article V is limited yet the language of Article V(2)(b) allows the local forum to mold the public policy exception as per its own understanding and national public policy. Consequently the public policy exception is invoked to prevent enforcement of a foreign award and has been referred to as a very unruly horse which once you astride, you will not know where it will take you. We are of the opinion that violation of public policy must be compelling in order for us to justify setting aside a foreign arbitral award. In this regard, we have considered the decisions from the courts of several different jurisdictions which have given meaning to the word public policy in the context of the cases before them under Article V (2) (b) of the Convention.

50. In the United States Court of Appeals for the Second Circuit in Parsons and Whittemore Overseas Co., Inc. v. Societe Generale de I'Industrie du Papier RAKTA and Bank of America, (508 F.2d 969, 974 (2d Cir. 1974), the Court held that enforcement of foreign arbitral awards may be denied only where enforcement would violate the forum state's most basic notions of morality and justice. In arriving at this conclusion, the Court was conscious of the Convention's pro-enforcement bias, its supersession of the Geneva Convention, and the principle of reciprocity, lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States. In this case, the United States Corporation against which enforcement of an ICC award was sought contended that, due to certain actions taken by the Government of the United States and the severance of relations between the United States and Egypt, it was required as a loyal citizen to abandon its contractual obligations in Egypt. It was argued that, therefore, enforcement of the award requiring performance under the contract would be contrary to public policy of the United States. The Court rejected this contention and noted that to read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility.

51. The Court of Final Appeal in Hong Kong in Polytek Engineering Co. Ltd. v. Hebei Import and Export Corp., (23 Y.B. COMM. ARB. 666, 666-84) (Hong Kong Ct. App.) (1999) relied on the standards established in Parsons and Whittemore and held that in order to refuse enforcement under the Convention, an award must be so fundamentally offensive to that jurisdiction's notions of justice that, despite being a party to the Convention, it cannot reasonably be expected to overlook the objection. The Court emphasized on the language 'of that country' in Article V(2)(b) to hold that public policy of the seat would differ from the public policy of the enforcement State. However, to refuse recognition and enforcement, the violation must be compelling and go beyond the minimum that would justify setting aside a domestic judgment or award.

52. The English Courts have also adopted a strong pro-enforcement policy and are reluctant to set aside an award on grounds of public policy. In the context of enforcement of an arbitral award, the English Court of Appeal in a decision cited at Deutsche Schachtbau-und Tiefbohrgesellschaft m.b.H. v. Ras Ali Khaimah National Oil Co., Shell International Petroleum Co. Ltd. Court of Appeal, Not indicated, 24 March 1987 (13 Y.B. COMM.ARB. 522, 534-35 (1988) held that considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. It has to be shown that there is some element of illegality or that the enforcement would be wholly offensive to the ordinary, reasonable and fully informed member of the public on whose behalf the powers of the State are exercised. In the case of Limited v. Nigerian Nat'l Petroleum Corp., (31 YB COMM. Arb. 853, 856) the High Court of Justice Queens Bench Division, noted that the public policy exception in Section 103(3) of the English Arbitration Act, 1996, is confined to the public policy of England (as the country in which enforcement is sought) in maintaining fair and orderly administration of justice.

53. The Indian Supreme Court has a split view on the public policy exception. In the Shri Lal Mahal Case, the Supreme Court of India reviewed the earlier decisions on public policy and cleared the confusion created on interpreting the concept of public policy with reference to enforcement of foreign awards in India. The Supreme Court held that a wider meaning as opined in the Saw Pipes Case is not applicable when interpreting the public policy exception. The Supreme Court explained that the meaning of the term 'public policy of India' means the fundamental policy of India, the interests of India or justice or morality. The court concluded that a narrower interpretation was required in cases of enforcement of foreign arbitral awards so as to encourage enforcement of foreign awards. This view is a departure from the view relied upon by the Appellant Counsel in the Geco Case where the Indian Supreme Court explained the meaning of the fundamental policy of India with reference to domestic awards to include all fundamental principles which provide basis for the administration of justice and enforcement of law. While agreeing with the decision given in the Saw Pipes Case which called for a wider interpretation of public policy in domestic arbitration, the Indian Supreme Court held that public good, public injury are part of the public policy of India. Both these judgments created ways to invoke the public policy exception whereas the Shri Lal Mahal Case is specifically with reference to foreign awards and requires a narrow approach thereby discouraging interference through the public policy exception.

54. The European Court of Justice in Allsop Automatic Inc. v. Tecnoski snc, Corte di Appello, 22 Y.B. COMM.ARB. 725, 725-26 (Ct. App. Milan) held that the public policy defence should be possible in exceptional circumstance, where there is non-conformity to basic principles of morality and justice. In other cases the French Courts have held that the public policy should be invoked when the enforcement of the award would be contrary to French Legal Order.

55. The judgment of the Court of Appeals, Milan in Allsop Automatic Inc. v. Tecnoski Snc, Corte di Appello, 22 Y.B. COMM.ARB, 725, 725-26 (Ct. App.

Milan) refers to international public policy the body of universal principles shared by nations of similar civilizations, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions. The Highest Arbitrazh Court of the Russian Federation in Ansell S.A. v. OOO Med Bus, Serv., Ruling No.VAS-8786/10, at 2 (2010) (Highest Arbitzah Ct., Russian Federation) has also stated that an award would be contrary to public policy, if it produces results contrary to universally recognized moral and ethical rules or threatening the citizens' life and health, or the State's security. However, both the decisions are obscure and do not go beyond holding that the award in those cases were not contrary to public policy.

56. Even under our own jurisdiction, public policy has been interpreted in the context of the 1937 Act in PLD 1982 Karachi 619 (supra) as being objects which are illegal under law, which are injurious to good government, which are adverse to justice, family life or public interest. Likewise in the context of Section 23 of the Contract Act, public policy would invoke some element of public injury or illegality, such that to hold a contract as illegal it must cause injury to society. Reliance is placed on Sultan Textile Mills (Karachi) Ltd., Karachi v. Muhammad Yousuf Shamsi (PLD 1972 Karachi 226).

57. A review of the decisions given in different jurisdiction establishes that non-interference or the pro-enforcement policy is in itself a policy of Contracting States which is not easily persuaded by the public policy exception argument. It is also representative of the fact that Courts perceive that defining public policy under Article V(2)(b) is the prerogative of each of the Contracting States and is based on the public policy of the State where enforcement is sought. By and large the application of the public policy exception is restrictive and limited to exceptional circumstances that affect the most fundamental values of a State. Accordingly public policy under Article V(2)(b) of the Convention is kept fluid and adaptive and can be invoked in cases of patent illegality or matters which are fundamental for a State. We are of the opinion that the public policy exception allows a Contracting State to safeguard its core values and fundamental notions of morality and justice which may change over time. The public policy exception acts as a safeguard of fundamental notions of morality and justice, such that enforcement of a foreign award may offend these fundamentals. However the Act requires the recognition and enforcement of foreign awards. In this way the Act encourages parties to an alternate dispute resolution mechanism for quicker and less costly resolution of disputes. It makes the foreign arbitral award binding on the parties and prima facie as of right, calls for recognition and enforcement of foreign arbitral awards. Consequently we find that the public policy exception should not become a back door to review the merits of a foreign arbitral award or to create grounds which are not available under Article V of the Convention as this would negate the obligation to recognize and enforce foreign arbitral awards. Such kind of interference would essentially nullify the need for arbitration clauses as parties will be encouraged to challenge foreign awards on the public policy ground knowing that there is room to have the Court set aside the award.

58. In the case before us, the Appellant has argued that not only does the take or pay clause offend Section 74 of the Contract Act but it also results in unjust enrichment which is also against the public policy. Unjust enrichment means that a person is able to retain a benefit, be it money or otherwise, which it is not entitled to as it was received unfairly, unjustly, without legal justification. So a party is enriched at the expense of another party, which has lost something of value. The Appellant argues that retaining an amount greater than the actual loss suffered by the Respondent, for gas not consumed by the Appellant is far less than what was awarded by the Sole Arbitrator. We are not persuaded by the arguments made with respect to unjust enrichment as the liability of the Appellant to pay the Respondent for gas is under the GSA. The amount of Rs.603,202,083/- pertains to invoices raised for the months May to October 2011 for gas consumed by the Appellant. This is neither denied nor disputed by the Appellant. Hence the payment of this amount cannot be termed as unjust or unfair as it is the amount due under the GSA for gas consumed. The GSA is a contractual arrangement between the parties, freely negotiated and executed by the parties. The contract is enforceable and in its entirety as is not offensive to the public policy of Pakistan. As such, we find that the argument of unjust enrichment is misplaced as the payment obligation is contractual, made under a valid and enforceable contract with respect to a payment mechanism agreed to by the Appellant. Furthermore remedy against unjust enrichment is in the form of restitution which in this case would mean that the Respondent returns amounts that it is lawfully entitled to under the GSA. Hence the Respondent has not benefited unfairly or unjustly at the expense of the Appellant. In fact the Respondent has been awarded amounts due to it under the GSA.

59. The Appellant Counsel Mr. Salman Akram Raja has stressed on the unjust enrichment argument to emphasize his case that the unjust enrichment argument goes to the root of the public policy exception being the fundamental policy of law. However, we are not persuaded by this argument either because the Appellant is obligated under the GSA to pay for gas, and if it defers taking the gas, then under Clause 3.6(c) of the GSA it has agreed to take Make Up Gas within the succeeding years. The disputed period arises after the lapse of the make up gas period. Resultantly while the Appellant has agreed to pay and take gas within the make up gas period, it failed to do so. This failure of the Appellant to invoke its make up gas right within the stipulated time does not render the take or pay clause as offensive to the fundamental or core values of Pakistan. Having agreed to the take or pay mechanism it hardly lies in the mouth of the Appellant to allege unjust enrichment pursuant to this clause. Furthermore the Appellant has attempted to set off payments for gas consumed by it against payments it claims have been retained in excess by the Respondent against gas not supplied after the March 2011 cutoff date under Clause 3.6(c) of the GSA. For the payment of actual gas consumed, there can be no argument regarding actual loss or unjust enrichment as the Appellant has consumed the gas supplied. The entire defense of the Appellant with respect to the Respondent claim for payment of Rs.603,202,083/- is an attempt to justify its efforts to set off amounts due against amounts paid for which the Appellant did not take make up gas within stipulated time. Even this effort cannot be justified as the GSA creates

specific obligations on both parties. The Appellant has not challenged any of its obligations, any terms of the GSA or even payments made under the take or pay clause. Notwithstanding the same, the Appellant seeks interference in the Sole Arbitrator findings through the public policy exception which would in fact impact the entire mechanism contemplated under Clause 3.6 of the GSA and cannot be isolated to the disputed transactions. We also find that the Sole Arbitrator has interpreted Clause 3.6 of the GSA by holding that the primary obligation is to pay for the gas and that there is no obligation to take gas on the Appellant. Hence he has dispelled the damages payable on breach argument. This contractual interpretation by the Sole Arbitrator goes to the merits of the dispute and is with reference to the performance required under the GSA. No injury is caused in the performance of the GSA to the public, no loss is caused to the public and no fundamental policy is adversely impacted by requiring the parties to make good on their contractual commitments. Resultantly the public policy exception is not made out even as per the Appellant's own case.

60. To conclude, we find that the take or pay clause was freely negotiated and agreed to by the Appellant; that the Appellant's primary obligation under the take or pay clause is to pay for the gas; that the Appellant has the option to take gas at the time of payment or to take it as Make Up Gas at a subsequent date; that the Appellant is not in breach of its obligation to take gas or Make Up Gas under Clause 3.6(a) and (c) of the GSA . We also find that take or pay clause is not a penalty clause; that payments of Rs.603,202,083/- are due to the Respondent for gas actually consumed under the GSA; that the take or pay clause does not offend Section 74 of the Contract Act nor has a case of unjust enrichment been made out. Consequently no ground is made out under Article V (2) (b) of the Convention calling for interference in the Award.

61. In view of the aforesaid, the instant I.C.A. is dismissed and impugned order dated 4.4.2018 passed by the learned Single Judge in C.O.S. No.16/2017 is maintained.

62. One of us (Shahid Jamil Khan, J.) though agree with the result of appeal, being dismissed, has given his observations through a separate note which is part of this judgment.

Sd/- Sd/-
(SHAHID JAMIL KHAN) (AYESHA A.MALIK)
JUDGE JUDGE

SHAHID JAMIL KHAN, J.---Though I agree with the result of appeal, being dismissed, for which, with respect, my reasoning is different. Yet, I am unable subscribe to the observations and reasons by the Sole Arbitrator, as recorded in Paragraphs 22 and 27 of main judgment.

2. The Sole Arbitrator ignored the spirit and words of the New York Convention while observing that 'there are lacunas in Pakistan Law' regarding the concept of 'Take or Pay' clause, which being predominately English and US, is recognized and

utilized internationally. Agreed that purpose of the Convention is pro-enforcement of arbitral awards, made in a territory of State other than the State where recognition and enforcement is sought, nonetheless it is strange, per se, to say that it shall be recognized and enforced, despite being in conflict with the law of that State, on declaration by an Arbitrator that the law of enforcing State carries lacunas or is defective.

Article II (3) of the Convention, (reproduced below) asks the Court of Contracting (enforcing) State to 'refer the parties to arbitration', unless such agreement is found null and void, inoperative or incapable of being performed. Needless to say that the Court of a Contracting State can find the agreement as null and void under its indigenous law and not a foreign or internationally accepted law.

ARTICLE II

"3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

Article VII also recognizes the law or the treaties of the country where such award is sought to be relied upon. Article V provides the grounds, in presence of which the recognition and enforcement can be refused;

Its Section 1(a) (reproduced below) recognizes the law to which the agreement is subjected by the parties. It is not the case of either party that GSA was subjected to a foreign law.

ARTICLE V

"1. Recognition and enforcement of the award may be refused, at
the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought. Proof that:-

(a) The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or"

Under Section 2(b) of Article V, recognition and enforcement can also be refused, if the award would be contrary to "Public Policy".

3. In my opinion, the argument and grounds on validity of 'Take and Pay' clause and 'unjust enrichment' were irrelevant. In light of the facts noted in Paragraph No.14 of main judgment, I agree with the finding that Payment Agreement dated 11.01.2010 was not an independent agreement, therefore, absence of arbitration clause in this agreement was of no consequence. The amounts agreed to be paid under this agreement were essentially agreed on a dispute under the 'Take or Pay' clause 3.6 of the GSA. After accepting to pay the amount under dispute, the appellant was estopped from challenging vi res of the clause, at least to the extent of these payments.

For the second claimed amount, appellant's attempt to set off payment of the gas, supplied and consumed, for period May to October 2011, against the payments for

which gas was not received is unjustified and that too on self-assumed interpretation. The appellant could not unilaterally decide that the payments not returned, for default in receiving the gas under clause 3.6, is against the provisions of Section 74 of the Contract Act, 1872. Appellant's act necessarily raised a dispute under GSA, therefore, respondent rightly resorted to its arbitration clause.

4. I subscribe to the finding that High Court has exclusive jurisdiction to recognize and enforce a foreign arbitral award under the Act of 2011. By dismissing appeal, I also agree to the extent of recognition of award by learned Single Bench without subscribing to the reasons and observations given by the Sole Arbitration, relating to application of Pakistan's Law and Public Policy.

Sd/-
SHAHID JAMIL KHAN,
JUDGE
KMZ/O-2/L Order accordingly.

PLJ 2019 Lahore 677 (DB)

***Present*: MRS. AYESHA A. MALIK AND JAWWAD HASSAN, JJ.**

PAKISTAN MEDICAL AND DENTAL COUNCIL, ISLAMABAD--Appellant

versus

SHAHIDA ISLAM MEDICAL COMPLEX (PVT.) LIMITED etc.--Respondents

ICA No.36399 of 2019, heard on 24.6.2019.

Law Reforms Ordinance, 1972 (XII of 1972)--

----S. 3--Writ Petition--Allowed--Direction to--Grant of Extension in admission Cut off date--Allocated quota--Adjustment of students of de-notified Hashmat Medical College in other colleges by P.M.D.C--Central admission policy--Extraordinary relief--Discrimination--Extra ordinary circumstances--Challenge to--Learned Single Judge through impugned order dated 3.6.2019 concluded that HMC has been allowed to admit students and Bolan University is seeking admission beyond deadline given by PMDC, which establishes that deadline for admission is not being honoured by PMDC itself--We are of opinion that these findings have been made against record--We find that reliance on HMC was totally misconceived as they were not admitting any medical or dental students since it was de-notified on 14.01.2019--Appellant PMDC decided to adjust students already enrolled and registered with HMC as they had commenced their academic year with said college in November 2018 to safeguard their admission in medical and dental colleges--For purposes of this adjustment, candidates were given an opportunity to approach colleges of their choice as per list provided to them to seek adjustment--This is not a case of discrimination, to contrary it is indicative of responsible manner in which PMDC has attempted to adjust 44 students who were already enrolled in HMC so that they do not lose out on account of de- notification of HMC--We also note that adjusting old students is different and distinguishable from admitting new students which fact was not considered in impugned order--Hence we are of opinion that no concession was given to HMC on basis of which learned Single Judge concluded that concession given to HMC should be given to Respondent Colleges before Court--We have heard all learned counsels for parties at length and do not find any irregularity or discriminatory practice exercised by PMDC during this time--To contrary we find that numerous meetings took place in which PMDC tried to streamline admission process so as to ensure that admission process for 2018-19 session was not adversely affected by delays of there being no Council--Any admission offered to such colleges is by way of a concession and cannot be claimed as of right--PMDC is required to maintain its academic calendar and follow schedule provided in Regulations for purposes of admissions, recognition, registration and examination--Although we understand that certain delays are out of PMDC's control, nonetheless effort must be made to streamline registration process and to ensure that where registration takes place in middle of academic year, colleges be refrained from admission in that academic year, if it means compromising on academic calendar--Extraordinary circumstances were duly considered and extensions were given under Regulations and by way of special

relaxation--Hence contention of Respondent Colleges was totally misconceived that they be given more time to fill up vacant seats--No legal right has been infringed and PMDC has not acted in a manner which was detrimental to Students or Colleges--We hold that learned Single Judge should not have interfered with cut off date or academic calendar--We also note that petitioners before learned Single Judge sought extraordinary relief from Court which was beyond scheme and provisions of Regulations--As to Students before Court their prayer was that admissions be allowed so that all vacant seats are filled up and merit list is revised sufficiently to ensure that all seats are filled up--We find that even this prayer is against provisions of Regulations which sets out deadlines for admission and registration of students--Furthermore UHS or PMDC declare a cut off merit beyond which students cannot be admitted--Hence Court cannot grant admissions to students without considering their merit and fact that they did not make it in nine merit lists--Intra Court appeals were allowed.
[Pp. 686, 687, 690 & 691] A, B, C, D, E, F & G

Ch. Muhammad Umar, Advocate for Appellant.
Ms. Ambreen Moeen, DAG for Respondents.
Mr. Munawar us Salam, Advocate for Respondent No. 1 (in ICA No. 36399/2019).
Ch. Sultan Mehmood, Advocate for Respondents No.1 to 17 (in connected ICA No.36401/2019).
Mr. Khalid Ishaq, Advocate for Respondent No. 19 (in connected ICA No.36401/2019).
Rao Muhammad Faisal Iqbal, Advocate for Respondent No.1 (in connected ICA No.31021/2019).
Mr. Haroon Mumtaz and Mr. Hassan Pervaiz, Advocates for Respondent No.1 Colleges in connected ICAs No.16407/2019, 16416/2019 and 16419/2019.
Ch. Muhammad Atiq and Mufti Ahtsham Uddin Haider, Advocates for Respondent University of Health Sciences, Lahore.
Date of hearing : 24.6.2019

JUDGMENT

Mrs. Ayesha A. Malik, J.--This common judgment decides upon the issues raised in the instant ICA along with connected ICAs detailed in Schedule **"A"** appended with the judgment.

2. The instant ICA and ICAs No.36401/19, 36402/19 have impugned order dated 3.6.2019 whereby the learned Single Judge allowed the writ petitions of the medical colleges in the following terms:

> In view of the above, this petition, along with connected petitions, is allowed to the extent that respondents are directed to extend the same relief, as has already been granted to Hashmat Medical College, Gujrat as well as the concession given to Bolan University of Medical and Dental Health Sciences, Quetta, as is evident in advertisement dated 31.05.2019 published

in Daily Dawn. The necessary process/approvals shall be initiated/granted within 7-days from the date of receipt of certified copy of this order.

3. ICA No. 31021/19 has impugned order dated 14.3.2019 passed by the learned Single Judge in WP No.9778/2019 wherein Avicenna Dental College sought a direction to the University of Health Sciences ("**UHS**") to conclude the admission process for the dental college with respect to the 2018-19 academic session and the learned Single Judge allowed the writ petition of Avicenna Dental College by directing the Respondents to admit students against 50 seats allocated to Avicenna Dental College. In this case the learned Single Judge has relied upon earlier decisions made in WP Nos.9468/19, 9503/19 and 9493/19.

4. ICAs No.16407/19, 16416/19, 16419/19 have impugned order dated 28.2.2019 passed by the learned Single Judge whereby the petitions of the medical and dental colleges were allowed and UHS was directed to admit students after the cut off date of 31.1.2019 as per the allocated quota.

Arguments of the Appellant, Pakistan Medical and Dental Council ("PMDC)"

5. Chaudhary Muhammad Umar, Advocate for the Appellant PMDC argued that the underlying objection that the Appellant has in all ICAs is with respect to the extension granted by the Court in the admission cut off date, which is regulated by PMDC. Specifically he argued that in ICAs No.36399/19, 36401/19 and 36402/19 the impugned order dated 3.6.2019 has allowed the writ petitions of the medical colleges and students on the ground of discrimination whereas no case of discrimination was made out by the Respondents. He explained that Hashmat Medical College, Gujrat ("**HMC**") is not allowed to admit any new student as the college was de-notified by the Federal Government *vide* notification dated 14.01.2019, hence there is no question of any student being admitted to HMC. Learned counsel explained that the Appellant did not extend the deadline of admissions to HMC, rather it adjusted students of HMC in other medical colleges to safeguard the academic year of the students. Learned counsel submitted that the contention that HMC was allowed admission beyond the cut off date of 31.5.2019 is factually incorrect and the conclusion that some benefit was given to HMC for the purposes of admission is contrary to the record. Learned counsel explained that 44 students of the de-notified HMC were adjusted in other medical colleges, hence it was not the medical college that was given any benefit, rather it was students already enrolled with HMC who were adjusted in other medical colleges so that they complete their education. Learned counsel argued that there is a distinction between adjusting enrolled students and admitting new students, which distinction was not taken into consideration.

6. Learned counsel further argued that the second ground which prevailed with the learned Single Judge in order dated 3.6.2019 was an advertisement issued by Bolan University of Medical and Health Sciences, Quetta **("Bolan University")** dated 31.5.2019 calling for admission. Learned counsel argued that in the first case the

advertisement was never produced by the petitioners on the first date of hearing nor appended in any of the writ petitions. Notwithstanding the same, the Appellant informed the learned Single Judge that the advertisement relied upon has been issued by the Bolan University without any permission from the Appellant, meaning thereby that this was done at their own instance. Hence PMDC has not discriminated against the medical and dental colleges as its not granted any extension to Bolan University. Learned counsel argued that the action of any admitting university without permission from PMDC does not amount to discrimination as PMDC never allowed Bolan University to call for admissions after 31.5.2019. Learned counsel also argued that there was yet another distinction which was not considered by the Court being that the academic year in the Province of Punjab commenced in November, 2018 whereas the academic year has not commenced in the Province of Baluchistan. Hence even on this account reference to Bolan University is misconceived and does not establish any discrimination.

7. With reference to ICAs No. 16407/19, 16416/19, 16419/19 wherein order dated 28.2.2019 has been impugned, he argued that several medical and dental colleges filed petitions alleging therein that PMDC had caused unreasonable delay in the recognition and registration process and due to the central admission policy the admission process was delayed. Consequently the Respondent Colleges had less time to fill up their available seats. Also that on 8.1.2019 the Pakistan Medical and Dental Council Ordinance, 2019 **("2019 Ordinance")** was promulgated by virtue of which the adhoc Council approved by the august Supreme Court of Pakistan was dissolved and the new Council held its first session on 31.3.2019. These being extraordinary circumstances required extraordinary measures, hence the Court directed the Appellant and the UHS to send students for admissions with the medical and dental colleges after the cut off date of 31.1.2019. He argued that the admission period was extended from 31.12.2019 to 31.1.2019 and then to 31.3.2019 and further to 10.4.2019 keeping in mind the extraordinary circumstances. He stated that these colleges have filled up their seats and the only issue against the order of 28.2.2019 which needs to be considered is that the Respondent Colleges have no legal right to claim admission beyond the cut off date; that the Court should not have substituted the opinion of the Council with that of its own as the PMDC acted as per law in the best interest of the students.

8. Learned counsel argued that PMDC is the regulatory authority which has duly considered the extraordinary circumstances for the session of 2018-19 and has provided nine merit lists to the various different medical and dental colleges for the purposes of admissions and has also extended the cut off date from 31.12.2018 to 31.03.2019 and to 10.04.2019. Under the circumstances, he argued that a fair chance was given to all colleges including the Respondent Colleges before the Court. Hence their case that they have been discriminated or that they have not been given sufficient opportunity to fill up their seats is totally without any basis. He further argued that there is a requirement under the MBBS and BDS (Admission, House Job and Internship) Regulations, 2018 ("**Regulations**") for a nine month academic year, which cannot be maintained if the admission process is continuously

extended to accommodate the wishes of medical and dental colleges. He also argued that admission through the *centralized induction system* is at its inception and due consideration to the different issues and problems that arise is given by the PMDC. Also the fact that the old Council was dissolved on 8.1.2019 and the new Council was notified on 28.2.2019 was taken into consideration. All these factors being extraordinary circumstances resulted in extensions up to 31.3.2019 and then 10.4.2019. Under the circumstances, the impugned orders failed to take into consideration that students admitted in the month of March, April, May or June cannot catch up or complete the academic year which started in November, 2018 and will end by December, 2018 with examinations scheduled in December, 2019.

Arguments by the Respondents

9. Mr. Munawar us Salam, Advocate for Respondent No.1, Shahida Islam Medical Complex argued that the College was established in 2016-17, however registered on 29.03.2019. On 01.04.2019 the college asked for admission for 2018-19 session to 50 students. A list was provided on 09.04.2019 of 50 students, however only ten seats were filled. The college requested for 40 more students, however the matter was delayed and eventually on 17.04.2019, the college was informed that no further admission can be made. Learned counsel argued that once the college is recognized and registered it is obligatory for the Appellant to ensure that the college is provided students for the purposes of admission against the sanctioned seats; that the seats could not be filled up from 01.04.2019 until the issuance of the impugned letter of 17.04.2019 through no fault of the college rather on account of in-action and slackness of the PMDC and the UHS; that a heavy investment has been made in setting up the college and if the seats are vacant in the first year, they will remain vacant until the fifth year meaning thereby that the Respondent college will have to bear a heavy loss since it cannot recover any fees from the vacant seats.

10. With respect to the case of Akhtar Saeed Medical and Dental College, Lahore, their grievance is that the college has been affiliated since 2009 providing education and awarding MBBS and BDS degrees. Under the centralized admission policy, seats have to be filled by the admitting university as per the allocation made by the PMDC, such that the medical colleges are provided lists against the number of available seats of students seeking admission as per their choice in any medical college. Hence PMDC provides the merit list to the medical colleges of the students who can be offered admission in the event of any vacancy. PMDC is required to provide successive lists to the merit list so as to ensure that the vacant seats are filled up quickly. For the academic year 2018-19 the Appellant did not fulfill its statutory obligation of allowing medical and dental colleges to fill up their vacant seats. Furthermore, they acted in a discriminatory manner by allowing admissions in HMC and allowing admission to Bolan University yet denying the Respondent College the right to admit students. He argued that the Respondent College has been making frequent requests to the admitting university UHS as well as PMDC to complete the admission process in such a way that all approved seats are filled up, however no positive steps have been taken by them. Learned counsel further argued that students are available, however the Appellant has not allowed the medical and

dental colleges to fill up their vacant seats which is unfair and unreasonable for the colleges as well as students.

11. Chaudhary Sultan Mahmood, Advocate for Respondent students in ICA No.36401/2019 argued that the Respondents are all students who filed WP No.31581/2019 seeking admission against vacant seats. He argued that the Regulations provide for a centralized admission mechanism on the basis of which one merit list is made and the medical and dental colleges are allocated students in terms of the preference given by the students. In some cases the students do not opt for the medical or dental college which offered them a seat as they get upgraded to one of their higher options or they opt not to accept the admission offer, hence the seat remains vacant. The admitting university issues subsequent merit lists offering students on the merit list admission in medical and dental colleges. The students are aggrieved by a decision of the Appellant to not allow any further admission given that the students fall on the merit and given that there are vacant seats in Sahara Medical College, Narowal. Learned counsel argued that this is an irrational and unreasonable decision by the PMDC as students, who are interested in pursuing their career in medical and dental field are denied admission simply on account of an arbitrary cut off date. He stated that no doubt there were nine merit lists, however, the Respondents were likely to come up on the next set of merit list if they were allowed by PMDC. The entire thrust of their case is that the vacant seats should be made available to the students whose names are available on the merit list.

12. Learned counsel for ICAs No. 16407/19, 16416/19, 16419/19 while impugning orders dated 28.2.2019 and counsel for ICA No.31021/19 stated that admissions have been completed since the cut off date was extended to 31.3.2019. Hence they do not have any grievance against the PMDC or UHS. However, the Appellant Counsel clarified that notwithstanding the extension granted by PMDC at the orders of the Court, the issue whether there is a right to seek extension from the Court, remains.

Issues

13. The issues raised before the Court as set out by the Appellant are firstly; whether a case of discrimination was made out on the facts in order to grant the Respondent Colleges permission to admit students after the cut off date of 10.04.2019; secondly whether the discretion exercised by the Appellant with respect to its decision for not extending the cut off date for admission was in any manner arbitrary, unreasonable or irrational and thirdly whether the medical and dental colleges or students can seek, as of right, admission beyond the cut off date.

The facts and opinion of the Court

14. The Respondent Colleges and students filed writ petitions before this Court impugning therein letter dated 17.04.2019 issued by the Appellant to the Team Leader Admission of the UHS being the admitting university. In terms of this letter admissions to Shahida Islam Dental College, Lodhran were allowed till 09.04.2019

on the basis of a final merit list provided to the Respondent College. The PMDC informed the college that it has decided that no further admission will take place after 09.04.2019 and in the event that a student does not take up the seat then that seat remains vacant as no further admissions will be permitted. The Respondent College was aggrieved by this letter because they were registered on 29.03.2019 and applied for admission on 01.04.2019. On 04.04.2019 the Respondent College was informed that they should complete all admissions by 08.04.2019. On 08.04.2019 the Respondent College informed the PMDC that interested candidates were asked to apply for admission at the medical college, however no list has been provided with respect to the names of such students to the college. The UHS responded that the merit list of students who gave their consent for admission with the Respondent College has been submitted to the PMDC for further action. On 10.04.2019 PMDC approved admissions for the session 2018-19 for the Respondent College. On 13.04.2019 the Respondent College wrote to the UHS that only ten students got admission on the basis of the list provided by the UHS as most of the students on the list were admitted by other colleges, hence could not be admitted with the Respondent College. Therefore once again the Respondent College sought 40 students to complete the admission process. On 15.04.2019 the UHS informed the PMDC of the number of vacant seats with the Respondent College as only ten students had taken admission and 40 seats were vacant. On 16.04.2019 the UHS informed the PMDC that all lists have been provided to the Respondent College, 18 candidates gave their consent for admission with the Respondent College out of which some of the candidates took admission in other colleges and 22 other students also did not join the College. Essentially in terms of this letter, UHS confirmed that only ten students took admission in the Respondent College whereas the other students named in the list either did not take admission in the medical college or preferred to take admission in some other medical college. On 17.04.2019 the PMDC informed UHS that no further admission can take place with respect to Shahida Islam Dental College, Lodhran. In terms of the contents of the petition, no ground of discrimination is made out and the only case put forward by the Respondent College was that since they were registered on 29.03.2019 and the admission process started on 01.04.2019 and ended on 09.04.2019, hence they were not able to fill up the 50 allocated seats. Therefore 40 seats remain vacant, which reason cannot be attributed to the Respondent College as there was no delay on their part. Their main contention before the Court was that the requisite number of students allocated to the College for admission has not been filled up due to the delay by PMDC. The record shows that the letter issued by the PMDC for the adjustment of students of HMC was not part of the petitions and was provided subsequently.

15. So far as Akhtar Saeed Medical and Dental College, Lahore is concerned, they were provided nine merit lists from the beginning of the admission process uptill the date of 31.03.2019 and thereafter 09.04.2019. Subsequent to that the Respondent College repeatedly wrote to the PMDC as well as the UHS seeking more admission to fill up the vacant seats. As per the letters four seats remained vacant, which they were desirous of filling up. In terms of the contents of the petition there is no

ground alleging discrimination with reference to the HMC or the advertisement issued by Bolan University.

16. With respect to Respondent Students in ICA No.36401/2019, their case is that since there are vacant seats, they should be allowed to fill up the vacant seats by allocating more students to Sahara Medical College, Narowal. In terms of the contents of the petition no allegation of discrimination was made out. Also no reference to HMC or Bolan University was found in this case. The record shows that it was never the case of these students that they have been discriminated against or that PMDC was acting in a discriminatory manner rather their only contention was that they be granted admission since there are vacant seats available in different medical and dental colleges.

17. In terms of the aforesaid, the record shows that it was never the case of any of the Respondent College or the Respondent Students that they have been discriminated against vis-a-vis HMC or Bolan University. These facts were allegedly brought to the notice of the Court during arguments. The learned Single Judge through the impugned order dated 3.6.2019 concluded that HMC has been allowed to admit students and Bolan University is seeking admission beyond the deadline given by PMDC, which establishes that the deadline for admission is not being honoured by the PMDC itself. We are of the opinion that these findings have been made against the record. The letter of 10.04.2019 issued by PMDC is with reference to the adjustment of students of the defunct HMC, against vacant seats. The letter is addressed to a candidate Adeeba Latif and reference to 44 first year students of HMC whose cases were taken up by the PMDC in its meeting on 02.05.2019 wherein it was decided that in order to protect the interest of the students and enable them to continue with their education in medicine, these 44 students be adjusted in medical and dental colleges having vacancies. As a result Adeeba Latif was informed that she should approach any of the medical colleges in the attached list to seek adjustment in the first year program, subject to fulfilling the requirements of the college in terms of payment of fee etc. Furthermore HMC was de-notified on 14.1.2019, hence there was no question of HMC being allowed any admission. Hence we find that reliance on HMC was totally misconceived as they were not admitting any medical or dental students since it was de-notified on 14.01.2019. The Appellant PMDC decided to adjust the students already enrolled and registered with HMC as they had commenced their academic year with the said college in November 2018 to safeguard their admission in medical and dental colleges. For the purposes of this adjustment, candidates were given an opportunity to approach the colleges of their choice as per the list provided to them to seek adjustment. We find that the case of adjusting students of HMC cannot be termed as discriminatory when compared with admitting new students. The adjusting students commenced their academic year in November 2018 and were adjusted as the college was de-notified. This is not a case of discrimination, to the contrary it is indicative of the responsible manner in which the PMDC has attempted to adjust 44 students who were already enrolled in HMC so that they do not lose out on account of the de- notification of HMC. We also note that adjusting old students is different

and distinguishable from admitting new students which fact was not considered in the impugned order. Hence we are of the opinion that no concession was given to HMC on the basis of which the learned Single Judge concluded that the concession given to HMC should be given to the Respondent Colleges before the Court.

18. So far as the second ground of discrimination with respect to the advertisement issued by Bolan University, we note that this is merely an advertisement issued by the university which in no manner suggests or indicates that they have been allowed to issue this advertisement by the PMDC. Learned counsel for PMDC has categorically stated that Bolan University has been called upon to explain why it has issued the said advertisement and is seeking to make admission beyond the cut off date announced by the PMDC being 31.03.2019. We also note that the counsel for PMDC explained that the academic year in the Province of Baluchistan with respect to medical and dental colleges has not commenced whereas the academic year with respect to medical and dental colleges in the Punjab has commenced. This fact alone distinguishes the case of Bolan University from that of the Respondent Colleges and in no manner can be termed as discriminatory with respect to the decision taken by the PMDC. Therefore, we find that the findings of the learned Single Judge on the point of discrimination are totally without basis and against the facts.

19. The second issue before the Court is whether PMDC has acted in a discriminatory, unreasonable or irrational manner with respect to its decision to stop admissions after 10.4.2019. This issue is of significance because the crux of the petitions filed by the Respondent Colleges as well as the Students is that PMDC has not acted in accordance with its mandate under the law nor has it exercised parental jurisdiction with respect to the students seeking admission in medical and dental colleges. The 2019 Ordinance provides that a uniform minimum standard of basic medical education and training and recognition of qualifications in medicine and dentistry be established through the PMDC. In terms of Section 15 of the 2019 Ordinance, recognition of medical institution, medical university and qualification is the sole responsibility of the PMDC and all medical colleges shall apply to the PMDC for recognition of its institution as well as all its degrees. Regulation 9 of the Regulations provides for admission process. In terms of Regulation 9(22) all admissions for private medical and dental institutions shall be completed by the 31st December of each year except admissions under Regulation 12(9) of Part II. However, the last date of admission in medical and dental institutions may, in extraordinary circumstances, be extended by not more than one month by the Admission Board constituted under Regulation 3. Regulation 9(23) provides that the lists detailing particulars of admitting students in public and private medical and dental institutions be submitted by the concerned Admitting University to the Council not later than the 31st March of each year for registration with PMDC and no such list and particulars of any student for registration shall be entertained after the said date. Regulation 10 of the Regulations provides that examination for each degree shall be at the end of each academic year. These Regulations were amended by the PMDC such that the academic year should spread over at least nine calendar

months and every professional examination shall be held at the end of the academic year. Hence in terms of the Regulations a scheme for admission and registration with the PMDC has been provided. The admission period commences each year after announcement of the dates by the PMDC. For the purposes of admission the order of preferences given by a candidate shall be final and cannot be changed and admissions shall be made on the basis of the preference given by the candidate. In case of vacant seats a candidate can be upgraded in a subsequent list to an institution higher in preference before 31st March of each year when the final lists of admitted students is sent to the PMDC for registration. Therefore, as per the Appellant, the candidates set out their preferences for admission in medical and dental colleges and after clearing the admission test the candidates whose names are available on the merit list will be placed in medical and dental colleges as per their given preference. Regulation 9(22) provides that the admission process must be completed by 31st December of each year and if at all, there is any extension it can only be in extraordinary circumstances that too, for one month. Once the admission process has concluded the students admitted in the medical and dental colleges have to be registered with the PMDC no later than 31st March of each year. The academic year must be at least nine calendar months after which the mandatory professional examinations are to be scheduled in terms of Regulation 10 of the Regulations.

20. The scheme provided under the Regulations controls the admission process, the academic year and registration process so as to ensure that at least a nine month academic year is available for students admitted in medical and dental colleges. The significance for regulating the admission process is reflected in the scheme provided PMDC as the regulator aims to admit students with the highest merit into the medical and dental colleges. Admission is a competitive process for which a clear and transparent process must be available so that candidates and colleges are duly informed of the opportunity and criteria for admission. The central admission system is in furtherance of this objective so as to ensure that there is little interference from the colleges and the choice of the candidate is given priority. When reviewing the actions and decisions of a regulatory authority the Court must consider all the facts and the role of the regulator and give deference to the regulator's decision unless grossly unreasonable so as to be infringing on a fundamental right or is against the law. The deference doctrine requires that the Court should defer to the decision of the regulator and not replace the regular decision with that of its own. Hence it is the decision making process which is reviewed so as to ensure due process of law and the procedures provided are followed.

21. In the cases before us for the purposes of 2018-19 session, the deadline for admissions was 31.12.2018 which was extended several times in order to counter the extraordinary circumstances prevalent in the year 2019. The first extension was granted from 31.12.2018 to the end of 31.1.2019 in accordance with the requirements of the Regulations. Subsequently, the Council was dissolved on 8.1.2019 after which a new council was notified on 28.2.2019 which held its first

meeting on 13.3.2019 where they granted another extension in the admission process to make up for the loss of time due to the fact there was no council. Several writ petitions were filed seeking more time in the admission process as a consequence to which the PMDC in its meeting dated 13.3.2019 decided to extend the admission process uptill 31.03.2019. The circumstances, spanning from January to March, 2019 prevented the admission process from being complete as there was no Council. Hence the PMDC took extraordinary steps to protect the interest of the students as well as medical and dental colleges to ensure that maximum benefit is granted for the purposes of admission and to fill up the vacant seats in the colleges. A total of nine merit lists were issued on the basis of which students were admitted in the colleges of their given preference or were upgraded to higher colleges as per their preference. We have heard all the learned counsels for the parties at length and do not find any irregularity or discriminatory practice exercised by the PMDC during this time. To the contrary we find that numerous meetings took place in which the PMDC tried to streamline the admission process so as to ensure that the admission process for the 2018-19 session was not adversely affected by the delays of there being no Council.

22. Learned counsel for the Respondents argued at great length on the significance of the nine month academic year and whether it is mandatory or directory and whether adjustments can be made after the deadline given. However we are not convinced by the arguments made that this Court should interfere in the planning of the academic calendar so far as medical and dental colleges are concerned. The responsibility of planning the academic calendar is that of the regulator PMDC. Its primary function is to carry out admissions, registration and examinations as per the requirements of the Regulations to ensure that premier education is provided by the medical and dental colleges over a span of at least nine months, meaning that the academic year in the very least must be nine months, if not more. There is nothing before us on the basis of which the decision to have a nine month academic year can be questioned or the decision to control the admission process as per the Regulations and issue the cut off dates can be called into question.

23. In our opinion one of the cause of the problem for seeking interference in the admission process is when cases of registration and recognition of colleges are processed during the academic year and colleges are given recognition in the middle of the academic year. The Respondent Shahida Islam Medical College was registered on 29.03.2019 right in the middle of the academic year. They sought admissions thereafter and were given an opportunity to fill up their seats, however could not manage to fill up more than ten seats out of the allocated 50 seats. As per the record, due to the late registration and notification their admission process did not commence until 1.4.2019. There are two substantive issues that arise in such cases; firstly the process of inspection and recommendation for registration with the Federal Government by the PMDC should be regulated keeping in mind the academic year so as to ensure that medical and dental colleges are recognized and registered under the law in a timely manner. For this an annual scheme may be prepared which streamlines the recognition and registration process to match the

academic year. In cases where they are registered in the middle of the academic year, if at all they are granted any admission it cannot be at the expense of the academic calendar and cannot be based on the understanding that extra classes, extra time and vacation time will be utilized to make up the months which have missed. Not only will this compromise on the quality of education but it also unnecessarily burdens the students to complete the work required to be done over a period of at least nine months being the minimum months required for such education in a shorter time. Second is the issue of admissions by colleges in the middle of an academic year. The process of recognition and registration does not ipso facto create a right for admission in the existing academic year simply because a college is recognized and registered. We are of the opinion that any admission offered to such colleges is by way of a concession and cannot be claimed as of right. PMDC is required to maintain its academic calendar and follow the schedule provided in the Regulations for the purposes of admissions, recognition, registration and examination. Although we understand that certain delays are out of PMDC's control, nonetheless effort must be made to streamline the registration process and to ensure that where registration takes place in the middle of academic year, colleges be refrained from admission in that academic year, if it means compromising on the academic calendar.

24. In view of the aforesaid, we are of the opinion that the extraordinary circumstances were duly considered and the extensions were given under the Regulations and by way of special relaxation. Hence the contention of the Respondent Colleges was totally misconceived that they be given more time to fill up vacant seats. No legal right has been infringed and PMDC has not acted in a manner which was detrimental to the Students or the Colleges.

25. Under the circumstances, we hold that the learned Single Judge should not have interfered with the cut off date or the academic calendar. We also note that the petitioners before the learned Single Judge sought extraordinary relief from the Court which was beyond the scheme and provisions of the Regulations. As to the Students before the Court their prayer was that admissions be allowed so that all vacant seats are filled up and the merit list is revised sufficiently to ensure that all seats are filled up. We find that even this prayer is against the provisions of the Regulations which sets out the deadlines for admission and registration of students. Furthermore the UHS or PMDC declare a cut off merit beyond which students cannot be admitted. Hence the Court cannot grant admissions to students without considering their merit and the fact that they did not make it in nine merit lists. Consequently, we **allow** all the ICAs detailed in Schedule **"A",** setting aside the impugned orders dated 3.6.2019, 14.3.2019 and 28.2.2019.

(Y.A.) Appeals Allowed

2019 P T D 1994
[Lahore High Court]
Before Ayesha A. Malik and Shams Mehmood Mirza, JJ
COMMISSIONER INLAND REVENUE
Versus
Messrs EDUCATION EXCELLENCE LTD.
I.T.R. No.255 of 2016, decided on 18th October, 2016.

Income Tax Ordinance (XLIX of 2001)---

----Ss. 133 & 113---Reference to High Court---Minimum Tax---Adjustment of excess amount of tax paid---Scope---Taxpayer, while filing the return of income, had claimed adjustment of minimum tax brought from tax years 2011, 2012 and 2013---Additional Commissioner had observed that as the appellant had not paid any tax under normal tax regime, therefore, the credit under S. 113(2)(c), Income Tax Ordinance, 2001 was not available---Commissioner Inland Revenue (Appeals) had rejected the appeal of taxpayer---Appellate Tribunal accepted the appeal of taxpayer and held that S. 113(2)(c), Income Tax Ordinance, 2001 was applicable in loss cases or zero tax payable cases---Validity---Findings of Appellate Tribunal were rooted in law---Reference application was dismissed.
Asjad Saeed Advocate, for the Applicant.

JUDGMENT
This income tax reference is filed under section 133(1) of the Income Tax Ordinance, 2001 (the Ordinance) seeking opinion of this Court on two questions of law stated to have arisen out of the order passed by Appellate Tribunal Inland Revenue, Lahore.

2. The issue involved in the case was the entitlement of the respondent tax payer to seek adjustment of minimum tax of Rs.37.028 Million in respect of tax years 2011, 2012 and 20 l3 under section 113(2)(c) of Ordinance. The Additional Commissioner disallowed the credit to the tune of Rs.35.232 Million. The appeal filed by respondent tax payer before the Commissioner Inland Revenue (Appeals) was also dismissed. The Appellate Tribunal Inland Revenue, however, came to the conclusion that section 113(2)(c) of the Ordinance is beneficial in nature and was meant to reduce the burden of taxation in cases where losses have been suffered by the taxpayer. While accepting the appeal of the respondent taxpayer, the Appellate Tribunal .Inland Revenue accordingly declared that Section 113(2)(c) of the Ordinance is also applicable in cases where losses have been suffered and that benefit thereof cannot be disallowed to the respondent taxpayer.

3. The findings of the Appellate Tribunal Inland Revenue are rooted in law and, therefore, the questions framed by the appellant do not raise and legal issue requiring us to render our opinion thereon.
4. This reference application is accordingly dismissed.
SA/C-12/L Application dismissed.

P L D 2020 Lahore 16
Before Ayesha A. Malik, J
PAKISTAN MEDICAL AND DENTAL COUNCIL, ISLAMABAD through Authorized Representative---Appellant
Versus
MALEEHA SYED and 4 others---Respondents
I.C.As. Nos.62074, 62075, 62076 and 62077 of 2019, decided on 5th November, 2019.

(a) Pakistan Medical and Dental Council Ordinance (II of 2019)---

----Ss. 42 & 49---MBBS and BDS (Admissions, House Job and Internship) Regulations, 2018, Reglns. 7 & 6---Adminission in Medical and Dental Colleges---Power of the Pakistan Medical and Dental Council ("PMDC") to make/alter regulations---Effect of Repeal of Pakistan Medical and Dental Council Ordinance, 1962---Saving of Regulations made under the Pakistan Medical and Dental Council Ordinance, 1962---Alteration of such regulations by "PMDC"---Scope---Appellant impugned order passed in Constitutional petition, whereby it was held that there existed no specific power under S.42(2) of the Pakistan Medical and Dental Council Ordinance, 2019 for PMDC to make regulations with respect to admissions in medical and dental colleges and held that S.49(2) of the said Ordinance, protected all regulations and actions made under the repealed Pakistan Medical and Dental Council Ordinance, 1962 and therefore in absence of specific power to make regulations governing admissions, power to alter repeal or modify the existing regulations was not available to "PMDC"---Validity---Held, while there was no specific provision authorizing "PMDC" to make regulations pertaining to admissions, there was specific authorization given under S.49(2) of the Pakistan Medical and Dental Council Ordinance, 2019, being the repeal and saving clause, to alter, repeal or modify regulations, decisions, disciplinary action taken by the "PMDC"---Sections 42 & 49 of the Pakistan Medical and Dental Council Ordinance, 2019 were independent provisions and repeal and saving clause in said Ordinance was not dependent on any other provision of the same---Legislature had specifically saved the MBBS and BDS (Admissions, House Job and Internship) Regulations, 2018 made under the repealed Ordinance, with the specific power to "PMDC" to alter, repeal or modify the saved regulations, and therefore intent of Legislature was clear---High Court set aside the impugned order and held that "PMDC" could in fact alter the MBBS and BDS (Admissions, House job and Internship) Regulations, 2018---Intra-court appeal was allowed, accordingly.
Pakistan Medical and Dental Council through President and 3 others v. Muhammad Fahad Malik and 10 others 2018 SCMR 1956 distinguished.
Federation of Pakistan through Secretary, Ministry of Law, Justice and Parliamentary Affairs, Islamabad and others v. Aftab Ahmad Khan Sherpao and others PLD 1992 SC 723; Federal Public Service Commisison and others v. Syed Muhammad Afaq and others PLD 2002 SC 167; Muhammad Fahad Malik v. Pakistan Medical and Dental Council and others PLD 2018 Lah. 75; Pakistan Automobile Corporation Limited through Chairman v. Mansoor ul Haque and 2

others 2004 SCMR 1308; Maj. Matloob Ali Khan v. Additional District Judge, East Karachi and another 1988 SCMR 747; Multiline Associates v. Ardeshir Cowasjee and 2 others PLD 1995 SC 423, Pakistan through Secretary Finance, Islamabad and 5 others v. Aryan Petro Chemical Industry (Pvt.) Ltd, Peshawar and others (2003 SCMR 370; Suo Motu Case No.13 of 2009 decided on 15.3.2011 (PLD 2011 SC 619); Amanullah Khan v. Chief Secretary, Government of N.WF.P and 2 others 1995 SCMR 1856 and Sabz Ali Khan v. Bismillah Khan and another 1997 SCMR 1781 ref.

(b) Interpretation of statutes---

----Repeal of statutes---"Repeal and saving clause"---Nature---Power to repeal any law and to save any decision, order, proceeding, rules or regulations under the repealed law was a Legislative function and was done with intent to safeguard that which the Legislature deemed necessary from the repealing provision---Saving clause acted as restriction on the repealing provision exempting all saved items from the repeal.

Chaudhary Muhammad Umar and Rana Muhammad Ansar for Appellant.
Ms. Ambreen Moeen, D.A.G., Chaudhary Muhammad Atiq and Mufti Ahtesham-Uddin-Hadier for Respondent UHS (in ICAs. Nos.62074/19 and 62076/19).
Imran Muhammad Sarwar for Respondent UHS (in ICAs. Nos.62075/19 and 62077/19).
Rizwan Mushtaq, Ashfaq Qayyam Cheema and Morris Nadeem, for Respondent No. 1 (in ICA No.62074/19).
Ms. Uzma Ahmad Bajwa for Respondent No.1 (in ICA No.62075/19).
Mian Muhammad Aslam for Respondent No.1. (in ICA No.62076/19).
Sahir Mahmood Bhatti for Respondent No.1 (In ICA No.62077/19).
Date of hearng: 5th November, 2019.

JUDGMENT

AYESHA A. MALIK J.--This common judgment decides the the instant ICA as well as connected ICAs Nos.62075/19, 62076/19 and 62077/19 having common questions of law and facts and arise out of the same impugned judgment dated 10.10.2019 passed by the learned Single Judge in W.Ps. Nos.52871/19, 54133/19, 56170/19 and 58578/19=2020 YLR 97

2. Chaudhary Muhammad Umar, Advocate for the Appellant, Pakistan Medical and Dental Council Islamabad ("PMDC") argued that the Appellant is aggrieved by the impugned judgment on the ground that the impugned judgment was passed without issuing any notice to the Attorney General for Pakistan under Order XXVII-A of the Civil Procedure Code, 1908 ("C.P.C.") which was mandatory given that the Respondents had challenged the vires of the amendments made to the MBBS and BDS (Admission, House Job and Internship) Regulations, 2018 ("2018 Regulations"). In this regard, learned counsel has relied upon Federation of Pakistan

through Secretary, Ministry of Law, Justice and Parliamentary Affairs, Islamabad and others v. Aftab Ahmad Khan Sherpao and others (PLD 1992 SC 723) and Federal Public Service Commission and others v. Syed Muhammad Afaq and others (PLD 2002 SC 167). Furthermore, the Appellant is aggrieved as the impugned judgment has held that the Appellant does not possess the power to make regulations pertaining to admission nor could it have amended the 2018 Regulations since there was no specific provision in the Pakistan Medical and Dental Council Ordinance, 2019 ("2019 Ordinance") granting such power to the Appellant. Learned counsel argued that the PMDC is the regulatory body for the medical profession as well as for medical education, training and recognition of qualifications in medicine and dentistry as per the 2019 Ordinance. The preamble of 2019 Ordinance clearly provides for the regulation and control of the medical profession and to establish a uniform minimum standard of basic medical education and training and recognition of qualifications in medicine and dentistry. Learned counsel further argued that in terms of various different pronouncements of the august Supreme Court of Pakistan it is now settled that the PMDC is empowered not only to regulate the admission process and make regulations thereto but also that its regulations are valid and legally binding on all medical and dental colleges across Pakistan. Learned counsel further stated that the provisions of Section 49(2) of 2019 Ordinance have not been appreciated in their proper context given that there is a clear mandate in the said section to alter, repeal or modify regulations. Learned counsel argued that one of the primary functions of PMDC is to regulate the admission process for which the policy and guidelines are set by the PMDC on the basis of which admissions are undertaken throughout Pakistan in medical and dental colleges. He argued that a plain reading of the preamble and the function of the PMDC read with Section 42(2)(a)(b) of 2019 Ordinance clarifies that the mandate for regulating admissions into medical and dental colleges vests with PMDC. Notwithstanding the same, Section 49(2) of 2019 Ordinance specifically grants PMDC the power to amend the 2018 Regulations, therefore there was no justification for setting aside the amendments made to the 2018 Regulations on 30.05.2019. Learned counsel argued that more than 70,000 applicants participated in the admission process. Only four petitioners challenged the amendments on the ground of being dual nationals. He argued that the amendments to the 2018 Regulations were made in May, 2019 yet the petitions were filed in September, 2019 after the petitioners participated in the MDCAT examination and realized that they do not fall at a higher merit for admission in public sector colleges. He relied upon the prayer made in the petitions to urge the point that the matter in issue had already been settled in Muhammad Fahad Malik v. Pakistan Medical and Dental Council and others (PLD 2018 Lahore 75) and Pakistan Medical and Dental Council through President and 3 others v. Muhammad Fahad Malik and 10 others (2018 SCMR 1956) and further that the 2018 Regulations were amended well before the holding of the MDCAT examination giving the Petitioners sufficient time to challenge the amendments if they deemed it so important. He argued that the delay in filing the petitions is simply because they did not meet the merit criteria for public sector universities hence they decided to challenge the entire admission process. This factor was also not duly considered and the impugned judgment set aside the amendments

notwithstanding the fact that the admission process so far as the holding of MDCAT examination had taken place and the merit lists were to be announced.

3. On behalf of the Respondents, Mr. Rizwan Mushtaq, Mian Muhammad Aslam, Ms. Uzma Ahmad Bajwa and Mr. Sahir Mahmood Bhatti, Advocates argued that notices under Order XXVII-A, C.P.C. was not required as no constitutional question was involved in the petitions. The only issue is with respect to the powers of PMDC to amend the 2018 Regulations, hence as such the requirement under Order XXVII-A C.P.C. was not mandatory. Learned counsel while distinguishing this case from PLD 1992 SC 723 (supra) and PLD 2002 SC 167 (supra) have placed reliance on Pakistan Automobile Corporation Limited through Chairman v. Mansoor-ul-Haque and 2 others (2004 SCMR 1308). Learned counsel further argued that the impugned judgment has clearly set out the case of the Respondents and clearly provided that since the PMDC did not have the power to make regulations with reference to admissions in medical and dental colleges, they did not have the power to amend the 2018 Regulations. Mr. Rizwan Mushtaq, Advocate argued that the power to make regulations with respect to the admission was deliberately omitted under the 2019 Ordinance to give continuity to the 2018 Regulations which were made under the direction of the august Supreme Court of Pakistan in 2018 SCMR 1956 (supra). Hence PMDC did not have the power to amend the 2018 Regulations. Reliance is placed on Maj. Matloob Ali Khan v. Additional District Judge, East Karachi and another (1988 SCMR 747), Multiline Associates v. Ardeshir Cowasjee and 2 others (PLD 1995 SC 423), Pakistan through Secretary Finance, Islamabad and 5 others v. Aryan Petro Chemical Industry (Pvt.) Ltd, Peshawar and others (2003 SCMR 370) and Suo Motu Case No.13 of 2009 decided on 15.3.2011 (PLD 2011 SC 619). He further relied on the doctrine of CASUS OMISSUS whereby any omission in the statute is considered to be intentional and that mistake cannot be rectified by the courts. Reliance is placed on Amanullah Khan v Chief Secretary, Government of N.WF.P and 2 others (1995 SCMR 1856) and Sabz Ali Khan v. Bismillah Khan and another (1997 SCMR 1781). He further argued that any delay on the part of the Respondents in filing the writ petitions is not only explainable but also irrelevant with respect to the legal questions raised in the writ petitions. Further that the Respondents acquired a vested right to seek admission under the 2018 Regulations since they, at the time of taking their A Level examination in May, 2019 had already decided that they were to participate in the admission process for medical and dental colleges and the sudden changes to the admission criteria brought through the amendments in the 2018 Regulations prejudiced their rights such that they were put to a disadvantage which is wholly unfair and cannot be done by the PMDC. Ms. Uzma Ahmad Bajwa, Advocate added to the arguments that the Respondents are dual national who were entitled to the benefit of Regulations 7 and 8 under the original 2018 Regulations and while their A Level examination was under way, the admission criteria was changed, hence they were deprived of the benefit of Regulations 7 and 8 of the original 2018 Regulations, putting them at a major disadvantage which is against the spirit of 2018 SCMR 1956 (supra). She argued that a lot of effort has been put in by these students in pursuing their desire to study medicine and the PMDC should not be allowed to change the rules and

regulations at the last moment as not only did the Respondents acquire a vested right in the admission process to be governed by the 2018 Regulations but also it does not inspire much confidence in the system which is subject to constant change.

4. We have heard the learned counsel for the parties at great length and have also gone through the record. The Appellant has raised the basic objection that notices were not issued under Order XXVII-A C.P.C. given that vires of 2018 Regulations were challenged on the touchstone of the 2019 Ordinance and the petitioners' fundamental rights. We have gone through the contents of the writ petitions and find that these petitions specifically allege that the amendments made by the respondents to the 2018 Regulations are liable to be struck down being against their fundamental rights and contraiy to the applicable laws. We also note that reliance of the Respondents on 2004 SCMR 1308 (supra) is not relevant as this case deals with a service matter in which the Court concluded that notices under Order XXVII-A, C.P.C. are not required. Therefore we find that notices under Order XXVII-A, C.P.C. in terms of the dicta laid down by the august Supreme Court of Pakistan in PLD 1992 SC 723 (supra) is mandatory. At this stage all learned counsel before us plead urgency in the matter as the issues pertain to admissions in medical and dental colleges and the issue of whether admissions are to be made under the 2018 Regulations or not should be resolved at the earliest so as to prevent any further delay in the matter. Ms. Ambeen Moeen, DAG present in Court on instructions stated that the Federal Government adopts the arguments of the PMDC in this case for a decision on its merits. Therefore we proceed to decide the case on its merits.

5. The relevant facts are that the 2018 Regulations were issued on 17.9.2018 which were amended on 30.05.2019 wherein the relevant regulations on the basis of which the writ petitions were filed are Regulations 7, 8 and 9 of the 2018 Regulations. Prior to the amendments, Regulation 7 of the 2018 Regulations provided for the eligibility criteria for MBBS and BDS courses in Pakistan and abroad calling for a sixty percent aggregate in three subjects. Respondent No.1 in I.C.A. No.62077/2019 is aggrieved by the amendment made to Regulation 7(2) of the 2018 Regulations which now requires a seventy percent aggregate in three subjects. The Respondents in ICAs Nos.62074 and 62076 of 2019 are aggrieved by the amendments made to Regulation 8(2) of the 2018 Regulations, which originally provided as follows:-

No candidate shall be eligible for foreign quota seats in public and private Medical and Dental institutions under sub-regulations (1) and (2) unless he holds a permanent foreign nationality or dual nationality or overseas Pakistani students who had studied and passed HSSC 12th grade examination or equivalent from outside Pakistan and has stayed in the foreign country for the whole duration of the above mentioned course (applicable w.e.f session 2021-2022) and possess a certificate from the institution last attended to this effect.

The amendments made on 30.05.2019 to Regulation 8(2) provided as follows:-

No candidate shall be eligible for foreign quota seats in the public and private Medical and Dental institutions under sub-regulations (1) unless, he holds a permanent foreign nationality or is an overseas (being a Pakistani citizen permanently resident in a foreign country) Pakistani student, and who has studied

and passed HSSC 12th grade examination or equivalent from outside Pakistan and is a resident of a foreign country at the time of applying for admission and possess a certificate from the institution last attended to this effect.
In terms of the amendments to Regulation 8(2), it was clarified that the foreign quota seats were available for those dual national or overseas Pakistani, who were residing permanently in a foreign country and who had studied and passed the 12th grade examination or equivalent from outside Pakistan and at the time of admission was a resident of a foreign country. The Respondents collectively are also aggrieved by the amendment to the 2018 Regulations which provides the threshold on the basis of which weightage was to be given to O Level and matriculation results. In terms of the 2018 Regulations the formula provided was ten percent weightage given to O Level and matriculation result whereas the amendments of 30.5.2019 did away with the ten percent weightage and the criteria was changed to fifty percent weightage for MDCAT and fifty percent weightage for F.Sc (Pre-Medical)/HSSC/equivalent (50%).

6. The impugned judgment considered the stance of the Respondents and concluded that there was no specific power under Section 42(2) of 2019 Ordinance authorizing PMDC to make regulations with respect to the admissions in medical and dental colleges. The Court further concluded that since there was no specific power under Section 42(2) of the 2019 Ordinance, the provisions of Section 49 of the 2019 Ordinance would not be applicable since the 2019 Ordinance did not permit the PMDC to make regulations related to admissions under Section 42 of the 2019 Ordinance. The Court held that Section 49(2) of the 2019 Ordinance protected all regulations and actions under the repealed Ordinance. However since the 2019 Ordinance did not grant the specific power of making regulations governing the admissions, then the power to alter, repeal or modify the existing regulations was also not available to PMDC being against the mandate of the 2019 Ordinance. It was further held that the power to alter, repeal or modify the regulations could only be allowed if there was a specific power vested in PMDC to make regulations pertaining to admissions.

7. We have duly considered the contentions and arguments of the Respondents' Counsel, however we are not in agreement with the findings in the impugned judgment on this issue. We find that notwithstanding the argument that there is no specific provision authorizing the PMDC to make regulations pertaining to admissions, there is specific authorization given under Section 49(2) of the 2019 Ordinance, being the repeal and saving clause to alter, repeal or modify regulations, decisions, disciplinary action taken by the PMDC, Adhoc Council, Executive Committee or any other committee or authority of PMDC. We also find that Section 42 and Section 49 of the 2019 Ordinance are independent provisions of the 2019 Ordinance and the repeal and saving clause is not dependent on any other provision of the 2019 Ordinance. The objective of the repeal and saving clause precisely as it states is to repeal the previous law being the Pakistan Medical and Dental Council Ordinance, 1962 ("1962 Ordinance") and to save all those decisions, rules and regulations that the legislatures deemed necessary. Under the 2019 Ordinance, the

2018 Regulations were saved making them the relevant regulations for the purposes of admission in medical and dental colleges with the specific power to the new council constituted under the 2019 Ordinance to alter, repeal or modify the existing regulations which included the 2018 Regulations. The power to repeal any law and to save any decision, order, proceeding, rules or regulations under the repealed is a legislative function. It is done with the intent to safeguard that which the legislature deems necessary from the repealing provision. Essentially the saving clause acts as a restriction on the repealing provision exempting all saved items from the repeal. Hence where the legislature has specifically saved the 2018 Regulations made under the repealed Ordinance, with the specific power to alter, repeal or modify the saved regulations, the intent of the legislature is clear and not dependent on any other provision of the 2019 Ordinance. Furthermore we find that there is no conflict with respect to the provisions of Sections 42 and 49 of the 2019 Ordinance as Section 49 grants special permission to the new council to alter, repeal or modify the existing regulations. The new council notwithstanding its power to make regulations as granted in Section 42 has the power to alter, repeal or modify existing regulations. Therefore for the purposes of the dispute raised by the Respondents in their respective petitions, no case was made out against the PMDC that they could not amend the 2018 Regulations on 30.5.2019.

8. We have also examined the prayers in the writ petitions wherein the petitioners essentially challenged the elimination of the quota for dual nationals and the exclusion of the weightage given to O Level results from the admission criteria. In this regard, we note that the petitioners were in fact not entitled to any foreign seat quota under the 2018 Regulations as they are admittedly students who have studied for their O Level and A Levels in Pakistan and for the purposes of their Secondary School Education and 12th grade examination, they did not reside abroad. Even under the original regulations any candidate applying for the foreign quota seats in public and private medical and dental colleges had to have studied and passed the 12th grade examination or equivalent from outside Pakistan and have stayed in the foreign country for the whole duration of the course. Admittedly none of the Respondents before the Court meet with this criteria, hence with respect to the eligibility of a foreign quota seats, the petitioners were not entitled to any relief in their constitutional petitions. Furthermore the Respondents' reliance on 2018 SCMR 1956 (supra) is misconceived as the facts are distinguishable. The amendments were publicized and posted on the website of the PMDC in June 2019 and was available in the booklet information made available to students prior to taking the MDCAT examination. The Respondents took the MDCAT examination and after getting their result filed the petitions in September 2019. Hence the Respondents' contention that the amendments came as surprise to them is totally without basis.

9. Under the circumstances, all four appeals are accepted and the impugned judgment dated 10.10.2019 passed by the learned Single Judge in W.Ps. Nos.52871/19, 54133/19, 56170/19 and 58578/19 is set aside and the 2018 Regulations are restored to their original amended form. Consequently the competent authority can proceed with the admission process as per the 2018 Regulations.

KMZ/P-15/L Appeals allowed.

P L D 2020 Lahore 167
Before Ayesha A. Malik, J
GHANI GLOBAL GLASS LTD.---Petitioner
Versus
FEDERATION OF PAKISTAN through Secretry Energy (Power Division), Islamabad and others---Respondents
Writ Petition No.48379 of 2019, heard on 20th November, 2019.

Regulation of Generation, Transmission and Distribution of Electric Power Act (XL of 1997)--

----Ss. 31 & 7---Powers and functions of National Electric Power Regulatory Authority ("NEPRA")---Tariff, determination of---Quarterly Tariff Adjustment, imposition of---Prescription of guidelines issued by NEPRA under S.7(2)(i) of Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997---Scope---Petitioners impugned imposition of quarterly tariff adjustment ("QTA") in their monthly electricity bills, inter alia, on the ground that such imposition was retrospective and also not in accordance with provisions of Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997---Validity---Objective of quarterly adjustment was to ensure that all pass-through costs were factored into determining tariff as per requirement of Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 and Rules framed thereunder---Distribution Companies did not have to bear such costs and were entitled to recover prudently all incurred costs and hence there existed requirement of quarterly or bi-annual adjustment---NEPRA determined tariff as per S. 31 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997, after distribution licensees filed petitions per the Rules and Guidelines---NEPRA determined consumer end tariff for each distribution licensee after assessing different components of revenue requirements and conducting public hearing---Formulae and principles for determining revenue requirement were provided under the Guidelines issued under S.7(2)(i) of Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 which prescribed for quarterly adjustment of capacity and transmission charges, and impact of transmission and distribution losses---Under such Guidelines, fuel adjustment was made on monthly basis whereas costs, charges and losses were made on a quarterly basis, which was neccessary because every tariff determination was based on presumptive figures at beginning of financial year, which figures had to be actualized on basis of actual data---Every tariff determination, and quarterly adjustment, was for a fixed period and hence QTA was as per the prescribed methodology and fell within the framework of the law---High Court held that periodical adjustments in tariff were in terms of prescribed procedure of law and no illegality existed in the same---Constitutional petitions were dismissed, in circumstances.
Lahore Electric Supply Company Limited (LESCO) and others v. National Electric Power Regulatory Authority and others PLD 2018 Isl. 20 and National Electric

Power Regulatory Authority v. Faisalabad Electric Supply Company Limited 2016 SCMR 550 rel.

Sh. Rahmatullah v. The Deputy Settlement Commissioner, Centre, 'A' Karachi and others PLD 1963 SC 633; Sheikh Fazal Ahmad v. Raja Ziaullah Khan and another PLD 1964 SC 494; Islamic Republic of Pakistan through the Secretary, Ministry of Commerce and Local Government (Commerce Division), Islamabad 1977 SCMR 509; Imtiaz Ahmad and others v. Punjab Public Service Commission through Secretary, Lahore and others PLD 2006 SC 472; Province of Punjab through Secretary to the Government v. Dr. Muhammad Zafar Iqbal and 10 others 2018 PLC (C.S) 152; Syeda Shazia Irshad Bokhari v. Government of Punjab through Secretary Health and another PLD 2005 Lah. 428; ICC Textiles Limited through Authorized Representative and 31 others v. Water and Power Development Authority (WAPDA), WAPDA House, Lahore through Chairman and 15 others 2009 CLC 1343; Flying Board and Paper Products Ltd. and others v. Government of Pakistan through Secretary Cabinet Division and others 2010 SCMR 517; Hameed Steel and others v. LESCO and others W.P. No.25437 of 20915 and National Electric Power Regulatory Authority v. Faisalabad Electric Supply Company Limited 2016 SCMR 550 rel.

Ahmed Pervaiz, Muhammad Mohsin Virk, Muhammad Aslam Sheikh, Sher Baz Ali, Majid Jehangir, Khalil ur Rehman, Mustafa Kamal, Lisan Ullah Khan, Mian Muhammad Hussain Chotya, Malik Sohail Ashiq Shujra, Sheikh Muhammad Akhtar Shahzad, Rana Mehboob Alam Khan, Syed Najaf Hussain Shah, Sayyed Alamdar Hussain Naqvi, Imran Anjum Alvi, Mian Mahmood Rashid, Rubi Saleha, Malik Kashif Rafique Rajwana, Rabia Hassan, Arshad Nazir Mirza, H.M. Majid Siddiqui, Moiz Tariq, Rana Muhammad Arshad Khan, Rai Muhammad Azam Kharal, Mian Ali Akbar, Rana Ahmed Tayyab Shahid, S.M. Raheel, Sohail Javed Chughtai, Chaudhary Muhammad Ajmal Haq, Muhammad Irfan Liaqat, Muhammad Farooq Sheikh, Khalid Gulzar, Rana Sajid Rasool Chaudhary Asim Iqbal, Muhammad Abbas Nasir Chaudhary, Muhammad Umer Tariq Gill, Sajid Naseer Chaudhary, Rai Zameer ul Hassan, Muhammad Anas Aftab, Mashood Iqbal, Ijaz Ahmad Awan, Muhammad Iqbal Akhtar, Syed Amjad Iqbal Hussain, Salman Afzal Malik, Muhammad Nawaz Sheikh, Sajjad Ahmad Jatoi, Mirza Bilal Zafar, Salman Ahmad Chaudhary, Mian Irfan Ahmad Sial, Ehsan Elahi Sheikh, Shoaib Yousaf Awan, Ch. Waqar Hassan, Muhammad Baqir Hussain, Rana Jamshed Khan, Nasrullah Sattar Pasha, Syed Habib Ullah, Jan Muhammad Chaudhary, Fawad Akram Sufi, Mian Waqas Khalid, Mudassar Shuja-ud-Din, Muhammad Qasier Amin Rana, Jahanzaib Khan, Muhammad Saqib Sheikh, Khalid Nawaz Ghumman, Shehzad Riaz Chattha, Hassan Jalees Tarar, Chaudhary Habib-ur-Rehman, Tahir Attique Piracha, Mubashar Hassan Sheikh, Naveed Anwar Chohan, Rana Mushtaq Ahmad Toor, Shaukat Ali Tanweer, Mian Tariq Mahmood, Hashim Aslam Butt, Adnan Ahmad, Tahir Mahmood Mughal, Malik Saqib Karim, Iftikhar Gull Khan, Muhammad Siddique Butt, Chaudhary Imtiaz Ullah Khan, Malik Muhammad Ashfaq, Arslan Arshad, Mian Masroor Ahmad, Ghulam Farid-ud-Din, Faisal Ghafoor Khokhar, Mirza Khurram Baig, Shahid Abrar Basra, Ch. Shafqat Ali Sulehria, Faisal Hanif Khokhar, Uzman Umar Khokhar, Shahid Shaukat Chaudhary, Adnan Qamar Malik, Adil Naeem Sheikh, Asif Hayat Khattak, Chaudhary Yasir

Ali, Rana Shafqat Hussain, Abdul Sami Qureshi, Syed Muhammad Ghazanfar, Nadeem Hussain, Amir Hussain, Chaudhary Muhammad Awais Kamboh, Rai Tanveer, Arshad Khan, Chaudhary Farid Anwar, Shakeel Ahmad Basra, Shaukat Ali Tanveer, Muhammad Ramzan Chaudhary, Zabi Ullah Nagra, Asif Amin, Muhammad Rashid, Chaudhary Mumtaz ul Hassan and Malik Bashir Ahmad Khalid for Petitioners.

Ms. Ambreen Moeen, DAG., Muhammad Shafique and Umer Sharif, Advocates for NEPRA, Muhammad Shoaib Rashid, Furqan Naveed and Ms. Manahil Khan, Advocates for LESCO, Mian Muhammad Mudassar Bodla, Advocate for LESCO, Sheikh Muhammad Ali, Advocate for FESCO along with Rana Muhammad Rafique, Chief Financial Officer, FESCO, M. Ismail Khalid, SDO and Ayaz Haider, Revenue Officer, FESCO, Raja Akhtar Nawaz, Advocate for FESCO., Malik Asad, Advocate for FESCO, Mian Ashiq Ali, Advocate for FESCO, Chaudhary Fiaz Ahmad Sanghaira, Advocate for IESCO, Chaudhary Imtiaz Elahi, Advocate for FBR., Shahid Sarwar Chahil , Advocate for FBR, Raza Bashir, Advocate for Chairman, WAPDA and Aurangzeb Mirza, Advocate for GEPCO and FESCO for Respondents.

Date of hearing: 20th November, 2019.

JUDGMENT

AYESHA A. MALIK, J.---This judgment decides upon the issues raised in the instant Petition as well as connected Petitions detailed in Schedule "A" as all Petitions raise common questions of law and facts.

2. The Petitioners have challenged the imposition of quarter tariff adjustment ("QTA") in the electricity bills issued by the relevant distribution company, who are the Respondents in these petitions. The Petitioners have also challenged the decision dated 14.6.2019 issued by the National Electric Power Regulatory Authority ("NEPRA") and the Notification dated 28.6.2019 issued by the Federal Government.

3. The basic relief sought for by the Petitioners is that the Respondents be restrained from recovering QTA on the consumption of electricity through their electricity bills. The Petitioners before the Court are all consumers of electricity who are aggrieved by the imposition of QTA in their bills on the basis of which the tariff has been adjusted retrospectively. Learned counsel for the Petitioners argued that as per the billing mechanism, the distribution company, on the basis of the monthly readings, issues bills to consumers in accordance with the tariff notified by the Federal Government. Once the bill is paid, it becomes a past and closed transaction as the Petitioners have paid the bill along with all relevant taxes and on the basis thereof have built that payment into their costs for the purposes of their business. Furthermore once the bill has been paid, there is no justification to seek any adjustment against a paid bill nor does the law provide for the same.

4. Learned counsel further argued that the tariff was first determined on 8.3.2016 being a multi year consumer end tariff for the years 2015 to 2020. Against this

tariff, LESCO filed a motion leave to review which was dismissed by NEPRA vide order dated 19.5.2016. The Federal Government made a request to reconsider the tariff which was also dismissed on 1.7.2016 by NEPRA. The Respondent distribution companies approached the Hon'ble Islamabad High Court through various different petitions, consequent to which the matter was remanded to NEPRA to re-determine the tariff for the financial year 2015-16 to 2019-20. On 23.10.2017 NEPRA on its own made some adjustments to the tariff for the financial year 2016-17 and for the first time notification for the financial year 2015-16 and 2016-17 was issued on 22.3.2018. In the meantime on 27.4.2018, Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 ("the Act") was amended, such that several amendments were made to Section 31 of the Act of which Section 31(4) is relevant for the purposes of the dispute before the Court. The Federal Government made a request before NEPRA for making uniform tariff and NEPRA issued its decision on 19.12.2018 for the financial year 2016-17 and 2017-18. This was notified on 1.1.2019. On 14.6.2019 NEPRA made its second decision whereby adjustments were made in the tariff that had already been notified on 1.1.2019. These adjustments were notified on 28.6.2019 after following the requirements of law for public notices and calling for objections. Learned counsel further argued that all adjustments made are in violation of Sections 31(2) (a), 31(2) (c), 31(3) (a) and 31(3) (d) of the Act. Learned counsel further argued that the decision was taken by only three members of NEPRA without any Chairman, which is against law. Reliance is placed on "Sh. Rahmatullah v. The Deputy Settlement Commissioner, Centre, 'A' Karachi and others" (PLD 1963 SC 633), "Sheikh Fazal Ahmad v. Raja Ziaullah Khan and another" (PLD 1964 SC 494), "Islamic Republic of Pakistan through the Secretary, Ministry of Commerce and Local Government (Commerce Division), Islamabad" (1977 SCMR 509), "Imtiaz Ahmad and others v. Punjab Public Service Commission through Secretary, Lahore and others" (PLD 2006 SC 472), "Province of Punjab through Secretary to the Government v. Dr. Muhammad Zafar Iqbal and 10 others" (2018 PLC (C.S) 152) and "Syeda Shazia Irshad Bokhari v. Government of Punjab through Secretary Health and another" (PLD 2005 Lahore 428).

5. Report and parawise comments have been filed by the Respondent LESCO. Learned counsel for the LESCO stated that the Respondents are Distribution Licensees who filed petitions before NEPRA for determination of consumer end tariff in accordance with the National Electric Power Regulatory Authority (Tariff Standards and Procedure) Rules, 1998 ("1998 Rules"). A public hearing is always given when adjustments are made and any member of the public can raise objections at the hearing. Quarterly adjustments are made on account of the variations in the components of the Power Purchase Price ("PPP") which includes transmission and distribution losses amongst other components. LESCO challenged the determination made on 8.3.2016 and ultimately the matter went to the Hon'ble Islamabad High Court wherein the issue of tariff determination was remanded to NEPRA in terms of the judgment cited at Lahore Electric Supply Company Limited (LESCO) and others v. National Electric Power Regulatory Authority and others (PLD 2018 Islamabad 20). Learned counsel argued that NEPRA issued the tariff

and made all adjustments as per the rules; that it has not violated any provision of the Act, the Rules or the National Electric Power Regulatory Authority Guidelines for Determination of Consumer End Tariff (Methodology and Process) 2015 ("the Guidelines") and that in fact this issue has been decided several times all the way up to the august Supreme Court of Pakistan. Learned counsel further stated that the Petitioners have no vested right to challenge the tariff. He argued that a public hearing is given and any objection that the Petitioners have to the prudency of the costs should be raised at that time and that such matter cannot be challenged in Constitutional petition. Learned counsel places reliance on ICC Textiles Limited through Authorized Representative and 31 others v. Water and Power Development Authority (WAPDA), WAPDA House, Lahore through Chairman and 15 others (2009 CLC 1343), Flying Board and Paper Products Ltd. and others v. Government of Pakistan through Secretary Cabinet Division and others (2010 SCMR 517) and in W.P. No.25437/2015 titled Hameed Steel and others v. LESCO and others vide order dated 2.9.2015. He further clarified that essentially QTA has always been made, however, it is for the first time that this has been depicted in a separate box in the bill in terms of the requirements stipulated in the Notification dated 28.6.2019 issued by the Ministry of Energy (Power Division), Islamabad. On the issue of the number of the members who can take a decision with respect to tariff he stated that the matter in issue stands decided by the august Supreme Court of Pakistan in "National Electric Power Regulatory Authority v. Faisalabad Electric Supply Company Limited" (2016 SCMR 550) hence this objection cannot be raised before this Court.

6. Report and parawise comments have also been filed by the Respondent NEPRA. Learned counsel for the Respondent NEPRA argued that NEPRA is statutory body established under the Act for the regulation of provision of electric power service in Pakistan. In terms of the Act, NEPRA is responsible for the determination of tariff. Every distribution licensee files a petition before NEPRA seeking determination of consumer end tariff in accordance with the provision of the 1998 Rules. The salient features of the petitions are published in the newspaper inviting comments, objections and interveners and a public hearing is granted. Subsequently, the tariff determination is made by NEPRA. In the case before the Court a multiyear consumer end tariff was determined for LESCO for a period of five years from 2015 to 2020. Essentially the determination was made on 08.08.2016 after carrying out a public hearing, however, LESCO was aggrieved by this determination, hence it filed a motion for leave for review, which was decided by NEPRA on 19.05.2016. Subsequently, reconsideration request was filed by the Federal Government, which was decided on 01.07.2016. LESCO being aggrieved filed a petition before the Hon'ble Islamabad High Court, Islamabad, which ultimately remanded the matter to NEPRA for reconsideration in terms of PLD 2018 Islamabad 20 (supra). Learned counsel stated that tariff methodology for determining PPP and quarterly adjustment are provided for in the Guidelines. The consumer end tariff is determined to ensure recovery of the revenue requirements of the distribution company in accordance with the Act and 1998 Rules. The Petitioners before the Court had efficacious remedy available to them under the Act in the form of an appeal, which remedy has

not been availed by them. Furthermore, they can always participate in the public hearing if they have any objection or comments with respect to the quarterly adjustment. However, the contention that the quarterly adjustments are against the mandate of the law or that they are applied retrospectively is totally without basis as it is part of the mechanism for tariff determination which is prescribed under the law and which has been followed by NEPRA regularly. He explained that quarterly adjustment can only be made after the actual consumption of electricity, hence the Guidelines prescribes for adjustment to be made at end of each quarter, once the actual figures are available. With respect to the arguments made on the composition of NEPRA and the fact that only three members were available at the time when the decision was taken, learned counsel stated that the matter in issue has already been decided by the august Supreme Court of Pakistan in 2016 SCMR 550 (supra), hence the said issue cannot be raised again before this Court.

7. Report and parawise comments have also been filed by the Respondent FESCO, GEPCO and IESCO. They have adopted the arguments raised by the learned counsel for the Respondent LESCO and NEPRA. On behalf of Federal Government, learned Deputy Attorney General for Pakistan also adopts the arguments made on behalf of NEPRA.

8. Heard and record perused. The impugned decision dated 14.06.2019 by NEPRA is related to the periodical adjustment in Tariff for the 1st and 2nd Quarters of the FY 2017-18. As per the decision, XWDISCOs filed their quarterly adjustment request on account of the variation in the PPP, which includes the impact of transmission and distribution losses for the first and second quarters being July to September, 2018 and October to September, 2018. A public hearing was held on 13.03.2019 and subsequently NEPRA gave due consideration to the comments, objections and interveners. A decision was made on 14.06.2019, which was communicated to the Federal Government for notifying in the official Gazette. The Petitioners are aggrieved by this decision on the ground that it is not in accordance with the Act; that it has retrospective effect and that the NEPRA was not duly constituted at the time. They rely on Section 31 of the Act to urge their point of illegality and being against the mandate of the law.

9. The basic frame work of the law for tariff determination falls under the Act. Section 7 provides for the powers and functions of the Authority, wherein Section 7(2)(i) prescribes that the Authority shall issue guidelines and standard operating procedures for tariff determination. Section 7(3)(a) prescribes that NEPRA shall determine tariff, rates, charges and other terms and conditions for supply of electric power service by the generation, transmission, and distribution companies and recommend to the Federal Government for its notification. Section 31 provides that the Authority shall in the determination, modification or revision of rates, charges and terms and conditions for the provision of electric power service be guided by the national electricity policy, the national electricity plan and such guidelines as may be issued by the Federal Government in order to give effect to the national electricity policy and national electricity plan. In terms of Section 31(3) the general

guidelines applicable for tariff determination have been provided in which it is stated that tariff should allow the licensees the recovery of any and all cost prudently incurred to meet the demonstrated needs of their customers. Section 31(4) provides that NEPRA shall determine a uniform tariff for distribution licensees on the basis of their consolidated accounts. Once the tariff has been approved, it has to be notified by the Federal Government in the official Gazette under Section 31(7). The Act also provides for an appeal under Section 12G against any decision or order of the Authority and the quorum of the Appellate Tribunal is in terms of Section 12E. The 1998 Rules prescribe for the procedure to be followed by the Distribution Licensees when filing its tariff petitions such that Rule 5 of the 1998 Rules requires publication and service of notices for a public hearing and in terms of Rule 9 the hearing is given by the Authority. Rule 17 of the 1998 Rules provides for the standards and guidelines on the basis of which tariff shall be determined and again in terms of Rule 17(3)(i) of the 1998 Rules tariff should allow licensees the recovery of any and all costs prudently incurred to meet the demonstrated needs of their customers.

10. In exercise of power under Section 7(2)(i) of the Act, NEPRA has issued Guidelines which provides for the methodology to be adopted with reference to tariff determination. In terms of Guideline 49 quarterly and bi-annual PPP adjustments are prescribed with reference to the PPP components being adjustments pertaining to the capacity and transmission charges, the impact of T&D losses and adjustment of variable O&M. Each component of the PPP is provided for in the revenue requirement of the distribution licensees on the basis of projected figures which are subject to adjustment as per actual figures as it is a pass through item. Also since there is a requirement for a uniform consumer and tariff at a national level, this is determined by NEPRA and notified by the Federal Government. The XWDISCOs file their adjustment requests on account of PPP variation in terms thereof. The objective of quarterly adjustment is to ensure that all pass through costs are factored into the tariff as per the requirement of the Act and 1998 Rules. The Distribution Companies do not have to bear these costs and are entitled to recover all prudently incurred costs. Hence the requirement of quarterly or bi-annual adjustment. It is noted that as per the Guidelines only fuel adjustment is made on a monthly basis.

11. NEPRA determines tariff as per Section 31 of the Act after a distribution licensees file the petitions as per the 1998 Rules and the Guidelines. NEPRA determines the consumer end tariff for each distribution licensee after assessing the different components of its revenue requirements. In this context, there is a public hearing, which is duly published in the newspapers inviting all comments, objections and interveners request. The formulas and principles for determining the revenue requirement is provided under the Guidelines. The Guideline prescribes for quarterly adjustment of capacity and transmission charges, the impact of transmission and distribution losses and the adjustment of variable O&M. As per the Guidelines, fuel adjustment is made on a monthly basis whereas the costs, charges and losses are made on a quarterly basis. This is necessitated because every

tariff determination is based on presumptive figures at the beginning of the financial year, which figures have to be actualized on the basis of actual data. This exercise is carried out periodically on a quarterly basis after holding a public hearing. In this way every tariff determination is for a fixed period and every quarterly adjustment is also for a fixed quarter. Hence QTA is as per the prescribed methodology and falls within the frame work of the Act. These are technical issues, based on projections and data for which NEPRA has laid out a transparent and comprehensive procedure, which should be followed. Therefore, the contention of the Petitioners with reference to QTA is without basis as the structure of the Act read with 1998 Rules and the Guidelines clearly provides for periodical adjustment of the PPP components which have to be determined based on actual costs incurred.

12. Consequent to the decision given by the Hon'ble Islamabad High Court, PLD 2018 Islamabad 20 (supra), NEPRA set out to re determine the tariff for the FY 2015-16 which included costs and adjustments pertaining to the entire financial year. A public hearing was held for the benefit of all stakeholders and the prudency of all costs claimed for that quarter were duly considered. At the time, NEPRA decided to include the impact of the component of the PPP for the entire FY 2015-16 as considerable period had lapsed from when tariff was earlier determined and when the matter was remanded to NEPRA vide the decision of the Hon'ble Islamabad High Court. Since there was a public hearing, the Petitioners should have participated in the same and could should have raised their objections at the time with respect to the prudency of the costs being claimed. At this stage, raising these objections before this Court in Constitutional jurisdiction is without basis as there is no vested right in favour of the Petitioners which they seek to enforce nor is there any basis on which they can claim that the periodical adjustments are illegal or have been even given retrospective effect. The periodical adjustments are in terms of the prescribed procedure under the scheme of the Act, hence no illegality is made out. Furthermore, remedy of appeal is provided under the Act, which was never availed by the Petitioners.

13. So far as the Petitioners' objection with respect to the composition of the authority and the fact that at the time they were only two members and one Vice Chairman, it is noted that this matter has already been decided by the august Supreme Court of Pakistan in "National Electric Power Regulatory Authority v. Faisalabad Electric Supply Company Limited" (2016 SCMR 550), hence no grievance is made out in this respect before this Court.

14. In view of the aforesaid, this petition as well as all connected petitions are dismissed. At this stage learned counsel for the Petitioners requested that in the event that their prayer is not accepted by the Court, NEPRA should be directed to make installments for the sake of payment of QTA. It is observed that in this regard any request for installment should be raised before NEPRA or the Distribution Companies.

SCHEDULE-A

Details of Writ Petitions mentioned in judgment Dated 20.11.2019 passed in W.P. No.48379/2019

1. 48379/19 Ghani Global Glass Limited v. Federation of Pakistan etc., 2. 63942/19 Muhammad Sarwar etc v. Federation of Pakistan etc., 3. 64071/19 Zahid Packages Pvt. Limited v. Federation of Pakistan etc., 4. 64072/19 Specialists Group Inc. Limited v. Federation of Pakistan etc., 5. 64073/19 Jauharabad Sugar Mill Limited v. Federation of Pakistan etc., 6. 64075/19 Naseem Fabrics v. Federation of Pakistan etc., 7. 64306/19 Waleed Ahmad Weaving Factory etc v. Federation of Pakistan etc., 8. 64318/19 Muhammad Nawaz etc v. Federation of Pakistan etc., 9. 64329/19 M.M. Plastic Industry v. Federation of Pakistan etc., 10. 64378/19 Sitara Textile Industries Limited etc v. Federation of Pakistan etc., 11. 64688/19 Noor Fatima Fabrics (Pvt.) Ltd. etc v. Federation of Pakistan etc., 12 64695/19 Shafqat Weaving Factory v. Federation of Pakistan etc., 13. 64698/19 M.D. Steel Furnace v. Federation of Pakistan etc., 14. 64786/19 Aamar Bilal Textile v. Federation of Pakistan etc.,15. 65002/19 Adil Javed v. Federation of Pakistan etc.,16. 65006/19 Muhammad Awais v. Federation of Pakistan etc., 17. 65050/19 Image Garments (Pvt.) Limited etc v. Federation of Pakistan etc., 18. 65390/19 Umer Zaheer Weaving Factory etc v. Federation of Pakistan etc., 19. 69841/19 Phoenix Chemicals Pvt Limited v. Federation of Pakistan etc., 20. 69718/19 Prime Worsted Spinning Mills etc v. Federation of Pakistan etc., 21. 69839/19 Al Fateh Aziz Industry v. Federation of Pakistan etc., 22 69834/19 Pak Panther Limited v. Federation of Pakistan etc., 23. 69840/19 Muridke Flour Mills v. Federation of Pakistan etc., 24.70068/19 Abdul Latif Mills v. Federation of Pakistan etc., 25. 69939/19 Muhammad Zubair v. Federation of Pakistan etc., 26 69886/19 Sheikh Shahbaz Foudary v. Federation of Pakistan etc., 27.69881/19 Haded Fabricators v. Federation of Pakistan etc., 28. 69883/19 Raiees Foundry Works v. Federation of Pakistan etc., 29. 69884/19 Capital Engineering Works v. Federation of Pakistan etc., 30. 70124/19 New Malik Steel Centre v. Federation of Pakistan etc., 31. 69889/19 Al Fateh Aziz Foundry v. Federation of Pakistan etc., 32. 70170/19 FYNK Pharmaceuticals v. Federation of Pakistan etc., 33. 70158/19 Usman Steel Re-Rolling Mills etc v. Federation of Pakistan etc., 34. 70175/19 Nisar Karim Flour and General Mills Limited v. Federation of Pakistan etc., 35. 62967/19 Tariq Roller Flour Mills Pvt. Limited v. Federation of Pakistan etc., 36. 61939/19 NKF Industries etc v. Federation of Pakistan etc., 37. 64072/19 Specialists Group Inc. Limited v. Federation of Pakistan etc., 38. 62639/19 Al Rafay Steel Industry v. Federation of Pakistan etc., 39. 56050/19 Madni Poly Tex Pvt. Limited v. Federation of Pakistan etc., 40. 53655/19 Aaj Paper Mills Pvt. Ltd v. Federation of Pakistan etc., 41. 62026/19 Sufi Wheat Products Pvt. Ltd v. Federation of Pakistan etc., 42. 53981/19 Dada Enterprises (Pvt.) Ltd v. Federation of Pakistan etc., 43. 62444/19 Naveed Alam Foundry v. Federation of Pakistan etc., 44. 52675/19 Al Aziz Paper Mills v. Government of Pakistan etc., 45. 53658/19 Zafar Silk Factory etc v. Government of Pakistan etc., 46. 53983/19 Zeenat Printing and Dyeing Mills Pvt. Limited etc v. Federation of Pakistan etc., 47. 55406/19 Ifrah Silk Factory etc v. Federation of Pakistan etc., 48. 48192/19 Best Fibers Pvt. Ltd. etc v. Federation of Pakistan etc., 49. 48184/19 Arsam Pulp and Paper Board Industries v. Federation of Pakistan etc., 50. 53929/19 R.G. Industries etc v. Federation of Pakistan etc., 51.

48771/19 Ujala Cotton Mills v. Federation of Pakistan etc., 52. 55271/19 FM Textile Mills Pvt. Ltd. v. Federation of Pakistan etc., 53. 55662/19 Waseem Younas etc v. Federation of Pakistan etc., 54. 59760/19 R.H. Textile Weaving Facotry and Art Tex v. Federation of Pakistan etc., 55. 55802/19 R.H. Textile Weaving Facotry and Art Tex v. Federation of Pakistan etc., 56. 62628/19 Kohinoor Textile Mills Limited etc v. Federation of Pakistan etc., 57.55666/19 DG Khan Cement Company Limited v. Federation of Pakistan etc., 58. 65393/19 Jannat Weaving Facotry v. Federation of Pakistan etc., 59. 60389/19 Dilshad Weaving Facotry etc v. Federation of Pakistan etc., 60. 48774/19 Taiga Apparel Pvt. Ltd v. Federation of Pakistan etc., 61. 47575/19 Kohinoor Spinning Mills Ltd etc v. Federation of Pakistan etc., 62. 64304/19 Mubarak Textile etc v. Federation of Pakistan etc., 63. 60377/19 Malik Flour and General Mills etc v. Federation of Pakistan etc., 64. 55392/19 Maqsood Faisal Paper and Board Mills Pvt. Ltd v. Federation of Pakistan etc., 65. 62662/19 Ghaznavi Industries Pvt. Ltd v. Federation of Pakistan etc., 66. 62394/19 Ghaznavi Industries Pvt. Ltd v. Federation of Pakistan etc., 67. 60373/19 Sigma Refrigeration Ltd etc v. Federation of Pakistan etc., 68. 61428/19 Rao Amir Sohail (M/s Remoxin Enterprises) v. Federation of Pakistan etc., 69. 54151/19 Abdullah Flour Mills Pvt. Ltd v. Federation of Pakistan etc., 70. 52417/19 Volta Plastic Industries Pvt. Ltd v. Federation of Pakistan etc., 71. 52415/19 Al-Harmain Flour and General Mills Private Ltd etc v. Federation of Pakistan etc., 72. 48934/19 Waqas Steel Furnace v. Federation of Pakistan etc., 73. 65005/19 Madina Enterprises etc v. Federation of Pakistan etc., 74. 53976/19 AZ Pharmaceutical Co. Ltd v. Federation of Pakistan etc., 75. 47483/19 Qasur Textile Mills Pvt. Ltd etc v. Federation of Pakistan etc., 76. 46032/19 Global Spinning Pvt. Ltd v. Federation of Pakistan etc., 77. 48644/19 Ghulam Murtaza Cotton Waste Factory etc v. Federation of Pakistan etc., 78. 47488/19 Ahsan Elahi Textile Mills etc v. Federation of Pakistan etc., 79. 48093/19 Fahad Javed Spinning Pvt. Ltd etc v. Federation of Pakistan etc., 80. 48277/19 Khalid Nazir Spinning Ltd etc v. Federation of Pakistan etc., 81. 55950/19 Bin Farooq Textile Mills etc v. Federation of Pakistan etc., 82. 64008/19 United Textiles etc v. Federation of Pakistan etc., 83. 55403/19 Azhar Ice Factory etc v. Federation of Pakistan etc., 84. 64316/19 Azhar Hussain etc v. Federation of Pakistan etc., 85. 64088/19 Al Zamin Textile Mills Pvt. Ltd etc v. Federation of Pakistan etc., 86. 55954/19 Mirza Mahboob Alam and Company v. Federation of Pakistan etc., 87. 55411/19 Abdul Rehman v. Federation of Pakistan etc., 88. 53996/19 Pure Gold Paper and Board Mills Pvt. Ltd etc v. Federation of Pakistan etc., 89. 51600/19 Ishtiaq Ahmad v. Federation of Pakistan etc., 90 65000/19 Rubina Imtiaz v. Federation of Pakistan etc., 91. 55393/19 A.A. Paper Private Limited v. Federation of Pakistan etc., 92. 52128/19 Naveed Nawaz Textiles Pvt. Ltd etc v. Federation of Pakistan etc., 93. 48508/19 Opera Textile Mills Pvt Ltd etc v. Federation of Pakistan etc., 94. 48667/19 Mandiali Paper Mills Pvt. Ltd etc v. Federation of Pakistan etc., 95. 63958/19 Maple Leaf Cement Company Limited etc v. Federation of Pakistan etc., 96. 48509/19 Rado Dyeing and Printing Mills Pvt. Ltd v. Federation of Pakistan etc., 97. 55947/19 Sitara Chemical Industries Ltd etc v. Federation of Pakistan etc., 98. 51593/19 Allah Din Steel Re-Rolling Mills etc v. Federation of Pakistan etc., 99. 48870/19 Asif Steel Industries etc v. Federation of Pakistan etc., 100. 48768/19 Gold Star Steel etc v. Federation of

Pakistan etc., 101. 64822/19 Aaqib Latif etc v. Federation of Pakistan etc., 102. 55413/19 Basharat Ali v. Federation of Pakistan etc., 103. 55761/19 Zahid Hussain etc v. Federation of Pakistan etc., 104. 48179/19 Al Hamd Spinning Mills Pvt. Ltd etc v. Federation of Pakistan etc., 105. 52796/19 Maqsood Ahmad Bhatti etc v. Federation of Pakistan etc., 106. 64396/19 Muhammad Arshad etc v. Federation of Pakistan etc., 107. 64062/19 Ghulam Rasool Textile Mills etc v. Federation of Pakistan etc., 108. 65010/19 Abdul Nasir Gill etc v. Federation of Pakistan etc., 109. 64700/19 Farhat Corporation etc v. Federation of Pakistan etc., 110. 64314/19 AAA Developers etc v. Federation of Pakistan etc., 111. 64027/19 Punjab Beverages Company Pvt. Ltd etc v. Federation of Pakistan etc., 112. 56564/19 Abu Bakar Anees Textile Mills v. Federation of Pakistan etc., 113. 55914/19 Sultani Elasto Produces Pvt Ltd etc v. Federation of Pakistan etc., 114. 57381/19 Star Textile Printing Industries v. Federation of Pakistan etc., 115. 56371/19 Messrs Faisal Mustafa Textile Mills Pvt. Ltd etc v. Federation of Pakistan etc., 116. 55659/19 M/S G.H and Sons Plastic Industries Pvt Ltd. v. Federation of Pakistan etc., 117. 55655/19 Hina Sana Textile Mills Pvt Ltd etc v. Federation of Pakistan etc., 118. 50987/19 H&M Knitting etc v. Federation of Pakistan etc., 119. 48443/19 Abdur Rehman Corporation Pvt Ltd. etc v. Federation of Pakistan etc., 120. 65193/19 Taiga Apparel Pvt Limited v. Federation of Pakistan etc., 121. 55397/19 Majeed Fabrics Pvt Ltd etc v. Federation of Pakistan etc., 122. 56559/19 Image Garments Pvt. Ltd. v. Federation of Pakistan etc., 123. 57492/19 Shuja Shuja through Malik Shakeel Yousaf v. Federation of Pakistan etc., 124. 55475/19 Ahmad Textile Industries (AOP) v. Federation of Pakistan etc., 125. 55402/19 Fine Star Processing Mills Pvt. Limited v. Federation of Pakistan etc., 126. 54435/19 Zafar Hayat v. Federation of Pakistan etc., 127. 53489/19 Arif Mehmood Malik Textile Pvt Ltd etc v. Federation of Pakistan etc., 128. 49746/19 Crescent Steel and Allied Products Limited v. Federation of Pakistan etc., 129. 63932/19 Muhammad Riaz v. Federation of Pakistan etc., 130. 55396/19 J.R Dyeing and Textile Mills Pvt Ltd v. Federation of Pakistan etc., 131. 62667/19 Asad Elahi etc v. Federation of Pakistan., 132. 62443/19 Kashif Raza v. Federation of Pakistan etc., 133. 54132/19 Khalid Hussain etc v. Federation of Pakistan etc., 134. 54124/19 OAK Steel and Metals Pvt. Ltd. v. Federation of Pakistan etc., 135. 55472/19 New Master Industries (AOP) v. Federation of Pakistan etc., 136. 55664/19 Z.T. Textile Mills v. Federation of Pakistan etc., 137. 56174/19 Shandy Cola Pakistan v. Federation of Pakistan etc., 138. 56628/19 Ch. Sarfraz Ahmad v. Federation of Pakistan etc., 139. 70345/19 Cotton and Cotton International v. Federation of Pakistan etc., 140. 70434/19 Haris Malik v. Federation of Pakistan etc., 141. 70341/19 Cotton Era Pvt. Ltd v. Federation of Pakistan etc., 142. 70347/19 Kausar Ghee Mills v. Federation of Pakistan etc., 143. 70344/19 Meat Foods etc v. Federation of Pakistan etc., 144. 46941/19 HA Fibres Pvt. Ltd. etc v. Federation of Pakistan etc., 145.46942/19 Ruby Textile Mills Ltd v. Federation of Pakistan etc., 146. 47870/19 Al Riaz Knitwear Pvt. Ltd etc v. Federation of Pakistan etc., 147. 48095/19 Wisal Kamal etc v. Federation of Pakistan etc., 148. 48635/19 Humbul Tex Pvt. Ltd v. Federation of Pakistan etc., 149 48639/19 Liaqat Spinning Mills v. Federation of Pakistan etc., 150. 48775/19 Mazhar Steel Mills etc v. Federation of Pakistan etc., 151. 48867/19 Roshan Steel Furnace etc v. Federation of Pakistan etc., 152. 50583/19 Rehmat

Nazir Rayon Pvt. Ltd. etc v. Federation of Pakistan etc., 153. 50831/19 Anjum Manzoor etc v. Federation of Pakistan etc., 154. 51977/19 Panther Tyres Limited v. Federation of Pakistan etc., 155. 52005/19 Leader Tanneries v. Federation of Pakistan etc., 156. 52113/19 Diomond Tyres Limited v. Federation of Pakistan etc., 157. 52223/19 Al Shifa Textile etc v. Federation of Pakistan etc., 158. 52525/19 Ali Ahmad v. Federation of Pakistan etc., 159. 52523/19 Steel Craft Pvt. Limited etc v. Federation of Pakistan etc., 160. 52999/19 Shafique Cotton Waste Factory etc v. Federation of Pakistan etc., 161. 53041/19 Data Flour Mills v. Federation of Pakistan etc., 162 53473/19 Gujranwala Carpet Yarn Indusries Pvt. Ltd. v. Federation of Pakistan etc., 163. 53483/19 Waqas Rafiq Inernational etc v. Federation of Pakistan etc., 164. 53487/19 Muhammad Ramzan v. Federation of Pakistan etc., 165. 53491/19 Kamran etc v. Federation of Pakistan etc., 166. 53493/19 Ishtiaq Hussain etc v. Federation of Pakistan etc., 167. 53661/19 Al Khair Tannery etc v. Federation of Pakistan etc., 168. 53663/19 UBC Convertee Pvt. Ltd. v. Federation of Pakistan etc., 169. 54209/19 Abdullah Textile etc v. Federation of Pakistan etc., 170. 54433/19 Canal Flour & General Mills v. Federation of Pakistan etc., 171. 55357/19 MK Cotton Waste Factory etc v. Federation of Pakistan etc., 172. 55979/19 ATC Processing Pvt. Ltd. v. Federation of Pakistan etc., 173. 56566/19 Ghani Habib Feed etc v. Federation of Pakistan etc., 174. 57901/19 Anwar Khawaja Industries Ltd. v. Federation of Pakistan etc., 175. 59847/19 MBS Steel etc v. Federation of Pakistan etc., 176. 60177/19 Ravi Autos Sunder Pvt. Ltd. v. Federation of Pakistan etc., 177. 60367/19 Tandlianwala Sugar Mills Ltd etc v. Federation of Pakistan etc., 178. 60375/19 Khawaja Touseef Usman etc v. Federation of Pakistan etc., 179. 60627/19 AR Fibers v. Federation of Pakistan etc., 180. 60649/19 Punjab Cotton Wase Merchant v. Federation of Pakistan etc., 181. 60685/19 Makka Roller Flour Mills etc v. Federation of Pakistan etc., 182. 60983/19 Premier Flour Mills etc v. Federation of Pakistan etc., 183 60999/19 Prime Poly Pack Private Limited v. Federation of Pakistan etc., 184. 61003/19 National Battery Industries Pvt. Ltd. v. Federation of Pakistan etc., 185. 61269/19 Quality Textiles Mills Limited v. Federation of Pakistan etc., 186. 61465/19 Ali Flour and General Mills etc v. Federation of Pakistan etc., 187. 61469/19 Talib Hussain etc v. Federation of Pakistan etc., 188. 61473/19 Al Barakah Industries etc v. Federation of Pakistan etc., 189. 61477/19 Barkat Textile Mills Ltd etc v. Federation of Pakistan etc., 190. 61589/19 Orient Electronics Pvt. Limited v. Federation of Pakistan etc., 191. 61739/19 Dynamic Bravo Industries Ltd etc v. Federation of Pakistan etc., 192. 61745/19 Ideal Steel Re-Rolling Mills v. Federation of Pakistan etc., 193. 61749/19 Al Nasr Textile Ltd etc v. Federation of Pakistan etc., 194. 61757/19 Shan Tanneries etc v. Federation of Pakistan etc., 195. 61797/19 Khushi Muhammad etc v. Federation of Pakistan etc., 196. 61827/19 Yousaf Weaving Mills Limited etc v. Federation of Pakistan etc., 197. 62021/19 Ulfat Textile Mills etc v. Federation of Pakistan etc., 198. 62023/19 Lasani Cold Storage v. Federation of Pakistan etc., 199. 62079/19 Azam Haleem Tannery etc v. Federation of Pakistan etc., 200. 62291/19 Kashif Mumtaz Bodla etc v. Federation of Pakistan etc., 201. 62303/19 Excel Cotton Pvt. Ltd. v. Federation of Pakistan etc., 202.62305/19 Paradise Spinning Mills Ltd v. Federation of Pakistan etc., 203. 62307/19 Hussain Flour Mills v. Federation of Pakistan etc., 204. 62637/19 Ayub

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Federation of Pakistan etc., 256. 63942/19 Muhammad Sarwar etc v. Federation of Pakistan etc., 257. 64071/19 Zahid Packages Pvt. Ltd v. Federation of Pakistan etc., 258. 64073/19 Jauharabad Sugar Mills Ltd. v. Federation of Pakistan etc., 259. 64075/19 Naseem Fabrics v. Federation of Pakistan etc., 260. 64306/19 Waleed Ahmad Weaving Factory etc v. Federation of Pakistan etc., 261. 64318/19 Muhammad Nawaz etc v. Federation of Pakistan etc., 262. 64378/19 Sitara Textile Industries Limited etc v. Federation of Pakistan etc., 263. 64688/19 Noor Fatima Fabrics Pvt. Limited etc v. Federation of Pakistan etc., 264. 64695/19 Shafqat Weaving Factory v. Federation of Pakistan etc., 265. 64786/19 Ammar Bilal Textile v. Federation of Pakistan etc., 266. 65002/19 Adil Javed v. Federation of Pakistan etc., 267. 65006/19 Muhammad Awais v. Federation of Pakistan etc., 268. 65050/19 Image Garments (Pvt.) Limited etc v. Federation of Pakistan etc., 269. 65390/19 Umer Zaheer Weaving Factory etc v. Federation of Pakistan etc., 270. 48865/19 Bashir Printing Industries Pvt. Ltd etc v. Federation of Pakistan etc., 271. 51587/19 Flying Cement Company Limited v. Federation of Pakistan etc., 272. 51583/19 Muhammad Yousaf v. Federation of Pakistan etc., 273. 48765/19 Taj International Pvt. Ltd v. Federation of Pakistan etc., 274. 48669/19 Afaq and Daniyal Steel Industry etc v. Federation of Pakistan etc., 275. 48637/19 Samira Fabrics Pvt. Ltd etc v. Federation of Pakistan etc., 276.48863/19 Madina Steel through Kashif Ali v. Federation of Pakistan etc., 277. 48791/19 Flying Paper Industry v. Federation of Pakistan etc., 278. 48177/19 Abdul Hafeez v. Federation of Pakistan etc., 279. 46028/19 Amtex Limited etc v. Federation of Pakistan etc., 280 45590/19 Ashiana Cotton Products etc v. Federation of Pakistan etc., 281. 48779/19 SS Fabrics Pvt. Limited etc v. Federation of Pakistan etc., 282. 47567/19 Asia Spinning Mills etc v. Federation of Pakistan etc., 283. 45937/19 Asim Textile Mills Ltd etc v. Federation of Pakistan etc., 284. 45765/19 Crescebt Textile Mills etc v. Federation of Pakistan etc., 285. 52403/19 Rehan Can Pvt. Ltd. v. Federation of Pakistan etc., 286. 48772/19 Shaheen Fabrics etc v. Federation of Pakistan etc., 287 48871/19 Flying Cement Company Ltd v. Federation of Pakistan etc., 288 53482/19 OK Flour Mills Pvt. Ltd v. Federation of Pakistan etc., 289.55769/19 Noon Sugar Mills Limited Bhalwal v. Federation of Pakistan etc., 290. 55916/19 Moeen Engineering Works v. Federation of Pakistan etc., 291. 53670/19 Madina Steel Industries etc v. Federation of Pakistan etc., 292. 55395/19 Shoaib Ghani etc v. Federation of Pakistan etc., 293. 54417/19 Modem Flour and General Mills v. Federation of Pakistan etc., 294. 52913/19 Ahmad Glass Industry Pvt. Ltd v. Federation of Pakistan etc., 295. 53659/19 Ahmed Straw Board v. Federation of Pakistan etc., 296. 53660/19 Sigma Refrigeration Ltd v. Federation of Pakistan etc., 297.55399/19 Muhammad Tahir v. Federation of Pakistan etc., 298. 69937/19 Asif and Javed Foundry v. Federation of Pakistan etc., 299. 69890/19 Zeeshan Plastic Industry v. Federation of Pakistan etc., 300. 54152/19 Frontier Foundry Pvt. Ltd etc v. Federation of Pakistan etc., 301. 60686/19 Noman and Company etc v. Federation of Pakistan etc., 302. 60980/19 Rustam Towel Pvt. Ltd etc v. Federation of Pakistan etc., 303. 60984/19 Sohail Mobeen Awan v. Federation of Pakistan etc., 304. 61058/19 Aaiez Safdar etc v Federation of Pakistan etc., 305. 61416/19 Khawaja Woolen Mills etc v. Federation of Pakistan etc., 306. 61432/19 Ali Waqas etc v. Federation of Pakistan etc., 307. 61748/19 Steel Complex Pvt. Ltd etc v. Federation of Pakistan etc., 308 51392/19

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Factory v. Federation of Pakistan etc., 409. 61680/19 HB SUB Noor Industry Pvt. Ltd etc v. Federation of Pakistan etc., 410. 61800/19 Gujranwala Paper and Board Mills v. Federation of Pakistan etc., 411. 62232/19 Rashid Steel Industry etc v. Federation of Pakistan etc., 412. 62287/19 Bilal Embroidery v. Federation of Pakistan etc., 413. 62300/19 Sajjad Ahmad v. Federation of Pakistan etc., 414. 63028/19 AS Chemicals v. Federation of Pakistan etc., 415. 64329/19 MM Plastic Industry v. Federation of Pakistan etc., 416. 64698/19 M.D Steel Furnace v. Federation of Pakistan etc., 417. 68118/19 United Roller Flour Mills (Pvt.) Ltd etc v. Federation of Pakistan etc., 418. 68782/19 Rana Muhammad Younus etc v. Federation of Pakistan etc., 419. 68788/19 Masco Spinning Mills Limited v. Federation of Pakistan etc., 420. 68845/19 Royal Poly Tex Pvt. Ltd v. Federation of Pakistan etc., 421. 68904/19 Mohid Industries v. Federation of Pakistan etc., 422. 68906/19 Nimir Chemicals Pakistan v. Federation of Pakistan etc., 423. 69208/19 Subhan Allah Steel v. Federation of Pakistan etc., 424. 69212/19 Pak Norrni Plastic etc v. Federation of Pakistan etc., 425. 69218/19 Papyrus Private Limited v. Federation of Pakistan etc., 426. 69669/19 SB Steel Mills etc v. Federation of Pakistan etc., 427. 52000/19 Pioneer Board Industries Pvt. Limited v. Federation of Pakistan etc., 428. 52474/19 Cool Industries Pvt. Limited v. Federation of Pakistan etc., 429. 52476/19 Muhammadi Paper and Board Industries Pvt. Limited v. Federation of Pakistan etc., 430. 54147/19 Abdul Wasay Flour Mills Pvt. Limited etc v. Federation of Pakistan etc., 431. 54434/19 Fazeelat Zafar v. Federation of Pakistan etc., 432. 55327/19 Shaheen Paper and Board Industries Private Limited v. Federation of Pakistan etc., 433. 55340/19 Lahore Paper and Board Mills Pvt. Limited v. Federation of Pakistan etc., 434. 62704/19 Nadeem Arshad v. Federation of Pakistan etc., 435. 68983/19 Ahmad Glass Industry Pvt. Ltd v. Federation of Pakistan etc., 436. 69037/19 HH Paper and Board Mills Pvt. Ltd v. Federation of Pakistan etc., 437 69213/19 Cool Point Pvt. Limited v. Federation of Pakistan etc., 438. 70339/19 Quality Textile Mills Limited etc v. Federation of Pakistan etc. and 439. 70373/19 Rupali Limited etc v. Federation of Pakistan etc.

KMZ/G-18/L Petition dismissed.

2020 P L C (C.S.) 183
[Lahore High Court]
Before Ayesha A. Malik, J
BILQEES SHAUKAT
Versus
GOVERNMENT OF PUNJAB through Chief Secretary and 3 others
W.P. No.109673 of 2017, heard on 8th November, 2019.

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

----R.20---Policy Notification SRO IV-8-25/78, dated 28-5-1979---Absorption---Domicile of husband---Petitioner was a civil servant in education department and after her marriage she shifted her abode from Karachi to Lahore---Female Civil Servant seeking her permanent absorption in department on the basis of domicile of her husband---Validity---Such female civil servant could be absorbed and accommodated (without relaxation of rules) in terms of policy of Government---High Court directed the authorities to absorb the civil servant in service on the basis of Government of Punjab Policy vide Notification SRO IV-8-25/78, dated 28-5-1979---Constitutional petition was allowed in circumstances.

WAPDA through Chairman and others v. Abdul Ghaffar and others 2018 SCMR 380 ref.
Senate Secretariat through Chairman and another v. Miss Faiqa Abdul Hayee 2014 SCMR 522 distinguished.
Amir Hamza v. Government of Balochistan and others 2005 SCMR 1422 rel.
Mrs. Rizwana Anjum Mufti for Petitioner (in W.P. No.109673 of 2017).
Ch. Tariq Javed for Petitioner (in W.P. No.181148 of 2018).
Akhtar Javed, Additional Advocate General with Asia Butt, Law Officer for Respondents.
Date of hearing: 8th November, 2019.

JUDGMENT

AYSHA A. MALIK, J.----This judgment decides upon the issue raised in the instant petition as well as in connected W.P. No.181148/2018 as common questions of law and facts are involved and Crl. Org. No.122343-W/2017.

2. The Petitioner in W.P. No.109673/2017 has impugned orders dated 27.02.2017, 06.04.2017 passed by Respondent No. 4. Senior Headmistress, Government Muhammadia Girls High School, Data Nagar Badami Bagh, Lahore and orders dated 06.09.2017 and 06.11.2017 passed by respondent No.2, Secretary School Education Department, Civil Secretariat, Lahore. Her case is that she was appointed as Junior School Teacher ("JST") the in the education department, Government of Sindh in 1996. The Petitioner got married to Shoukat Ali resident of Lahore. Therefore, she applied for permanent inter provincial transfer from Government of Sindh to the Government of Punjab on wedlock policy. In this regard, Government

of Sindh issued No Objection Certificate ("NOC") in her favour, however she has not been able to obtain permanent absorption into Government of Punjab despite her repeated request. The Petitioner therefore, sought deputation and has been working in the Province of Punjab on deputation, which was extended from time to time. Finally on 06.09.2017 the impugned order was issued terminated her deputation for being beyond the sanction time and requiring her to go back to her parent department i.e. Government of Sindh, (SGA&CD) Karachi for her further posting/adjustment. Being aggrieved, the petitioner filed W.P. No.70440/2017 before this Court in which a direction was issued on 15-9-2017 requiring Secretary School Education Punjab to hear the matter of the Petitioner and decide the same. The case was heard and Secretary School Education concluded that there is no provision of permanent absorption, in School Education Department, Government of the Punjab, hence the Petitioner was repatriated from the date or her expiry of extended deputation to her parent department for further posting.

3. The Petitioner in W.P. No.181148/2018 has impugned order dated 15.01.2018 passed by Respondent No.2, Secretary Specialized Healthcare and Medical Education Department. Her case is that she was appointed as Charge Nurse (BS-16) on 19.08.2000 and posted at Bolan Medical Complex Hospital, Quetta. She got married at District Gujranwala in the year 2010 and after obtaining NOC from Secretary Health, Balochistan as well as from Secretary Health Punjab she applied for her inter provincial transfer from Quetta, Balochistan to Gujranwala; Punjab. Hence, the Petitioner was transferred on deputation for a period of three years vide order dated 17.03.2011, which was extended from time to time. Finally on 15.01.2018 the impugned order was issued which terminated her deputation for being beyond the sanctioned period and required her to return to her parent department i.e. Health Department, Government of Balochistan.

4. Learned counsel for the Petitioner argued that the matter with reference to permanent absorption has already been decided by this Court through judgment dated 13.05.2014 in W.P. No.7467/2012, order dated 22.10.2010 in W.P. No.15348/2010 and by the august Supreme Court of Pakistan in "WAPDA through Chairman and others v. Abdul Ghaffar and others" (2018 SCMR 380). Therefore, in the light of the earlier precedents, learned counsel argued that the Petitioner is also entitled to permanent absorption in the civil service of the Government of Punjab.

5. Report and parawise comments have been filed by the Respondents. Learned Law Officer argued that there is no rule or regulation governing inter provincial transfer or absorption. He argued that there is no vested right to claim deputation or absorption and the department is dully authorized to repatriate the employee back to the parent department. Learned Law Officer further argued that the Petitioner's deputation has been extended from time to time beyond the required period and therefore, are not entitled to any further deputation or absorption. Reliance is placed on "Senate Secretariat through Chairman and another v. Miss Faiqa Abdul Hayee" (2014 SCMR 522) and order dated 19-2-2016 passed by this Court in W.P. No.18662/2015.

6. Heard and record perused. The basic contention of the Petitioner is that she is entitled to permanent absorption on the strength of Rule 20 of the Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974 ("1974 Rules"), which provides that in the case of a female government servant, who by virtue of para 7 of appendix 4 to the Civil Service Rules (Punjab) Vol.I Part II acquires the domicile of her husband from the date of her marriage and follows the domicile of her husband during the marriage, exception can be made if authentic documentary proof (such as Nikah-nama) in case of Muslims or Marriage Certificate in case of others) is furnished. This is the stated policy of the Government of Punjab in terms of its Rule SOR IV-8-25/78 dated 28.05.1979 on the basis of which several cases have been decided. In the case of a female government servant, who has acquired the domicile of her husband from the date of her marriage then such a female government servant who is desirous to transfer can be absorbed and accommodated without relaxation of rules in terms of the policy of the Government of Punjab. Learned Law Officer has relied upon several cases, however, the cases relied upon especially 2014 SCMR 522 (supra) does not pertain to a female government servant, hence is distinguishable. On the given issue the august Supreme Court of Pakistan in "Amir Hamza v. Government of Balochistan and others" (2005 SCMR 1422) has already held that policy having statutory backing has attained the legal status and is required to be adhered to in letter and spirit by all the departments of Government. However, female government servant has been absorbed on the basis of this policy.

7. Under the circumstances, these petitions are allowed. The impugned orders are set aside and the Respondents are directed to issue permanent absorption orders of the Petitioners in the relevant departments immediately.

MH/B-16/L Petitions allowed.

2020 P L C (C.S.) 214
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
PARKS AND HORTICULTURE AUTHORITY and others
Versus
EJAZ AHMAD SIAL
I.C.As. Nos. 246032 and 207440 of 2018, heard on 18th September, 2019.

Civil service---

----Intra-court appeal---Daily wages employees of Parks and Horticulture Authority---Regularization of service---Declaring a post as permanent---Scope---Employees filed constitutional petition for their regularization in service---Single Judge of High Court declared the post to be permanent and ordered for regularization of the employees---Validity---No vacant sanctioned post against which employees could be regularized was available in the department---Employees were not appointed through proper procedure and were employed from time to time on daily wages---No permanent post existed against which employees were appointed---Only department could declare any post to be permanent---Court could only direct that a candidate should be considered for regularization but it could not order for regularization of person against post that had not been sanctioned and was not a permanent post---Impugned judgment passed by the Single Judge of High Court was set aside---Intra court appeal was allowed in circumstances.

Waqar A. Sheikh for Appellants.
Mian Sohail Anwar and Hafiz Sarfraz Ahmad for Respondents.
Date of hearing: 18th September, 2019.

JUDGMENT

AYESHA A. MALIK, J.----This common judgment decides the instant Intra Court Appeal ("ICA") as well as connected I.C.A. No.207440/2018 whereby the Appellant has impugned judgments dated 24.04.2018 and dated 29.03.2018 passed by learned Single Judge in W.P. Nos.20827/2016 and 105238/2017 and allowed both the Petitions.

2. The basic case of the Appellant is that through the impugned order dated 24.04.2018, the learned Single Judge declared a post to be permanent and against the said post regularized the Respondents. Learned counsel argued that the post was not a permanent post and in fact there is no permanent post available against which the Respondents could have been regularized. Learned counsel further argued that the Respondents claim that they were recruited as Court Clerk in the legal department of the Appellant yet they seek regularization against the post of Mali. Learned counsel argued that there was no permanent post against which the Respondents could be recruited as they were recruited from time to time to do

various odd jobs and there is no permanent post available against which they can claim regularization.

3. On the other hand, learned counsel for the Respondents supports the impugned judgments and argued that the Respondents joined the Appellant in 2007 on daily wages as Court Clerk, which post was permanent in nature yet they were never regularized. Learned counsel argued that the petition was filed by the Respondents seeking regularization from the date of their appointment with all back benefits to the post of Court Clerk. The impugned judgments considered the contention of the Respondents and held that since the Respondents have been in service for nine years, they have acquired the status of a permanent workman under the Standing Order 1 of the Industrial and Commercial Employment (Standing Orders) Ordinance, 1968. Further that since they were initially appointed as Mali and were deputed to work as Court Clerk, hence they are entitled to be appointed against the permanent post of Mali. The Court therefore, declared the post to be permanent and directed the Appellant to regularize the services of Respondents against the said post.

4. We have heard the learned counsel for the parties at great length. The basic issue is whether or not the Respondents could have been regularized and whether the Court could have declared the post to be permanent. The contention of the Appellant is that there was no post available against which the Respondents could have regularized. This fact has been clearly stated in the report and parawise comments filed by the Appellant in W.P. No.20827/2016 and in W.P. No.105238/2017 and further that there is no vacant sanctioned post of Mali against which the Respondents can be regularized. It has also been pointed out that the Respondents were not recruited through any procedure, that was no advertisement, interview or appointment letter issued in their favour. They were simply employed from time to time, on daily wages, to meet the day to day requirements of the Appellant. Moreover it is an admitted fact that there was no permanent post against which the Respondents were appointed. When confronted with this question, learned counsel for the Respondents was unable to show that the post of Court Clerk was a permanent post against which they sought regularization. Learned counsel for the Respondents were also confronted with the fact that they sought regularization against the post of Court Clerk but instead were regularized as Mali. In this regard, they were unable to show that there was a sanctioned post of Mali against which they were regularized. Interestingly as per the Respondents case they worked as Mali and only worked as Court Clerk. Learned counsel for the Appellant clarified that there is no vacancy available against any post of Mali and that the Respondents were appointed on daily wages to work on different projects for which there are no permanent posts against which they can be regularized.

5. On the issue of declaring a post permanent, we note that this is an administrative function of the relevant department. In involves financial considerations whereby the rate of a sanctioned pay has to be applicable. It also requires that the department follow due process for appointment so as to ensure that required and qualified

people do the job. In this case the Respondents sought regularization against the job of Court Clerk for which there is no sanctioned post. The Court declared the post of Mali as permanent as there were no vacant posts and regularization the Respondents against the Court declared post. There has been no financial sanction for their posts, hence as such there is no financial sanction to pay the Respondents as it has not been budgeted.

6. Under the circumstances, we are of the opinion that the impugned judgments could not have declared the post of Mali as permanent as this is the function of the relevant department after looking into financial and other aspects of the matter. As per the august Supreme Court of Pakistan judgment at best the Court can direct that a candidate be considered for regularization, however it cannot order for the regularization of persons against posts that have not been sanctioned and are not permanent posts. Therefore, we find that in this case a direction declaring a post as permanent could not have been given since the Respondents sought regularization as Court Clerks which admittedly is not a permanent post. Even otherwise, we find it alarming that the Respondents seek regularization against the post of Court Clerk, which is the job they claim they have been doing for ten years and yet their regularization is against the post of Mali, for which they themselves states they never worked.

7. For what has been discussed above, these ICAs are allowed and the impugned judgments dated 24.04.2018 and dated 29.03.2018 passed by learned Single Judge in W.P. Nos.20827/2016 and 105238/2017 are set aside.

ZC/P-12/L Appeals allowed.

P L D 2020 Lahore 261
Before Ayesha A. Malik, J
EJAZ TEXTILE MILLS LIMITED and others---Petitioners
Versus
FEDERATION OF PAKISTAN and others---Respondents
Writ Petition No.49178 of 2017, decided on 13th December, 2019.

(a) Oil and Gas Regulatory Authority Ordinance (XVII of 2002)--

----S. 6(2)(r)---Petroleum prices---Determination by Oil and Gas Regulatory Authority ("OGRA")---Policy directives issued to OGRA by the Federal Government from time to time---Oil and Gas Regulatory Authority was bound to follow such directives.

(b) Oil and Gas Regulatory Authority Ordinance (XVII of 2002)---

----Ss.6(2)(r), 9 & 13---Re-gasified Liquefied Natural Gas ("RLNG")---Tariff determination by Oil and Gas Regulatory Authority ("OGRA")---Right of affected parties to a public hearing---Scope---Plea of petitioners (consumers of RLNG) that when OGRA made its determination for cost of services and transmission and distribution losses in the supply of RLNG, it was bound to hear them in a public hearing as such decision directly and adversely affects their rights---Plea of OGRA that it was not required to grant a public hearing to the petitioners as the impugned determinations were provisional which did not call for a public hearing---Held, that as per the RLNG supply agreements between the petitioners and the gas supply company, the provisional price of RLNG was to be fixed every month and this price was subject to change when the final determination was made---Admittedly the cost of service, transportation cost and retainage component had to be on actual basis in any financial year---Since cost of services and transmission and distribution losses was based on actuals, every determination made by OGRA would impact the petitioners---To cater to such impact, S.9 of the Oil and Gas Regulatory Authority Ordinance, 2002 ('the 2002 Ordinance) provided that a right of hearing should be granted where a decision would directly and adversely affect the rights of a person---Public hearing was necessary where OGRA had to make a determination on cost of services and Unaccounted for Gas ("UFG") as they directly impacted the petitioners---RLNG pricing mechanism had not been streamlined into a regular process where provisional and final determinations were systematically made and notified,hence it was necessary to keep all parties on board so as to ensure smooth management of the terms of the agreement between the parties and the supply of RLNG---Public hearing was granted to make the tariff determination process all inclusive so that the views of interested parties could be taken into consideration, especially those who had stakes in the outcome of the regulator's decision---Public hearing ensured accountability and transparency in the decision making process and positively impacted the implementation of the regulator's decisions---Hence, it was also the first step towards future conflict management with respect to the regulator's decision---More inclusive the process, the less likely it would be that the

determination was challenged---Furthermore, the involvement of the public and the stakeholders created trust and confidence in the decision making process which catered to acceptability of the decision and its reasons---High Court directed that RLNG price determinations by OGRA, at the time of actualization of the prices, for a given financial year, should be done after holding a public hearing in terms of S. 9 of the 2002 Ordinance; that where a determination was made after granting a public hearing, in the event that OGRA reviewed or re-heard any portion of that determination, which would directly and adversely impact the rights of the petitioners, it was to grant a right of hearing before making a decision under S.13 of the 2002 Ordinance; that OGRA should streamline the RLNG process providing provisional pricing and possibly a quarterly or bi-annual determination based on actual costs and losses; that this quarterly or biannual determination should be on the basis of a public hearing so as to improve efficiency in the pricing mechanism; that the right of hearing should be granted where the determination would impact the final outcome of all provisional adjustments made, and that OGRA was required to hold a public hearing to resolve the computation issues related to UFG and cost of services, and that such public hearing was also necessary as the petitioners had been granted interim relief (by the courts) with respect to the differential amounts which needed to be adjusted---Constitutional petitions were allowed accordingly.

(c) Oil and Gas Regulatory Authority Ordinance (XVII of 2002)---

----Ss. 6(2)(r), 9, 13 & 21---Re-gasified Liquefied Natural Gas ("RLNG")---Tariff determination by Oil and Gas Regulatory Authority ("OGRA")---Right of affected parties to a public hearing---Main reasons why it was mandatory to have a public hearing in the RLNG price determination process stated.

Following are the two main reasons why it was mandatory to have a public hearing in the Re-gasified Liquefied Natural Gas ("RLNG") price determination process:

Firstly, the entire RLNG sector was governed by contracts and government policies along with the delegated function granted to Oil and Gas Regulatory Authority ("OGRA"). While there was a contractual relationship setting the terms and conditions between the parties inter se being the RLNG consumers and Sui Northern Gas Pipelines Limited (SNGPL) and SNGPL and Pakistan State Oil (PSO). The Federal Government issued policy directives with respect to RLNG allocation and price which directives were subject to change as per Government requirements. OGRA's determinations were based on the Government's notifications or policy guidelines under section 21 of the Oil and Gas Regulatory Authority Ordinance, 2002 ('the 2002 Ordinance'), which meant that it had to take all such components, as directed by the Government, into consideration while making its determination. Hence any change that a government policy directive made would be implemented by OGRA. Stakeholders such as SNGPL and PSO were heard at the provisional determinations where the directives were applied but the majority stakeholders being the consumers or interveners were not heard. This was because during the provisional pricing PSO and SNGPL were heard and the public was not involved.

Second reason was with respect to the right to review a decision under section 13 of the 2002 Ordinance. Within the given framework when a review application was filed and the cost of services or transmission losses or distribution losses were reviewed and changed without hearing parties, it left the RLNG consumers remediless as there was no provision for a second review under the 2002 Ordinance. Essentially under section 13 of the 2002 Ordinance, the RLNG consumers could dilute the impact of public hearings if the public was not heard in the review proceedings. In the event that PSO or SNGPL moved for a review of any determination, no public notice was given. Consequently the determinations may decide upon cost of services and transmission and distribution losses without hearing the public which was originally heard during a public hearing.

(d) Oil and Gas Regulatory Authority Ordinance (XVII of 2002)---

----Ss. 6(2)(r) & 21---Re-gasified Liquefied Natural Gas ("RLNG")---Tariff determination by Oil and Gas Regulatory Authority ("OGRA")---Policy directives issued by the Federal Government with respect to RLNG allocation and price---Contracts between RLNG consumers and gas supply companies---In cases of RLNG price, on one hand there were Federal Government policy directives and on the other contracts between the RLNG consumers and gas supply companies---In the event of any conflict between the terms of the contracts and the Government directive, OGRA must attempt to resolve the matter by referring the issue to the Federal Government for clarification or re-consideration; it could not simply rely on Government policy directives under S.21 of the Oil and Gas Regulatory Authority Ordinance, 2002, and ignore the contractual arrangement as that went goes against the mandate of S.6(2)(r) of the 2002 Ordinance---In such cases OGRA was obligated to resolve the issues as a frontline regulator and not mitigate its functions as a government delegatee.

Petitioners by:

Salman Akram Raja, Tariq Bashir and Malik Ahsan Mehmood, Mansoor Usman Awan, Mohsin Mumtaz, Ms.Shehzeen Abdullah, Asghar Leghari; Muhammad Asif Butt, Khalil ur Rehman, Mustafa Kamal, Zia Haider Rizvi; Sajjad Haider Rizvi, Sayyed Alamdar Hussain, Ashfaq Ahmad Tabassum, Mian Muhammad Rashid, Ms. Ruhi Saleha, Malik Bashir Ahmad Khalid, Mian Muhammad Afzal, Arslan Riaz, Bilal Bashir, Iftikhar Ahmad Ansari, M.A. Hameed Awan, Subah Sadiq Kalsoon, Adnan Ahmad, Shahid Mehmood Bhatti; Muhammad Azeem Daniyal, Abdul Waheed Habib, Rana Sajid Rasool M. Irfan Liaqat, Muhammad Imran Yousaf, Abad ur Rehman, Waleed Khalid, Tahir Mahmood Mughal, Mian Tariq Mehmood, Muhammad Shafiq Malik, Waseem Mehmood Malik, Muhammad Junaid Ashraf, H.M. Azhar Ali, Usman Aziz Cheema and Shahzad Ahmad Cheema, Karamat Hussain Janjua, Syed Iqbal Hussain Shah Gillani, Abid Hussain, Khichi, Chaudhary Imtiaz Ullah Khan Warriach, Rana M.Arshad Khan and Afzaal Husssain Rana.

Respondents by:

Ms. Ambreen Moeen, DAG., Mrs. Samia Khalid for Respondent OGRA along with Altaf Hussain, Chief Audit Officer, Aatif Sajjad, Executive Director (Finance), M. Rizwan-ul-Haq, Executive Director (Litigation), OGRA, Fahad Malik for Respondent SNGPL along with Imran Javed, Senior Law Officer, SNGPL.

Date of hearing: 28th October, 2019.

JUDGMENT

AYESHA A. MALIK, J.---This common judgment decides upon the issues raised in the instant Petition along with connected Petitions, as detailed in Schedule "A" appended with the judgment, as all Petitions raises common questions of law and facts.

2. The Petitioners before the Court are all primarily engaged in the textile sector or the CNG sector and are consumers of Re-gasified Liquefied Natural Gas ("RLNG"). As per the prayers in the Petitions, the Petitioners have challenged the vires of SRO 405(1)/2015 dated 7.2.2015 and SRO 971(1)/2015 dated 30.9.2015 along with tariff determinations dated 7.10.2016, 2.6.2017 and 20.6.2017. During the course of arguments, the Petitioners limited their grievance to the procedure followed by OGRA in setting the RLNG price without any hearing. The Petitioners are specifically aggrieved by the tariff determinations made by the Respondent OGRA dated 2.6.2017 and 20.6.2017 which revised the RLNG tariff for the period 1.7.2016 to 31.12.2016 and for the period 1.1.2017 to 31.3.2017 unilaterally, without any hearing. The Petitioners are also aggrieved by the tariff determination dated 7.10.2016 made by the Respondent OGRA in relation to the quantum of cost of service and Unaccounted for Gas ("UFG") permitted to the Respondent SNGPL. The basis of the Petitioners' grievance is that they have been denied the right of hearing in each of the impugned determinations; that cost of service and determination of transmission and distribution losses as well as UFG necessitates due process and a hearing, before OGRA can adjudicate upon the same; that the tariff for the impugned period was decided after a public hearing, however OGRA of its own motion, re adjusted the tariff and made it applicable retrospectively on the tariff billed to the Petitioners.

Facts of the Case

3. On account of shortage of natural gas in the country, the Federal Government made arrangements to import liquid natural gas to be re-gasified as RLNG. The Economic Coordination Committee ("ECC") of the Federal Cabinet on 2.7.2013 authorized the Ministry of Petroleum and Natural Resources, Islamabad to import LNG up to 500 MMCFD on Delivered Ex-Ship (DES) basis from Qatar. On 27.7.2015 the ECC approved the import of LNG which was to be re-gasified by the re-gasification terminals to be set up at various sea ports. The re-gasification process results in RL NG which is to be supplied through the SSGC and SNGPL transmission and distribution networks for industrial consumers who were not getting sufficient supply of the indigenously produced natural gas. At the time it was decided that the RLNG pricing and other matters were to be determined by OGRA under the Petroleum Products (Petroleum Levy) Ordinance, 1961 ("1961 Ordinance") on monthly basis, in line with other petroleum products. To give effect to this decision, appropriate amendments were made in the 1961 Ordinance through SRO 405(1)/2015 dated 7.5.2015 whereby RL NG was included in the First Schedule as a petroleum product and the name of SNGPL and SSGPL were inserted in the Second Schedule as gas utilities. The Federal Government also issued SRO

971(1)/2015 dated 3.9.2015 stating that RLNG price shall be determined by OGRA and notified by the Pakistan State Oil. On 27.7.2015 the Federal Government issued its pricing components and price parameters for RLNG which included cost of service, transmission and distribution losses. OGRA was required to determine both cost of service and transmission and distribution losses with reference to RLNG price. OGRA made a provisional determination on 7.10.2015. PSO, SSGC, SNGPL, all approached OGRA to review its provisional determination to include actual and anticipated costs of importing and supplying RLNG, however, OGRA did not agree to all the claims, but accepted some of the claims in its decision of 18.3.2016. The decision of 18.3.2016 is based on public hearings carried out at Karachi and Lahore. The Petitioners and others participated in these hearings. The said determination was made for the period April 2015 to January 2016 where after OGRA made subsequent determinations, however no public hearing was offered for any of the subsequent decisions.
Arguments of counsel

4. Counsel for the Petitioners argued that the RLNG Tariff Determination Framework comprises of the gas supply agreements between the Petitioners and SNGPL and various decisions and notifications issued by the Federal Government, by the ECC and by OGRA. The core feature of this framework is that the tariff determination of RLNG was ring-fenced keeping it separate from the tariff determination of natural gas. Hence it calls for a separate process to settle RLNG prices. The Petitioners are aggrieved by the manner in which RLNG tariff determination is made by OGRA as it is done without hearing the Petitioners with respect to key components of the tariff, which include transmission and distribution losses as well as cost of service. Learned counsel argued that RLNG tariff determination is made by OGRA on the basis of the delegation of authority by the Federal Government in terms of Section 6(2)(r) of the Oil and Gas Regulatory Authority Ordinance, 2002 ("2002 Ordinance"). The Counsel argued that OGRA is bound to hold a public hearing in all matters where its decision is with reference to a regulated activity as per the provisions of Section 9 of the 2002 Ordinance. Learned counsel further argued that the Petitioners challenged the vires of SRO 405(1)/2015 dated 7.2.2015 and SRO 971(1)/2015 dated 30.9.2015 on the ground that OGRA has the power to fix the tariff under the 2002 Ordinance and the process to be followed for RLNG tariff is as per the 2002 Ordinance. However during the course of arguments since the Respondents accept this contention, the Petitioners do not press the vires of the two SROs in this case.

5. Learned counsel argued that the Petitioners essentially press their right of hearing at the time when the tariff is determined in order to ensure that their objections with reference to the prudency of transmission and distribution losses and cost of service are duly considered before granting amounts to the Respondent SNGPL or SSGC. They argued that the RLNG tariff was determined in the impugned determinations, without grant of hearing to the Petitioners. In the process the Respondents radically changed the computation mechanism of various costs allowed to SNGPL/SSGC without giving the Petitioners an opportunity of objecting to the same. By way of

example, the Petitioners stated that the Respondents included cost of service in the RLNG tariff determination on 7.10.2016 without any hearing to the Petitioners in terms of Section 9 and made it applicable retrospectively, whereas originally through earlier determinations they were not granted any cost of service despite their requests. OGRA also revised the manner in which UFG was calculated through its determination of 7.10.2016 even though the mechanism for calculating UFG is decided in the agreements with SNGPL and again during the public hearings at Lahore and Karachi. In essence they claim that in the order of 7.10.2016 OGRA reviewed its earlier orders and changed the computation mechanism for UFG allowance and allowed cost of service with retrospective effect. As per the counsels' arguments these issues were decided and finalized by OGRA vide its determination of 18.3.2016 and could not have been revised with retrospective effect. They further argued, if at all any amount was to be fixed under these heads, it had to be done prospectively after hearing the Petitioners. Learned Counsel also argued that tariff determination for the period April 2015 to January 2016 was finalized through the tariff determination of 18.3.2016 which is based on a public hearing. This decision of 18.3.2016 was reviewed and changed with retrospective effect on 7.10.2016 without giving the Petitioners an opportunity of hearing, hence the Petitioners have challenged the same.

6. Learned counsel also argued that the impact of the impugned determinations is that it has increased the cost of service allowed to SNGPL over and above 41 cents per MMBTU to 81 cents per MMBTU, hence the cost of service has doubled, without hearing the Petitioners and without giving them an opportunity to object to the increase made. It is the Petitioners' contention that the Respondent OGRA has not considered any of the objections of the Petitioners and consequently gave a huge financial benefit to SNGPL. In the same way, they argued that SNGPL was allowed UFG at 4.5% which increased to 9.2% which is unreasonable and does not meet the standard of reasonableness and prudency. In this regard, learned counsel relies upon OGRA Natural Gas (Regulated Third Party Access) Rules, 2012 ("2012 Rules"), in terms of which UFG is to be determined. The Counsel contend that following any other methodology is against the terms of their agreement. Learned counsel further argued that RLNG Tariff Determination is a power given to OGRA by the Federal Government in terms of Section 6(2)(r) of the 2002 Ordinance, hence OGRA is required to ensure that it is in compliance with the requirements of the 2002 Ordinance, such that in terms of Section 9 of the 2002 Ordinance, an obligation to hold a public hearing in all matters where the decision relates to a regulated activity must be complied with.

7. On behalf of Respondent OGRA, it was argued that OGRA is in compliance with the law and the guidelines provided by the Federal Government. Learned counsel explained that in order to deal with the shortfall of locally produced natural gas, the ECC of the Federal Cabinet authorized the Ministry of Petroleum and Natural Resources to negotiate with Qatar Gas for the import of LNG on Delivered Ex-Ship basis. The ECC approved the import of LNG on 2.7.2013 on DES basis to be re-gasified as RLNG. Thereafter the Federal Government put into place a framework

on the basis of which the price of RLNG is to be determined. In principle, it was agreed that the price determination framework will be similar to the tariff determination of petroleum products under the 1961 Ordinance and the Rules. Consequently SRO 405(1)/2015 dated 7.5.2015 was issued and thereafter SRO 971(1)/2015 dated 3.9.2015 was issued to include RLNG in the 1961 Ordinance. In this framework OGRA acts as the delegatee of the Federal Government and even though authorized to determine RLNG prices as per the 1961 Ordinance it is bound by the guidelines provided by the Federal Government under Section 21 of the 2002 Ordinance. The price determination of RLNG is carried out on a monthly and provisional basis and ultimately a final determination is made by OGRA based on actual costs which is then notified by PSO. During the initial phase, one of the key considerations was that there was no infrastructure for the import and distribution of RLNG, hence SNGPL would use its existing infrastructure on the understanding that ultimately this will be separated and RLNG shall and have its own infrastructure. This has been factored into the price determinations made by OGRA for which it held two public hearings in which the Petitioners participated.

8. Learned counsel further argued that RLNG prices are determined on provisional basis at the start of the pricing period and have to be actualized when the actual pricing data becomes available to OGRA. In this regard, the Federal Government has issued the pricing components for RLNG on 27.7.2015 on the basis of which the price for RLNG is actualized. She explained that in terms of the letter issued on 27.7.2015 a public hearing is not required for all components as some of the components are provided for by the Federal Government whereas OGRA has to determine cost of services and transmission and distribution losses. A public hearing is given with reference to the cost of services and the transmission and distribution losses and was provided to the Petitioners who are before the Court. So far as the financial years 2015-16 and 2016-17 are concerned, the Petitioners were heard. Learned counsel clarified that throughout this process, the Petitioners were aware that the tariff determination was provisional and subject to actualization at the end of the pricing period. She further explained that once a public hearing is granted and all objections are noted, it is not necessary that at the time of actualization of the pricing components that the Petitioners are heard. She further stated that the 1961 Ordinance does not require a public hearing at every stage and any objections that the Petitioners had towards the UFG or cost of services could have been raised with OGRA in the first instance. Learned counsel also stated that the entire dispute stems from the notion that the Petitioners are entitled to a hearing at every stage on monthly basis when the tariff is determined. This is not how the tariff determination is modeled and it is also practically impossible. The Counsel placed several RLNG determinations on record to show that the Petitioners have not objected to the computation or methodology subsequent to the impugned determinations. Hence, she argued that no case is made out before this Court.

9. On behalf of Respondent SNGPL, it was argued that RLNG was ring-fenced, meaning that all costs incurred by the gas utility company in supplying RLNG would not be included in the revenue requirements of the company for indigenously

produced natural gas. The ring-fencing requirement was given to ensure that the extra cost of importing LNG and process to re-gasify and make RLNG would be borne by the consumer for whose benefit this entire exercise was carried out. The Petitioners entered into cost supply agreements with the Respondent SNGPL and they agreed to bear the costs of import of RLNG notwithstanding the fact that it may be receiving indigenously produced natural gas in lieu of RLNG. The Petitioners also agreed to pay tariff for RLNG as determined by OGRA and notified by the PSO which includes the cost of services in which it was agreed that distribution and transmission losses would be paid by the Petitioners. Furthermore they agreed that OGRA will make provisional determination on a monthly basis which would be subject to a final determination and that if there is any balance in payment between the provisional tariff and the final tariff, based on the actual costs that would be paid by the Petitioners. Further that OGRA in fact carried out this entire process and has been in compliance with the law yet the Petitioners have challenged this process notwithstanding the fact that they have contractually agreed to it. Learned counsel stated that it has already been decided by this Court vide judgment dated 8.2.2017 passed in W.P. No.1821/2017 titled Mayfair Limited and others v. Federation of Pakistan and others that there is a contractual agreement between the parties which governs the terms and conditions on which RLNG will be supplied to the consumers and the terms of the agreement specifically provide what amounts are to be paid. Under the circumstances, learned counsel argued that the Petitioners are not entitled to any relief from this Court. SNGPL has been supplying RLNG to the Petitioners and has been accumulating all data of actual costs incurred in relation thereto. These costs are put before OGRA who then makes its determination. The entire mechanism has been transparent after following due process and the Petitioners have no cause to claim that they have been denied public hearing when the record shows otherwise.

Opinion of the Court

the legal framework:

10. The 1961 Ordinance provides for the levy and collection of petroleum levy on petroleum products and matters connected therewith. SRO 405(1)/2015 dated 7.5.2015 amended the First and Second Schedule of the 1961 Ordinance to bring RLNG within the scope of petroleum products so that RLNG is treated as a petroleum product and to treat SNGPL and SSGCL as utility companies under the 1961 Ordinance. Further SRO 971(1)/2015 dated 3.9.2015 brought RLNG within the sphere of the categories of petroleum products for which the Federal Government fixes prices and may delegate its function to OGRA. The Petitioners do not dispute this position and no longer raise challenge to the SROs. The 2002 Ordinance established OGRA and in terms of Section 6 of the 2002 Ordinance set out the powers and functions of OGRA. RLNG price determination has been delegated to OGRA consequent to Section 6(2) (r) of the 2002 Ordinance which provides that OGRA shall administer or establish prices for those categories of petroleum for which the Federal Government establishes prices and may delegate the function to the Authority. Hence under the said Ordinance OGRA is a delegatee of the Federal Government. Section 13 provides for the review, rescind or change of

the Authority's decision who can rehear and change a decision in the event of changed circumstances or the discovery of new evidence which was not available at the earlier stage and will materially alter the decision. Section 21 grants the Federal Government the power to issue policy guidelines to OGRA on matters of policy not inconsistent with the provisions of the 2002 Ordinance or rules made thereunder and OGRA must comply with them. These directives are therefore binding on OGRA. Section 9 provides for the right of hearing in regulated activity, where the decision of the Authority may directly and adversely affect the right of a person. As per the contentions raised before the Court all parties agree that OGRA sets RLNG prices as a delegatee of the Federal Government after making its determination as per the formula provided in the directives.

11. The issue raised by the Petitioners is with respect to their right of hearing when OGRA makes its determination for cost of services and transmission and distribution losses in the supply of RLNG because this decision directly and adversely affects their rights. They argue that OGRA is obligated to hear them before making a determination on these components as per Section 9 of the 2002 Ordinance. Specifically they raise the issue that RLNG tariff determination after March 2016 has been made without a public hearing and quantums decided at the public hearings were subsequently enhanced through subsequent determinations retrospectively without any hearing. In this context, it is important to note that OGRA is obligated to follow all policy directives issued by the Federal Government. The Federal Government issued the pricing components under policy directive dated 27.7.2015 for RLNG and both parties agree that the role of OGRA is limited to determinations at serial Nos.1(v) and (vii) of the directive dated 27.7.2015. As per the directive the price components are as follows:

No.DGO(AC)-5(235)/15-LNG
Government of Pakistan Ministry of Petroleum and Natural Resources,
(Policy Wing) Directorate General of Gas,
21-E, Huma Plaza, Blue Area
Islamabad, the 27th July, 2015.
01. The Chairman, 02. The Managing Director,
Oil and Gas Regulatory Pakistan State Oil
Authority, Islamabad Company Ltd. Karachi Ltd.
03. The Managing Director 04. The Managing Director
Sui Northern Gas Sui Southern Gas Company Ltd.
Piplelines Ltd. Lahore Karachi
Subject: SALE PRICE OF RLNG
Dear Sir(s)
I am directed to inform that Economic Coordination Committee (ECC) of the Cabinet in its meeting held on 06.06.2015 while considering a summary submitted by this Ministry on the above subject vide Case No.ECC-87/11/2015 dated 06.06.2015 approved the following proposals:
(I) Pricing Components for RLNG:

i. LNG DES Price including any take or pay volumes, losses on account of Net Sale Proceeds and relevant adjustments due to exchange rate. In case of FOB cargoes, the price should include FOB price plus freight charges.
ii. PSO's other imports related actual costs.
iii. PSO's Margin upto 4 percent of LNG DES Price, subject to review after three months
iv. Terminal Charges under LNG Service Agreement (LSA).
v. SSGCL/SNGPL cost of service (to be determined by OGRA).
vi. SSGCL/SNGPL administrative margin upto $ 0.05/MMBTU (to be paid in rupees) for each company (to be treated as non-operating income), subject to review after three months.
vii. Transmission losses at 0.5% and distribution losses, if any (to be determined by OGRA).
(II) The RLNG Price will be determined by OGRA and notified by PSO on similar lines to that for petroleum products pricing including Exchange Rate adjustments. However; RLNG price will be determined on the basis of price of LNG cargoes scheduled to arrive in Pakistan during the relevant month (as against the preceding month's practice in fuels) so that price should reflect the close to actual cost of LNG.
(III) Moreover PSO has been allowed to incorporate any differential between actual versus provisional prices in subsequent pricing period upon availability of all actual costs. This will remove any ambiguity in the pricing mechanism and ensure that the actual and auditable prices are charged to customers.
(IV) Gas infrastructure Development Cess will not be applicable on RLNG.
2. It was also approved by the ECC that a Committee Comprising Secretary Finance Division (Convener), Secretary Ministry of Water and Power, Secretary Ministry of Petroleum and Natural Resources and Secretary Law, Justice and Human Rights to review the pricing mechanism after three months and submit report to ECC for consideration.
3. You are kindly requested to take further necessary action in the implementation of above ECC decision under intimation to this Ministry at the earliest please.
Yours truly,
Abdul Rashid Jakhio,
Director (Tech)
Tele: 9204812
The Federal Government issued another policy directive on 27.6.2016 with reference to price determination of RLNG which is reproduced hereunder:
Government of Pakistan
Ministry of Petroleum and Natural Resources,
(Policy Wing)
Directorate General of Gas,
First Floor, Petroleum House, Ataturk Avenue G-5/2
Islamabad, the 27th June, 2016
01. The Chairman, 02. The Managing Director,
Oil and Gas Regulatory Pakistan State Oil
Authority, Islamabad Company Ltd. Karachi

03. The Managing Director 04. The Managing Director
Sui Northern Gas Sui Southern Gas Company Ltd.
Piplelines Ltd. Lahore Karachi
Subject: DETERMINATION OF SALE PRICE OF RLNG
Dear Sir(s)
I am directed to inform that Economic Coordination Committee (ECC) of the Cabinet in its meeting held on 14.6.2016 considered the summary submitted by this Ministry on the above subject vide Case No.ECC-72/12/2016 dated 14.06.2016 and approved the recommendations of the Committee, constituted by ECC vide case No.ECC-87/11/2015 dated 06.06.2015, for conveying to OGRA as policy guidelines under Section 21 of the OGRA Ordinance, 2002 as under:
i. LNG DES price to be taken as per Contract.
ii. Port charges will also be taken at actual including amount reimbursed to supplier as per relevant agreement. There was a consensus that all relevant cost may be allowed to POA to sustain its operations along with a reasonable profit margin.
iii. PSO was advised to take up the matter with Sindh Government for non-applicability of Sindh infrastructure Cess in line with other 'Petroleum Products'. The Ministry of Petroleum and Natural Resources was also advised to facilitate PSO accordingly. It was also agreed that pending the ultimate settlement of this issue, the said Cess will also be included in RLNG price.
iv. PSO margin will be determined at 2.50%.
v. All charges under LSA including but not limited to capacity charges and utilization charges as well as Retainage are to be included at actual. SSGC/PSO will share all relevant details with OGRA.
vi. SSGC's Margin for LSA Management to be determined @ $ 0.025/MMBTU to be treated as non-operating income.
vii. Transmission Loss to be determined and charged at actual subject to a maximum of 0.5% (to be shared by gas companies based on length of Transmission Line involved).
viii. Distribution Loss to be determined and charged at actual. The said loss for the customers located on high pressure transmission lines as well as those customers who are willing to lay their dedicated line from SMS/TBS at their own cost shall also be determined and charged at actual. However, for other customers on distribution lines, an actual average UFG for the last financial year will taken in determination.
2. You are kindly requested to take further necessary action in the implementation of above ECC decision under intimation to this Ministry.
Yours truly,
Abdul Rashid Jakhio
Director (Tech)
Tele: 920812
As per the directive of 27.6.2016 several changes were introduced, however for the purposes of the dispute before the Court, the Federal Government changed the computation requirement from the earlier directive of 27.7.2015 with respect to transmission losses and distribution losses as well as UFG. Relevant components of this policy are (vii) and (viii) which are to be determined by OGRA.

12. Within the stated legal framework, the supply of RLNG is based on a contractual arrangement between Respondent SNGPL and the Petitioners. As per the agreement RLNG sales are to be ring-fenced in line with the ECC decision made on 9.4.2015 and 23.4.2015 and the seller SNGPL can only supply RLNG to the buyer if it is willing to bear the line losses of the distribution system through the tariff. The agreement also provides that UFG losses shall be borne by the buyer, being the Petitioners, in line with the 2012 Rules. The parties agree that RLNG tariff is to be determined by OGRA and notified by PSO. That the notified price is the provisional price and is subject to change after final determination of RLNG price by OGRA. Furthermore the differential of the provisional and final price must be paid by the buyer, being the Petitioners. Hence in terms of the contractual arrangement the Petitioners are to pay for line losses, UFG and any difference in the provisional tariff and final tariff. It is noted that there is no dispute with reference to the contractual arrangement.
the determinations:

13. By way of background OGRA made a provisional determination of RLNG price for the financial year 2015-16 on 7.10.2015. RLNG cost built up and submissions by PSO were considered and evaluated where after OGRA found that the LNG framework suffers from some financial short comings. Firstly the sale purchase agreement with Qatar had not been finalized nor the agreement between PSO and SNGPL and SSGCL nor any agreement with the end consumer. Secondly the price components as given by the Federal Government vide letter dated 27.7.2015 had not been calculated. However the supply of RLNG started in April 2015, therefore it was necessary to provisionally fix the price to prevent an energy shortfall and loss to the public exchequer. Hence the provisional price was set considering PSO margin of 4% of DES price and cost of service. At the time OGRA did not allow cost of service because there was no separate RLNG infrastructure and all relevant costs were already built into the revenue requirements for the financial years 2015-16 for the indigenous natural gas. Accordingly OGRA denied all requests as there was no incremental cost. The Petitioners contend that subsequently OGRA changed its view with respect to cost of service and losses and granted SNGPL the same without hearing the Petitioners through the impugned determinations. They also claim that once OGRA decided not to allocate any costs, if at all, any costs were to be granted a public hearing was mandatory.

14. The entire dispute between the parties revolves around determinations made during a fixed period and the manner in which proceedings were undertaken by OGRA to fix the price of RLNG. The Petitioners have specifically impugned determinations dated 2.6.2017 and 20.6.2017 on the ground that it revised the earlier tariff fixed for the period 1.7.2016 to 31.12.2016 and 1.1.2017 to 31.3.2017. They claim that the impugned determinations include a retrospective liability which they are not liable to pay. The Petitioners have also impugned the decision dated 7.10.2016 on account of the change in formula to calculate UFG. They claim that this decision also includes a retrospective liability that they are not liable to pay. Hence the relevant period under dispute is the financial year 2015-16 and 2016- 17

and the issue is with respect to OGRA changing its original decision of not allowing cost of service and the change in the computation of UFG which is not based on the 2012 Rules. In order to appreciate the concern of the Petitioners, it is necessary to look at the determinations made by OGRA during this period. A series of determinations were issued by OGRA which are as follows:

(i) 7-10-2015

This sets out the background and the RLNG framework. It refers to the Federal Government approved pricing components vide letter dated 27.7.2015. The determination is made with reference to the months of April, June, July and September, 2015. At this time, since the required agreements with Qatar, with PSO and with SNGPL were not in place, a provisional assessment of the price for the said months was made. In this determination, OGRA also observed that a public hearing would prove to be helpful and in the larger public interest.

(ii) 18-3-2016

This fixes the price of PLNG for the period April, 2015 to January, 2016. Public hearing was held in December 2015 and January 2016 at Karachi and Lahore respectively. All Pakistan Textile Mills Association, All Pakistan CNG Associations participated along with independent participants and representatives of the general public from different Textile and CNG businesses. All parties were heard and the tariff was fixed for the given period. In this determination, cost of service was not given to the utility companies because at this point they did not have an independent infrastructure for RLNG, hence the Authority decided that since no additional cost had incurred and cost of service had already been allowed in the regular revenue stream for the financial year 2014-2015, they were not entitled to cost of service. The other objections regarding retainage, terminal charges were also heard and computed accordingly.

(iii) 7-10-2016

This determination is made in a Petition filed by PSO seeking price determination period February 2015 to June, 2016. This is again a provisional determination because the relevant agreements were not in place. Cost of service was not allowed. Import related costs were provisionally allowed.

(iv) 10.10.2016

This is the provisional determination for RLNG price for August, 2016.

(v) 13.10.2016

This is the provisional price for September 2016.

(vi) 28.10.2016

This is the provisional price for October 2016.

(vii) 2.1.2017

This is the provisional price for December 2016 to January 2017.

(viii) 2.6.2017

This is the provisional price for July to December 2016.

(ix) 20.6.2017

This is the provisional price for January 2017 to March 2017.

Therefore at first glance it is important to note that all decisions are provisional as the basic issues enumerated in para 13 of this judgment continued during this time. Secondly there was one public hearing with reference to the period April 2015 to

January 2016 and the subsequent decisions namely 7.10.2016 which have been impugned before this Court, reviewed the decisions of this period and granted certain cost of service, distribution losses and UFG to SNGPL. The other two decisions which have been impugned are 2.6.2016 and 20.6.2016 which relate to the period July to December 2016 and January to March 2017. These are provisional decisions which were finalized on actuals in November 2017 for the financial year 2016-17.

15. The Petitioners claim that RLNG price for the financial year 2015-16 was determined on 18.3.2016 after public hearings in Karachi and Lahore. This price was changed on 7.10.2016, 2.6.2017 and 20.6.2017 without any hearing. Essentially they are aggrieved with the basis for calculating distribution and transmission losses and cost of services. Consequently they argue that since the determinations were made without hearing them, they are not liable to pay the increased amounts which have been applied retrospectively. It is noted that during this time the RLNG pricing system was evolving as there was no fixed infrastructure for RLNG and as the RLNG system developed, the cost and losses were being considered simultaneously. As per the procedure followed a provisional price for RLNG is notified every month, however cost of supply, retainage and transmission and distribution losses cannot be determined on a monthly basis. This has to be done on a yearly basis when these costs are actualized and made available. At the time when the actual figures are made available the provisional price is revised and a final determination is made based on actual costs. This system will have a retrospective application as the differential is added to the provisional price and has to be paid by the Petitioners for the relevant period. The Petitioners are aware of the framework catering to provisional and final determinations as this was agreed to in their contracts for supply of RLNG. They also agreed that monthly pricing has to be provisional. During the course of arguments the Petitioners stated that they do not object to the provisional billing as their concern is limited to the cost of service and UFG granted by OGRA which should be made after a public hearing. OGRA argues that it is not required to grant a public hearing as the impugned determinations are provisional which does not call for a public hearing. The Respondent OGRA informed the Court through its Counsel that there was a public hearing for the 18.3.2018 determination. The Petitioners' concerns were heard and have been noted. Furthermore remedy of review under Section 13 of the 2002 Ordinance is available and has been availed by the Petitioner APTMA against decisions it was aggrieved by. Hence they contend that the remedy of review caters to the objectives of the right of hearing required by the Petitioners as all issues can be addressed in the review petition. Even otherwise they contend that the Petitioners have participated in the public hearing held on 28.12.2015 and 4.1.2016 at Karachi and Lahore for the 18.3.2018 determination and have not challenged any of the subsequent price determinations which are based on the government directive of 27.6.2016. The Counsel explained that the OGRA is required to follow all government directives issued under Section 21 of the 2002 Ordinance and that all subsequent determinations are based on 27.6.2016 directive. She further explained that the Federal Government changed its earlier directive of 27.7.2015 with the directive

issued on 27.6.2016 consequent to which the methodology to compute distribution and transmission losses and UFG was changed. Since they were provisional determinations they were actualized subsequently on 23.11.2017 based on the 27.6.2016 directive which decision has not been challenged. Therefore the financial years 2015-16 and 2016-17 stand closed and finalized for all intents and purposes.
the right to public hearing:

16. Notwithstanding the arguments made on behalf of OGRA, the argument of the Petitioners with respect to the right of hearing must be seen in the context of the tariff determination process set up by the Federal Government and followed by OGRA. The tariff determination of 7.10.2015 denied cost of service to SNGPL as there was no infrastructure to service RLNG and because RLNG was being supplied through the existing transmission and distribution system. Consequently OGRA concluded that since SNGPL was not incurring any RLNG related cost of service it could not claim any. This position was maintained by Respondent OGRA on 18.3.2016 which decision was made on the basis of a public hearing. However, on 7.10.2016 in a review petition filed under Section 13 of the 2002 Ordinance by PSO and SNGPL cost of services was included, without notice of hearing to the Petitioners, who had participated in the public hearing for the 18.3.2016 determination. The relevant period was April 2016 to February 2017 in both determinations. Hence a dispute arose as determination of 7.10.2016 allowed certain costs to SNGPL based on actual figures without hearing the Petitioners and OGRA maintained this position in its subsequent decisions of 2.6.2017 and 20.6.2017 without notice to the Petitioners. The record shows that the decisions of 2.6.2017 and 20.6.2017 were provisional and actualized on 23.11.2017 and duly notified. This decision is not challenged nor was any review filed by the Petitioners. However the Petitioners argue that the cost of losses allowed by OGRA directly and adversely affect their rights, hence a hearing is mandatory. It is important to note that the determination of 7.10.2016 was made on the basis of the directive of 27.6.2016 based on the actual figures available at the time whereas the earlier determination of 7.10.2015 and 18.3.2016 was based on the directive dated 27.7.2015. Since the computation of the price components were changed by the Federal Government, its application was bound to give rise to a dispute, as the Petitioners could not participate in the proceedings where the 27.6.2016 directive was applied. Therefore the question before the Court is whether OGRA is required to grant a hearing every time it determines cost of services or losses in terms of the letter of 27.7.2015 and 27.6.2016 and whether it is required to grant a hearing with the change in policy directive under Section 21 of the 2002 Ordinance.

17. As per the RLNG supply agreements between the parties, the provisional price of RLNG will be fixed every month and this price is subject to change when the final determination is made. The parties agree that cost of service, transportation cost and retainage component has to be on actual basis in any financial year. Since cost of services and transmission and distribution losses is based on actuals, every determination made by OGRA will impact the Petitioners. To cater to such impact, Section 9 of the 2002 Ordinance provides that a right of hearing should be granted

where a decision will directly and adversely affect the rights of a person. This is the concept of a public hearing which is followed in the tariff determination process for natural gas.

18. A public hearing is granted to make the tariff determination process all inclusive so that the views of interested parties can be taken into consideration, especially those who have stakes in the outcome of the regulator's decision. It ensures accountability and transparency in the decision making process and will positively impact the implementation of the regulator's decisions. Hence, it is also the first step towards future conflict management with respect to the regulator's decision. The more inclusive the process, the less likely it will be that the determination is challenged. Furthermore, the involvement of the public and the stakeholders creates trust and confidence in the decision making process which caters to acceptability of the decision and its reasons. In the context of the 2002 Ordinance, this right of public hearing is provided for in Section 9 which requires a hearing to be granted where a decision relating to regulated activity may directly and adversely affect the rights of a person. OGRA has taken the stance that there is no right of hearing in the RLNG price determination mechanism but public hearings are a regular feature of the regular tariff determination framework. This position of OGRA is negated by Section 9 of the 2002 Ordinance which requires a hearing to be given where the decision impacts the rights of persons. Furthermore it is admittedly a regular feature of the tariff determination framework for indigenous gas and as per the RLNG price determinations placed before the Court OGRA observes that it is in the public interest that a public hearing be granted.

19. There are two reasons why this right of hearing is required in the RLNG price determination process. Firstly the entire RLNG sector is governed by contracts and government policies along with the delegated function granted to OGRA . While there is a contractual relationship setting the terms and conditions between the parties inter se being the Petitioners and SNGPL and SNGPL and PSO. The Federal Government issues policy directives with respect to RLNG allocation and price which directives are subject to change as per Government requirements. OGRA's determinations are based on the Government's notifications or policy guidelines under Section 21 of the 2002 Ordinance which means that it has to take all such components, as directed by the Government, into consideration while making its determination. Hence any change that a government policy directive makes will be implemented by OGRA. Stakeholders such as SNGPL and PSO are heard at the provisional determinations where the directives are applied but the majority stakeholders being the consumers or interveners are not heard. This is because during the provisional pricing PSO and SNGPL are heard and the public is not involved. The second reason is with respect to the right to review a decision under Section 13 of the 2002 Ordinance. It is noted that within the given framework when a review application is filed and the cost of services or transmission losses or distribution losses are reviewed and changed without hearing parties, it leaves the Petitioners remediless as there is no provision for a second review under the 2002 Ordinance. Essentially under Section 13 of the 2002 Ordinance, the Petitioners can

dilute the impact of public hearings if the public is not heard in the review proceedings. In the event that PSO or SNGPL moves for a review of any determination, no public notice is given. Consequently the determinations may decide upon cost of services and transmission and distribution losses without hearing the public who was originally heard during a public hearing. A relevant fact on this point with reference to the cases before the Court is that the tariff for April, 2015 to January 2016 was decided after a public hearing on 18.3.2016 yet in the decision of 7.10.2016 the tariff for the same period was reviewed and OGRA which had earlier not granted costs and losses now computed transmission losses and cost of service as per the policy directive of 27.6.2016. Having done so the decision of 7.10.2016 directly and adversely affected the rights of the Petitioners yet they were not heard. In this regard, it is also argued that the policy directive issued on 27.6.2016 under Section 21 of the 2002 Ordinance as per the contentions of the Petitioners was a total departure from the settled terms between the parties which again qualifies for a reason to grant a hearing.

20. In the same context, another issue raised by the Petitioners was the change in the computation mechanism for UFG consequent to the government directive of 27.6.2016. As per the contractual arrangement UFG must be decided as per 2012 Rules. The Petitioners contend that UFG allowance was changed from the just and reasonable allowance as per the 2012 Rules which is a 4.5% allowance to a 9.21 % allowance by changing the computation mechanism on 27.6.2016 and by not following the 2012 Rules. Again they re-iterated that each time the government issues a new scheme for computation, the Petitioners being stakeholders must be heard at the time of the determination. Therefore the concerns raised by the Petitioners in this regard have merit, as the change in policy resulted in an overall change in the UFG computation scheme.

21. There is no dispute between the parties that the 2002 Ordinance is applicable as OGRA acts under Section 6(2)(r) of the 2002 Ordinance and follows directives under Section 21 of the 2002 Ordinance. Hence in order to preserve the scheme of the 2002 Ordinance, OGRA in the tariff determination process for RLNG, must as far as practicable, protect the interest of the consumers and the stakeholders so far as RLNG pricing is concerned. A public hearing is necessary where OGRA has to make a determination on cost of services and UFG as they directly impact the Petitioners. Furthermore Section 9 of the 2002 Ordinance mandates such a hearing and OGRA itself agrees that it is in the public interest. While the elements of the price components and its calculation is a technical function for OGRA to decide on the basis of government directives, the RLNG pricing mechanism has not been streamlined into a regular process where provisional and final determinations are systematically made and notified. Hence it is necessary to keep all parties on board so as to ensure smooth management of the terms of the agreement between the parties and the supply of RLNG. It is also necessary to give clarity to the pricing mechanism so as to reduce conflict between OGRA and the public.

22. As per the contentions raised it is admitted that decisions based on the 27.6.2016 directive have not been challenged. It is also admitted that after the impugned decisions of 7.10.2016, 2.6.2017 and 20.6.2017, the actualization of the prices for the financial year 2016-17 was made on 23.11.2017. Even this determination has not been challenged. The Petitioners on the filing of the Petitions were granted interim relief with respect to the differential amounts on account of the 7.10.2016, 2.6.2017 and 20.6.2017 determinations. The Petitioners did not get a hearing for the 7.10.2016 determination, when OGRA changed its earlier decisions of not granting costs, to allowing certain costs of service. Furthermore the computation for UFG was also changed and re-determined as per the 27.6.22016 directive without granting any hearing to the Petitioners. Therefore in the interest of justice and to protect the rights of the Petitioners with respect to being heard, in the form of a public hearing, OGRA is required to hold a public hearing to resolve the computation issues related to UFG and cost of services. This public hearing is also necessary as the Petitioners have been granted interim relief with respect to the differential amounts which need to be adjusted. Therefore before any adjustments are made a public hearing is required.

23. This Court is mindful of the decision in W.P. No.1821/2017 dated 8.2.2017 titled Mayfair Limited and others v. Federation of Pakistan and others. At the time the petitioners in that case challenged the determinations made by OGRA with respect to UFG for being made without hearing the Petitioners. The Court held that RLNG and its tariff fixation is based on a contractual arrangement and that the parties agreed to pay UFG and cost of supply in respect of RLNG. So far as the right of hearing was concerned, the Court held that the petitioners could not establish that they were entitled to a monthly hearing. Since the passing of the said judgment and now a lot of features of the regulatory regime have evolved and the dispute has been narrowed down to the right of hearing at the time of actualization of the price components to be determined by OGRA. In this regard even OGRA in its determination has observed that a right of hearing should be given in the RLNG pricing regime.

24. Moving forward OGRA should streamline the RLNG process providing provisional pricing and possibly a quarterly or bi-annual determination based on actual costs and losses. This quarterly or bi-annual determination should be on the basis of a public hearing so as to improve efficiency in the pricing mechanism. Essentially the right of hearing should be granted where the determination will impact the final outcome of all provisional adjustments made. Once the process is streamlined and the costing of components is settled, the issues related to costs and services should also settle.

25. One of the primary functions of OGRA is to provide for prices for petroleum products where it has been delegated to OGRA by the Federal Government. The establishment of prices as per Section 6(2)(r) of the 2002 Ordinance is subject to Section 21 and any existing contract or agreement specifying prices. In cases of RLNG price, there are Federal Government directives and contracts between the

parties, the terms of which are relevant and need consideration. In the event of any conflict between the terms of the contract and the Government directive OGRA must attempt to resolve the matter by referring the issue to the Federal Government for clarification or re-consideration. However it cannot simply rely on government directives under Section 21 and ignore the contractual arrangement as that goes against the mandate of Section 6(2)(r) of the 2002 Ordinance. In such cases OGRA is obligated to resolve the issues as a frontline regulator and not mitigate its functions as a government delegatee.

Therefore in view of the aforesaid, all the Petitions are allowed on the following terms:

(i) The RLNG price determinations by OGRA, at the time of actualization of the prices, for a given financial year, should be done after holding a public hearing in terms of Section 9 of the 2002 Ordinance;

(ii) Where a determination is made after granting a public hearing, in the event that OGRA reviews or re-hears any portion of that determination, which will directly and adversely impact the rights of the Petitioners, it will grant a right of hearing before making a decision under Section 13 of the 2002 Ordinance;

(iii) For the purposes of the impugned determination of 7.10.2016, 2.6.2017 and 20.6.2017, interim orders have been passed by this Court on account of which adjustments are required to finalize the amounts due from the Petitioners. OGRA is directed to fix a public hearing before issuing revised bills, in order to hear and determine on the objections raised by the Petitioners with reference to UFG, cost of services and transmission and distribution losses.

Schedule-A

Details of Writ Petitions mentioned in judgment Dated 28.10.2019 passed in WP No.49178/2017.

1.49179/17 Gazcon CNG etc. v. Federation of Pakistan etc., 2.50356/17 7 Star CNG etc. v. Federation of Pakistan etc., 3.58502/17 United CNG etc. v. Oil and Gas Regulatory Authority etc., 4.59582/17 Unique Associate etc. v. Oil and Gas Regulatory Authority etc., 5.49584/17 Crescent Bahuman Limted etc. v. Federation of Pakistan etc., 6.52432/17 Ashraf Ceramics etc. v. Federation of Pakistan etc., 7.50345/17 Service Industries Limited etc. v. Federation of Pakistan etc., 8.53620/17 Asfyya Sons (Pvt.) Ltd. etc. v. Federation of Pakistan etc., 9.67595/17 Rafi CNG v. Federation of Pakistan etc., 10.67592/17 Sarajia CNG Station v. Federation of Pakistan etc., 11.49177/17 North Star Textile Mills Limited v. Federation of Pakistan etc., 12.50363/17 Chakwal Spinning Mills Ltd etc. v. Federation of Pakistan etc., 13.129406/18 Ulfat Textile Mills Pvt. Ltd. v. Federation of Pakistan etc., 14.200102/17 AIMS Hosery v. Federation of Pakistan etc., 15.161767/18 Habeeb Haseeb Spinning Mills Pvt. Ltd etc. v. Federation of Pakistan etc., 16.193849/18 Nishat Dairy Limited etc v. Federation of Pakistan etc., 17.201344/18 Reshma Tex Limited v. Federation of Pakistan etc., 18.132088/18 Aruj Garments Accessories Ltd v. Federation of Pakistan etc., 19.59057/17 Kamal Fabrics etc v. Federation of Pakistan etc., 20.51075/17 Hassan Limited v. Federation of Pakistan etc., 21.49583/17 Combined Fabrics Ltd etc v. Federation of Pakistan etc., 22.50245/17 Shujabad Weaving Mills Limited v. Federation of Pakistan etc., 23.49555/17 Sajjad Textile Mills Limited etc. v. Federation of

Pakistan etc., 24.160952/17 Latif Worsted Spinning Mills Pvt. Ltd. v.Federation of Pakistan etc., 25.49547/17 Shams Textile Mills Ltd etc. v. Federation df Pakistan etc., 26.58221/17 Ramay Textile (Garments) Pvt. Ltd v. Federation of Pakistan etc., 27. 68063/17 Din Textile Mills Ltd. v. Federation of Pakistan etc., 28.16672/17 Kamal Limited (Weaving Unit) v. Federation of Pakistan etc., 29.50213/17 Fahad Javed Spinning Mills Pvt. Ltd. v. Federation of Pakistan etc., 30.58471/17 Jamal Fabrics (Pvt.) Ltd v. Federation of Pakistan etc., 31.49542/17 Al Zamin Textile Mills Pvt. Ltd. etc. v. Federation of Pakistan etc., 32.51939/17 Dawood Spinning Mills Limited. v. Federation of Pakistan etc., 33.59390/17 Ishaq Textile Mills Pvt. Ltd. v. Federation of Pakistan etc., 34.160364/18 Ideal Spinning Mills Limited v. Federation of Pakistan etc., 35.131524/18 Ali Akbar Spinning Mills Ltd. v. Federation of Pakistan etc., 36.49961/17 Masood Textile Mills Limited etc. v. Federation of Pakistan etc., 37.176599/18 Ittehad (Private) Limited v. Federation of Pakistan etc., 38.218558/18 Rana Textile Mills Limited v. Federation of Pakistan etc., 39.218848/18 Rantex (Pvt.) Limited v. Federation of Pakistan etc., 40.193815/18 Shahzad Textile Mills v. Federation of Pakistan etc., 41.49992/17 Bismillah Textile Limited etc. etc. v. Federation of Pakistan etc., 42.50350/17 Zeenat Printing and Dyeing Mills Pvt. Ltd etc. v. Federation of Pakistan etc., 43.51424/17 US Apparel and Textile Pvt. Ltd. v. Federation of Pakistan etc., 44.240180/18 Habib Haseeb Spinning Mills Pvt. Limited v. Federation of Pakistan etc., 45.49981/17 Ghani Glass Limited v. Federation of Pakistan etc., 46.205277/18 Pak Italian Ceramics Factory v. Government of Pakistan etc., 47.52022/17 Master Tiles and Ceramic Industries Limited v. Government of Pakistan etc., 48.52929/17 Pakarab Fertilizers Limited v. Federation of Pakistan etc., 49.58493/17 Diamond Tyres Limited etc. v. Federation of Pakistan etc., 50.208343/18 Anwar Ahmad Khan v. Federation of Pakistan etc., 51.188784/18 Muhammadi Glass Industries v. Federation of Pakistan etc., 52.69915/17 Walton Gasoline CNG Station v. Federation of Pakistan etc., 53.201630/18 Punjab Milk Shop v. Federation of Pakistan etc., 54.196277/18 EMCO Industries Limited v. Federation of Pakistan etc., 55.49180/17 City CNG etc. v. Federation of Pakistan etc., 56.49545/17 Sitara Peroxide Limited v. Federation of Pakistan etc., 57.8631/19 Al Rehman Water Tank Industry v. Federation of Pakistan etc., 58.218963/18 Shehroz CNG Filling Station v. Federation of Pakistan etc., 59.216374/18 Ghani Glass Limited v. Federation of Pakistan etc.,60.49725/17 Al Muqeet CNG Filling Station etc. v. Federation of Pakistan etc., 61.49985/17 Shahi CNG Station etc. v. Federation of Pakistan etc., 62.52932/17 Fatima fert Limited v. Federation of Pakistan etc., 63.52206/17 Maple Leaf Cement Factory Limited etc. v. Federation of Pakistan etc., 64.50734/17 Balochistan Glass Limited v. Federation of Pakistan etc., 65.252003/18 Shaheen CNG Station etc. v. Federation of Pakistan etc., 66.49181/17 Sitara Chemicals Industries v. Federation of Pakistan etc., 67.53927/17 Abbas CNG Filling Station v. Federation of Pakistan etc., 68. 57915/17 Ali CNG Filling Station etc. v. Federation of Pakistan etc., 69.58832/17 Royal CNG Filling Station etc. v. Federation of Pakistan etc., 70.59272/17 Pak Asia 1 CNG Filling Station v. Federation of Pakistan etc., 71.59389/17 Naveed Enterprises CNG Filling Station etc. v. Federation of Pakistan etc., 72.61196/17 Madina CNG Filling Station etc. v. Federation of Pakistan etc., 73.65022/17 Ramay CNG Filling Station v. Federation of Pakistan

etc., 74.67438/17 Zaka Toor CNG Filling Station etc. v. Federation of Pakistan etc., 75.68164/17 Faisal CNG Filling Station v. Federation of Pakistan etc., 76.68617/17 Three Star CNG Filling Station v. Federation of Pakistan etc., 77.80060/17 Anmol CNG Filling Station v. Oil and Gas Regulatory Authority etc., 78.70089/17 Nankana CNG Filling Station v. Federation of Pakistan etc., 79.72305/17 Warraich CNG Filling Station v. Federation of Pakistan etc., 80.50341/17 Fuel Perfect etc. v. Oil and Gas Regulatory Authority etc., 81.49176/17 Econo Fuels etc. v. Oil and Gas Regulatory Authority etc.,

MWA/E-8/L Petitions allowed.

2020 P T D 331
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
COMMISSIONER INLAND REVENUE
Versus
RAJA MAZHAR HUSSAIN
I.T.R. No.73287 of 2019, decided on 3rd December, 2019.

Income Tax Ordinance (XLIX of 2001)---

----Ss. 82 & 111 --- Convention between the Government of the French Republic and the Government of the Islamic Republic of Pakistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (1994), Art. 4 --- Non-resident person---Non-taxability/chargeability of funds for purchase of property/assets in Pakistan --- Appellate Tribunal held that respondent had centre of vital interest in France by virtue of his personal and economic interests; that respondent had his family, business, Bank account(s) and permanent house in France, and his income was also assessed there; that respondent and his family were French citizens; that the respondent did not come to Pakistan as a routine, and even when he did, he did not stay for long enough to establish himself as a resident of two countries; and that once it was established that the respondent's centre of vital interest was not Pakistan, S. 111 read with S. 82 of the Income Tax Ordinance, 2001 were not applicable to the respondent and were superseded by Art. 4 of the Bilateral Tax Treaty between Pakistan and France ---Held, that deletion of levy of tax had been made by the Appellate Tribunal after detail scrutiny of facts and discussing merits of case by invoking correct legal provisions of Income Tax Ordinance, 2001 and Art. 4 of the Bilateral Tax Treaty between Pakistan and France upon applicable tie-breaker test --- Appellate Tribunal had correctly held that S. 111 of the Income Tax Ordinance, 2001 was not attracted to the case of the respondent --- Reference filed by Inland Revenue authority was dismissed.
Mrs. Fozia Bukhsh for Applicant.

ORDER

This Reference Application under Section 133 of the Income Tax Ordinance, 2001 (the "Ordinance") has been filed by the Applicant, being dissatisfied by the order passed by the Appellate Tribunal Inland Revenue, (Headquarters Bench), Islamabad ("Appellate Tribunal") in I.T.A. No.490/IB/2018 (Tax Year 2008) dated 08.05.2019.

2. Following questions of law are pressed for our opinion in instant Reference, which are asserted to have arisen out of judgment:-
(1) Whether under the facts and circumstances of the case the learned Appellate Tribunal was justified to ignore the basic legal question regarding taxability and chargeability of funds/sources to purchase property/assets in Pakistan by a Non-Resident Person?

(2) Whether under the facts and circumstances of the case, the learned Appellate Tribunal was justified to ignore the legal issue that chargeability/taxability of a Non Resident person shall be governed in terms of provisions of Sections 11(6), 79(2), 101, 172(3) read with Section 111 of the income Tax Ordinance, 2001?
(3) Whether under the facts and circumstances of the case, the learned Appellate Tribunal was justified to ignore the legal issue that Double Taxation Treat cannot redundant the provision of Income Tax Ordinance, 2001 specifically section 111 of the Income Tax Ordinance, 2001 when there is issue of seeking explanation regarding sources of investment made in purchase of property/assets by a Non-Resident Person in Pakistan?
(4) Whether under the facts and circumstances of the case, the learned Appellate Tribunal intentionally ignored the Rules 14, 17 and 19B of the Income Tax Rules, 2002?
(5) Whether under the facts and circumstances of the case, the learned ATIR, being the "Final Fact Finding" authority under the appellate hierarchy of Inland Revenue in Pakistan, is justified to pass order under the influence of clarifications/opinion of some foreign jurisdiction on double taxation treaties?
(6) Whether a discretionary relief under the appellate jurisdiction of the Appellate Tribunal Inland Revenue can be given to help retention of ill-gotten money gained by a party (Non-Resident Person buying properties in Pakistan), as supported by [2009 SCMR 19 = 2008 PTD 2019]. ?
(7) Whether in view of the admission of the Taxpayer "he had enough agricultural income to purchase this property", interpretation of Section 111 of the Income Tax Ordinance, 2001 by the learned Tribunal, has made the provisions governing taxability of concealed income as redundant, while learned Tribunal intentionally ignored the binding verdict in Civil Appeals Nos.815 to 855, 860 to 974 etc dated 08.01.2019, wherein Hon'ble Supreme Court finally declared the verdict?
(8) Whether under the facts and circumstances of the case, the learned Appellate Tribunal intentionally ignore the root cause of the lis i.e., lack of evidence to explain funds/sources to purchase property/asset in Pakistan by a Non-Resident Person and whether the decision of learned Tribunal is in direct conflict with the binding verdict of Hon'ble Supreme Court of Pakistan in "Messrs Squib Pakistan (Pvt.) Ltd. v. Commissioner of Income Tax (2017 PTD 1303)?.
(9) Whether the learned Appellate Tribunal has erred in fact as well as law while declaring that the Section 111 of the Income Tax Ordinance, 2001 is not attracted to Non-Resident Person in the presence of double tax treaty?
(10) Whether the learned Appellate Tribunal has erred in fact as well as law to issue directions to the department in the following vague and unlawful manner by overstepping the lawful jurisdiction provided under the law to the Tribunal, "the Zonal Commissioner Inland Revenue is directed to return the amount extorted".
(11) Whether the learned Appellate Tribunal has wrongly and erroneously interpreted the Double Taxation Treaty and ignored the binding provisions of Income Tax Ordinance, 2001 read with Income Tax Rules, 2002?
(12) Whether the interpretation of Section 111 of the Income Tax Ordinance, 2001 in case of Non-Resident Person by the learned Tribunal has made the whole income

tax law redundant, which redundancy cannot be attributed to any provision promulgated by the legislature?.
(13) Whether under the facts and circumstances of the case order passed by the learned Appellate Tribunal is a speaking order in terms of Section 24-A of the General Clauses Act, 1897 and binding verdicts of judiciary?.

3. Learned counsel for the Applicant has submitted that the Appellate Tribunal was not justified to delete levy of tax under Section 111 of the Income Tax Ordinance, 2001 by accepting Appeal of the Respondent, therefore, it has been prayed that the impugned order may be set-aside and the questions proposed may be answered in favour of the Applicant and against the Respondent.

4. We have heard the arguments of learned counsel for the Applicant and perused the order passed by Appellate Tribunal. The operative part thereof reads as under:
"We would hold that the Appellant has centre of vital interest in France by virtue of his personal and economic interest abroad. He has his habitual abode abroad, and his income is assessed in France. According to the submission in para 5(xx) wherein the tie breaker test was applied as under on the Appellant terms of Article 4 of the Tax Treaty between Pakistan and France and it was concluded that:
a) The appellant has a permanent house in Paris, France. In order to assess his personal and economic relations, reliance is placed on the following facts
i) The Appellant has a business in Paris, whereby, he is a restaurateur, carrying business through a restaurant that serve Pakistani/Indian cuisine;
ii) The Appellant, in order to make payments to employees, has a bank account in France.
iii) The Appellant's family live in Paris and have lived so far several years.
iv) The Appellant's French tax number is attached with his Tax Returns.
v) The Appellant's children were born in France and are French citizens.
vi) The client does not come to Pakistan as a routine, and even so, does not stay for long enough to establish himself as a resident of two countries. Reliance is placed on the test of "considerable time". Therefore, to suggest that Pakistan is his habitual abode would be incorrect in law and also contrary to the facts of the case.
vii) The Appellant is a naturalized French Citizen. He holds a French Passport.
It was further observed which reads as follows:
"The taxpayer has closer personal relations as well as substantial economic relations, to one contracting state (France), while in other state (Pakistan) he merely has an economic interest that is current (wherein the appellant has just purchased a piece of land). His centre for vital interest will be deemed to be the first contracting State i.e. France. In the case of Appellant, it is obvious to us now that the centre for vital interest for him is France and not Pakistan. Once it is established that the centre of vital interest is not Pakistan, section 111 read with section 82 of the Income Tax Ordinance, 2001 are thus superseded by, and thus quashed by Article 4 of the Bilateral Tax Treaty between Pakistan and France"

5. We observed that deletion of levy of tax has been made by the Appellate Tribunal vide impugned order after detail scrutiny of facts and discussing merits of case by

invoking correct legal provisions of Income Tax Ordinance, 2001 and Article 4 of the Bilateral Tax Treaty between Pakistan and France upon applicable tie-breaker test and it was categorically held that the section 111 of the Income Tax Ordinance is not attracted to the case of the Respondent. The facts are so obvious and clear that the department's point of view appears to be as an un-necessary effort hence averments made by the learned counsel for the Applicant before us stands falsified. The deletion of levy of tax, therefore, is unexceptionable.

6. We agree with the findings of the Appellate Tribunal and see no reason to interfere with the impugned order which does not suffer from any factual or legal infirmity as the same has been passed after scrutinizing the relevant record as well as on the basis of sound reasoning.

7. Therefore, the Reference application is decided against the Applicant.

8. Office shall send a copy of this order under seal of the Court to the Appellate Tribunal as per Section 133(5) of the Ordinance.
MWA/C-21/L Reference dismissed.

P L D 2020 Lahore 354
Before Ayesha A. Malik, J
SHEHZAD ALI SHAH---Petitioner
Versus
SPECIAL JUDGE RENT, LAHORE and others---Respondents
Writ Petition No.24651 of 2019, heard on 22nd January, 2020.

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

----Ss. 26 & 34---Civil Procedure Code (V of 1908), S.12(2)---Qanun-e-Shahadat (10 of 1984), Preamble---Rent Tribunal to exercise powers of Civil Court---Bar on provisions of Qanun-e-Shahadat, 1984 and Civil Procedure Code, 1908 on proceedings under Punjab Rented Premises Act, 2009---Application under S.12(2), C.P.C. for setting aside ex parte ejectment order---Scope---Question before High Court was whether an application under S.12(2), C.P.C. read with S.151, C.P.C. for setting aside ex parte order in ejectment petition under Punjab Rented Premises Act, 2009 was maintainable---Held, that per Ss.26 & 34 of Punjab Rented Premises Act, 2009, provisions of C.P.C. were only applicable to the extent specified in S.26 of the Act and no other provision of C.P.C. was applicable in proceedings under Punjab Rented Premises Act, 2009---High Court observed that S.12(2), C.P.C. was not applicable on account of bar contained in S.34 of the Punjab Rented Premises Act, 2009---Constitutional petition was allowed, accordingly.
Muhammad Tariq Khan v. Khawaja Muhammad Jawad Asami and others 2007 SCMR 818 and Saeed Pervaiz v. Syed Masood Hassan 2008 SCMR 568 rel.

(b) Limitation Act (IX of 1908)---

----Ss. 29(2) & 5---Limitation period prescribed by special law---Condonation of delay---Scope---Ability of a court to condone delay had been excluded under special or local laws and it was only authorized specifically where law of limitation had been made applicable in such a statute---Where law of limitation had not been made applicable under a special law, then court could not condone delay and had to ensure that an application was made within specified period given in such statute---Where law under which proceedings had been initiated itself prescribed a period of limitation, then benefit of S.5 of the Limitation Act, 1908 could not be availed unless same had been made applicable as per S.29(2) of the Limitation Act, 1908.
Allah Dino v. Muhammad Shah and others 2001 SCMR 286 rel.
Umer Afzal Chaudhry for Petitioner.
Sheikh Muhammad Suleman Qureshi for Respondents Nos. 3 and 4.
Date of hearing: 22nd January, 2020.

JUDGMENT

AYESHA A. MALIK, J.--Through this Petition, the Petitioner has impugned order dated 11.3.2019 passed by Respondent No.1, Special Judge (Rent), Lahore.

2. The basic contention of the learned counsel for the Petitioner is that the Petitioner filed an ejectment petition against Respondent No.2 before Special Judge (Rent), Lahore. Respondent No.2 did not appear before the court, hence the eviction petition was decided ex-parte on 11.4.2016. The Petitioner then filed an execution petition in order to have the Respondents evicted. However Respondents Nos.3 and 4 filed an application under Section 12(2) read with Section 151 Civil Procedure Code, 1908 ("C.P.C.") on 11.2.2017 which application was accepted on the same date that is 11.2.2017. Learned counsel for the Petitioner argued that provision of Section 12(2) of the C.P.C. is not applicable in the proceedings under the Punjab Rented Premises Act, 2009 ("Rent Act") as it has been specifically barred under Section 34 of the Rent Act. Furthermore he stated that the Limitation Act, 1908 ("Limitation Act") is also not applicable and the delay in filing the application under Section 12(2) C.P.C. could have also not been condoned as the Limitation Act is not applicable to the proceedings under Rent Act.

3. On behalf of Respondents Nos.3 and 4, learned counsel argued that the case was considered on its merits and that in terms of the order impugned before this Court, the application for condonation of delay was accepted in the interest of justice as law favours decision on merit rather than technicalities. Therefore he stated that the arguments of the Petitioner's Counsel are based on technical grounds, hence should not be accepted. Consequently prays for dismissal of the Petition.

4. The basic issue before the Court is whether the application filed under Section 12(2) read with Section 151 C.P.C. for setting aside ex-parte order was maintainable under the Rent Act. Section 34 of the Rent Act reads as follows:
Save as otherwise expressly provided under this Act, the provisions of the Qanun-e-Shahadat Order, 1984 (P.O. No.10 of 1984) and the Code of Civil Procedure, 1908 (Act V of 1908) shall not apply to the proceedings under this Act before a Rent Tribunal, District Judge or Additional District Judge.
In terms of the said Section, it is clear that the provisions of the C.P.C. shall not apply to proceedings before the Rent Tribunal, District Judge or Additional District Judge. Section 26 of the Rent Act provides that the Rent Tribunal can exercise the powers of a Civil Court in order to enforce the attendance of a person, compel the production of evidence, inspect a premises or issue commission for examination of a witness or local inspection. Therefore when Section 26 is read with Section 34, the provisions of the C.P.C. are only applicable to the extent specified in Section 26 and no other provision of the C.P.C. is applicable in rent proceedings under the Rent Act. The august Supreme Court of Pakistan in this regard has already held in Muhammad Tariq Khan v. Khawaja Muhammad Jawad Asami and others (2007 SCMR 818) that the Rent Tribunal should evolve its own procedure for disposal of ejectment proceedings and follow the enabling provisions of the C.P.C. and the principles contained therein. It has also held that equitable principles of the C.P.C. can be applied, however the provisions of the C.P.C. themselves were not applicable. Reliance is placed on Saeed Pervaiz v. Syed Masood Hassan (2008 SCMR 568).

5. In the instant case, an application under Section 12(2) C.P.C. was filed against an ex-parte judgment dated 11.4.2016. In this regard, it is noted that Section 21 of the Rent Act provides for appearance of parties and consequences of non-appearance. In terms of Section 21(8) of the Rent Act, if an application has been dismissed in default of the appearance of an applicant and an application for restoration of the same is made within thirty days of the dismissal order, the Rent Tribunal may restore the application on such terms as it may deem appropriate. The Rent Act, therefore specifically provides for the mode and manner in which a dismissal in default of appearance can be restored, that too within a period of thirty days. In this case, the eviction petition under Section 15 of the Rent Act was filed on 25.2.2016. The order sheet shows that ex-parte proceedings were initiated vide order dated 22.3.2016 and the case was fixed for ex-parte evidence on 26.3.2016. In terms of order dated 26.3.2016 ex-parte evidence was recorded and the case was fixed on 30.3.2016 for arguments and on 30.3.2016 the case was adjourned to 11.4.2016. On 11.4.2016 no one appeared on behalf of the respondent, hence ex-parte judgment was passed by Respondent No.1. The ex-parte judgment dated 11.4.2016 finds that the respondent was summoned by using different modes of service including publication in the newspaper, but he did not appear. Hence the judgment and decree dated 11.4.2016 was passed. The Respondents moved an application under Section 12(2) C.P.C. on 11.2.2017 for setting aside ex-parte judgment dated 11.4.2016. The court considered the application and allowed it primarily in the interest of justice.

6. For ease of reference Section 12(2) of the C.P.C. is reproduced:
Where a person challenges the validity of a judgment, decree or order on the plea of fraud, mis-representation or want of jurisdiction, he shall seek his remedy by making an application to the Court which passed the final judgment, decree or order and not by a separate suit.
In my opinion, this section is not applicable on account of the bar contained in Section 34 of the Rent Act. It is further noted that in terms of the contents of the application, no case of fraud or misrepresentation was made out rather a simple prayer for restoration on account of non-appearance was made out before the court. Notwithstanding the same, if an application was made under Section 12(2) of the C.P.C., it could have been treated as an application under Section 21(8) of the Rent Act, which means it had to be filed within thirty days of the dismissal order dated 11.4.2016. Therefore not only was the application under Section 12(2) C.P.C. barred under the law in terms of Section 34 of the Rent Act but also barred by time under Section 21(8) of the Rent Act.

7. In this regard, Section 29(2) of the Limitation Act is relevant and reproduced under:
Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the First Schedule, the provisions of section 3 shall apply, as if such period were prescribed therefor in that Schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law:

(a) the provisions contained in section 4, sections 9 to 18 and section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law; and
(b) the remaining provisions of this Act shall not apply.
On the basis of the aforementioned Section, it is clear that the ability of a court to condone the delay has been excluded under special or local laws and is authorized specifically where the law of limitation has been made applicable in the said statute. In cases where the law of limitation has not been made applicable under the special law, then the court cannot condone the delay and the court has to ensure that the application is made within the specified period given in the statute. Reliance is placed on Allah Dino v. Muhammad Shah and others (2001 SCMR 286) wherein it has been held that where the law under which proceedings had been initiated itself prescribed a period of limitation, then the benefit of section 5 of the Limitation Act, 1908 could not be availed unless the same had been made applicable as per section 29(2) of the Act. The operation of section 5 of the Limitation Act is expressly excluded by section 29(2) of the Limitation Act. Therefore the application under Section 12(2) C.P.C. was not maintainable and the Special Judge (Rent), Lahore did not have jurisdiction to condone the delay of 10 months.

8. Under the circumstances, the instant Petition is allowed and impugned order dated 11.3.2019 passed by Respondent No.1 is set aside.

KMZ/S-9/L Petition allowed.

P L D 2020 Lahore 367
Before Ayesha A. Malik, J
SUI NORTHERN GAS PIPELINES LIMITED---Petitioner
Versus
OIL AND GAS REGULATORY AUTHORITY---Respondent
Writ Petition No.40897 of 2019, heard on 3rd February, 2020.

Oil and Gas Regulatory Authority Ordinance (XVII of 2002)---

----Ss. 6, 12(2) & Preamble---Regulatory powers of Oil and Gas Regulatory Authority (OGRA)---Supply of gas to domestic consumers---Pressure Factor---Presumptive billing---Scope---Petitioner Sui Northern Gas Pipelines Ltd. ("SNGPL) impugned decisions of Oil and Gas Regulatory Authority (OGRA) whereby it was directed to refund amounts charged to demestic consumers under head of "Pressure Factor"---Contention of SNGPL, inter alia, was that Gas Meters installed in consumers' premises did not meansure Pressure Factor, and they were often tampered with, hence Pressure Factor was charged to prevent misappropriation of gas---Validity---SNGPL had not physically verified each and evey domestic consumer to conclude that gas meters had been tampered with, therefore, charging of Pressure Factor across the board was a presumptive exercise which was rejected by OGRA as not being sufficient reasons to charge said Pressure Factor---SNGPL's charging of all domestic consumers was, therefore, rightly rejected by the regulator OGRA as not being in compliance with the contractual understanding between the parties---In terms of the Preamble of the Oil and Gas Regultory Authority Ordinance, 2002, OGRA was mandated to protect public interest while respecting individual rights and in the present matter, OGRA had repeatedly required petitioner SNGPL to honour the terms of its contracts with domestic consumers and to bill ony those who have tampered with gas installations to obtain higher Pressure Factor---No reasons existed for High Court to interfere in the impugned directions of OGRA---Constitutional petition was dismissed, in circumstances.
Uzair Karamat Bhandari, Arsalan Saleem Chaudhary and Qasim Ali, with Faisal Iqbal, CFO and Ahmed Arsalan, Chief Law Officer for Petitioner.
Samia Khalid and Ambreen Moeen, DAG for Respondent
Date of hearing: 3rd February, 2020.

JUDGMENT

AYESHA A. MALIK, J.---This Petition has been filed under Section 12(2) of the Oil and Gas Regulatory Authority Ordinance, 2002 ("Ordinance 2002") read with Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution") whereby the Petitioner, Sui Northern Gas Pipelines Limited ("SNGPL") has challenged decisions dated 15.01.2019, 27.02.2019 and 31.05.2019 (the Impugned Decisions) passed by the Respondent, Oil and Gas Regulatory Authority ("OGRA").

2. The basic grievance of the Petitioner is that OGRA has wrongfully decided that the Petitioner cannot recover Pressure Factor from domestic consumers. Further that the Petitioner is entitled to recover Pressure Factor from domestic consumers who are using gas in excess of 8 inches of water column pressure. The consumers are required to compensate SNGPL for the actual delivery of pressure availed by them. Learned counsel argued that the relationship between domestic consumers and SNGPL is governed by the Standard Domestic Gas Supply Contract ("Gas Contract") whose terms are approved and notified by OGRA after obtaining feedback from all stakeholders. Clause 11 of the Gas Contract clearly provides that natural gas shall be supplied at a pressure not exceeding 8 inches of water column above atmospheric pressure. The basic case of the Petitioner is that gas meters installed for domestic consumers only measure the volume of gas flowing through it and there is no inbuilt system to measure any changes in pressure. Consequently, if any domestic consumer consumes gas at a higher pressure than that allocated to it by the Petitioner, it will result in incorrect billing on account of misappropriation of gas, as the consumer does not pay for the quantity of gas it has actually consumed. To deal with this problem, the Petitioner executed a policy dated 30.10.2008 ("Pressure Factor Policy") regarding application of Pressure Factor to domestic consumers. The objective of the Pressure Factor Policy was to enable the Petitioner to rectify measurement errors so as to ensure that a consumer is billed for correct quantity of gas consumed. In terms of the Pressure Factor Policy, if a consumer is found using gas in excess of 8 inches water column pressure, then the Pressure Factor corresponding to the actual delivered pressure should be applied. Essentially the Pressure Factor Policy allows the Petitioner to ensure that any consumer receiving gas beyond the prescribed Pressure Factor will be liable to pay for the excess gas that it has consumed.

3. Learned counsel for SNGPL argued that the relationship between the domestic consumer and the Petitioner is covered by the Gas Contract the terms of which are approved and notified by OGRA. As per terms of the Gas Contract, the domestic consumer is to be supplied gas at a pressure not exceeding 8 inches of water column above atmospheric pressure. The volume of gas is recorded in cubic feet or cubic meters on the meter, which is converted to energy units i.e. million british thermal units (MMBTU) based on the average BTU per cubic foot (at absolute pressure of 14.65 pounds per square inch and a temperature of 60 degrees Fahrenheit) recorded on the calorimeters and/or gas chromatographs for the particular city/town, village or locality where the consumer is located. However, where consumer is found tampering with the meter, regulator, service pipe or other installations and has obtained gas at a higher pressure, such consumer is liable to pay the Petitioner gas charges which commensurate with the gas consumed. Learned counsel argued that in terms of Clause 11 read with Clause 19 of the Gas Contract, the Petitioner is entitled to recover charges for excess Pressure Factor in order to ensure and prevent gas misappropriation. Learned counsel further argued that although the Gas Contract stipulates that the Petitioner can terminate the contract and subsequently disconnect the supply of gas, yet the Petitioner did not resort to doing the same and instead has made efforts to recover amounts due to it. In this regard, he argued that

the Petitioner conducted an extensive exercise of physical verification at the premises of consumers who were misappropriating the gas and billed them accordingly. He explained that Pressure Factor is charged in the bill to consumers against whom proper physical verification has been carried out. Learned counsel further argued that in this context, several letters have been issued by the Petitioner to the Respondent explaining its position with reference to misappropriation of gas and the necessity to charge Pressure Factor to domestic consumers. Learned counsel explained that although over all there has been a decline in gas reserves, usage of gas has increased at the same time and there has been a shortfall in power generation. Hence the overall environment has created an increased usage of gas and gas generators. All these factors are necessary, important and relevant when looking into the matter of Pressure Factor especially for winter season. Learned counsel argued that the Impugned Decisions have failed to take these factors into consideration and has wrongfully, against the terms of the Gas Contract, denied the Petitioner amounts due for enhanced consumption of gas by unlawfully increasing Pressure Factor. Learned counsel clarified that Petitioner is under no obligation to supply gas at a pressure exceeding 8 inches water column. Where consumers through unauthorized means enhanced the pressure and have managed to extract more gas than they are entitled to, in such cases, the Petitioner is entitled to recover amounts for excess gas consumed. Therefore, the real question in issue before OGRA was the illegal means that domestic consumers have resorted to, in order to procure gas beyond what they are entitled to. Learned counsel also relied upon the Natural Gas Distribution Technical Standards Regulations, 2004 ("2004 Regulations") which is contrary to the terms of the Gas Contract. Hence the learned counsel argued that the Regulations will prevail over the Gas Contract and the higher limits prescribed by the Regulations can apply in this regard. Furthermore learned counsel argued that Clause 19 of the Contract has been totally ignored; the Petitioner's entitlement to recover charges for actual gas consumed by applying a proper Pressure Factor has also been ignored; reliance on Clause 11 of the Contract is misconceived and the decision of OGRA to refund all amounts collected under the head of Pressure Factor to consumers is totally based on a direction issued by the Federal Government and is not an independent reasoned direction of OGRA. Consequently, he argued that the Respondent has not discharged its functions in accordance with law.

4. On behalf of Respondent, report and parawise comments have been filed. Learned counsel argued that the matter in issue is with reference to the application of Pressure Factor across the board to all domestic consumers without carrying out a detailed physical verification of each and every consumer. She argued that the Respondent has relied upon Clause 19 of the Contract which provides that if a consumer tampers with a meter, regulator, service pipe or other installations to secure more supply than is recorded on the meter or to obtain gas at a higher pressure than maintained by Petitioner, that consumer is liable to pay gas charges commensurating with the consumption of gas as ascertained by the Petitioner for the relevant period in accordance with company's policy on theft of gas. She argued that in terms of this Clause, the Petitioner has to physically verify that a particular

consumer has tampered with the gas installations and thereby consumed more gas or obtained gas at a higher pressure than that it is entitled to. States that in these cases, the Petitioner did not carry out any physical verification, rather it applied Pressure Factor to domestic consumers on the presumption that each and every domestic consumer has wrongfully obtained gas at a higher pressure than that it is entitled to. She argued that this fact is admitted in the correspondence that the Petitioner has made with the Respondent. States that matter was duly considered through the Impugned Decisions dated 15.01.2019 whereby the Respondent directed the Petitioner to re-examine the application of correct Pressure Factor in the domestic consumers' gas bills and make any adjustment on this account to ensure that consumers who have tampered with gas installations are held liable for the same and not otherwise. The matter was again considered through the Impugned Decision dated 27.02.2019 whereby the Respondent once again directed the Petitioner to make reversal/adjustment to the affected consumers due to application of Pressure Factor above 8 inches of water column across the board for the period from July, 2018 to February, 2019. Since the adjustment claims were not found to be based on any physical verification, therefore, the Respondent directed the Petitioner to reverse all Pressure Factor adjustments claimed in the bills and only demand the same where proper physical verification has been made. And finally, the matter was again considered in the Impugned Decision dated 31.05.2019 at great length wherein the Respondent observed that the Petitioner is neither complying with the directions of OGRA nor with the directions of Government of Pakistan with respect to refund of amounts that have been charged excessively by the Petitioner under the head of Pressure Factor. Learned counsel argued that in this regard, the Petitioner has itself formulated the Policy, yet they are unable to provide all the verification documents on the basis of which they have billed the domestic consumers for Pressure Factor. She stated that the Respondent has repeatedly been asked for the documents pertaining to physical verification but the same has not been provided. Hence, she stated that Impugned Decisions are in accordance with law and do not call for any interference by this Court.

5. Heard. Record perused. The Petitioner is aggrieved by the Impugned Decisions of OGRA on the basis of which it has been directed to refund all amounts charged to the domestic consumers in excess, under the head of Pressure Factor since July, 2018 to February, 2019. The basic contention of the Petitioner is that OGRA failed to take into consideration the fact that on account of an increased demand for gas, consumers have resorted to illegal means to enhance supply of gas through manipulation of the Pressure Factor for the purposes of increasing supply of gas. In this context, the gas meters installed by Petitioner do not measure Pressure Factor rather only measure volume of gas consumed. Hence, it is difficult for the Petitioner to prevent misappropriation of gas by domestic consumers. The entire controversy, as has been argued on behalf of Petitioner is based on the Gas Contract between the Petitioner and domestic consumers. The relevant Clauses of the Contract as relied upon by both the parties are reproduced hereunder:-

Clause 11: Measurement Standard: Natural gas shall be supplied at a pressure not exceeding 8 inches of water column above atmospheric pressure. The volume of gas

shall be recorded in cubic feet or cubic meters on the meter, which shall be converted to energy units i.e. Million British Thermal Units (MMBTU) based on the average BTU per cubic foot (at absolute pressure of 14.65 pounds per square inch and a temperature of 60 degrees Fahrenheit) recorded on the calorimeters and/or gas chromatographs for the particular city/town, village or locality where the consumer is located.

Clause 18: Contract Termination on violation of terms of the Contract:

(I) This Contract shall be subject to cancellation by the Company at any time for any of the following causes:

(i) Neglect or default of the Consumer to pay the bills rendered by the Company for any month's supply of gas or other dues payable by the Consumer within the period specified in Clause 12 hereof.

(ii) Any action by OGRA, Municipal Authorities, Improvement Trust, Local Bodies or any Government authorities or any legal proceeding against the Company by any party interfering with the Company's right to supply gas or collect dues payable to the Company hereunder.

(iii) Any action by the Consumer to secure gas through his meter for purposes other than that mentioned hereinabove or for another party without written consent of the Company.

(iv) Any action by the Consumer tending to secure more gas than the meter registers or to secure gas through the said meter at a higher pressure than that at which the regulators are set by the Company or any interference by the Consumer with the meters or regulators tending to prevent the same from properly operating and correctly registering.

(v) Violation of or default in compliance with any of the terms and conditions of this contract.

(vi) Any major alteration, addition, extension to the existing gas installation carried out by the Consumer without obtaining prior approval of the Company in writing.

(II) In case of termination of this Contract for any cause whatsoever, all claims for gas supplied and or services rendered by the Company upto the date of disconnection of gas supply shall become forthwith due and payable without notice from the Company and the Consumer shall pay the same on demand.

(III) This Contract shall stand cancelled if the person, premises and/or the purpose for which the gas is supplied under this Contract, have been transferred or assigned in favour of any other person, body corporate or firm, with effect from the date of such transfer or assignment. The Company shall have the right to discontinue supply and to remove any or all of its property from the premises unless a fresh Contract is signed by the new owner/occupier of the premises or property in question. On the transfer/assignment of the premises the security deposit may be transferred by the Consumer and thereafter the same will be held by the Company, as security deposit in favour of the new occupant, and execution of a notice to this effect shall be sufficient proof of such transfer, and the Consumer shall cease to have any right of action against the Company in respect of such security deposit.

Clause 19: Tampering of Gas Installations: If meter, regulator service pipe or other installations at the Consumers premises are found to have been tampered in any way in order to secure more supply for the Consumer than is recorded on the meter or to

obtain gas at a higher pressure than maintained by the Company, the Consumer shall be liable to pay to the Company gas charges commensurate with the Consumer's consumption of gas ascertained by the Company for this period in accordance with company's policy on theft of gas, duly approved by OGRA.

6. The argument of the Petitioner is that Clause 11 of the Contract does not take into consideration the illegal modes adopted by domestic consumers to extract higher pressure of gas, beyond what it is entitled to. Consequently where a consumer is found to be tampering with the Pressure Factor, the Petitioner can either terminate the Gas Contract under Clause 18(iv) and thereby disconnect the supply of gas or else it can be compensated, by charging the consumer for the excess amounts of gas consumed under Clause 19. On the basis of the record, it appears that this issue has been highlighted by the Petitioner several times before OGRA and as far back as 30.10.2008, a policy regarding application of Pressure Factor to domestic consumers was made in terms of which if a consumer is found to be using gas in excess of 8 inches of water column, consumer's signatures may be obtained by a responsible Engineer/Supervisor on the inspection report and any amounts in excess of the entitled Pressure Factor would be charged with effect from the date of detection. As per the Pressure Factor Policy, no recovery can be made prior to the date of inspection. This Policy itself stipulates that there has to be a physical verification by a responsible Engineer/Supervisor who has to confirm that the consumer has been tampering with the gas installations for procuring higher pressure of gas. The bills appended with the instant Petition show that all domestic consumers have been billed for Pressure Factor. This fact is not denied by the Petitioner. The dispute between SNGPL and OGRA is whether the Petitioner can charge for Pressure Factor across the board, to all domestic consumers and whether physical verification of all consumers who were billed for Pressure Factor was carried out. The Petitioner's contention is that it has carried out physical verification of all consumers and has billed them for Pressure Factor. This statement of the Petitioner is negated by its own correspondence appended with this Petition, on the basis of which Petitioner has repeatedly stated to OGRA that it has charged Pressure Factor to domestic consumers taking a lenient view against termination of the Gas Contract. In the correspondence through letters No. RA-Pressure Factor-001-19 dated 25.01.2019, RA-Pressure Factor-002-19 dated 04.02.2019, RA-Pressure Factor-003-19 dated 15.02.2019 and RA-Pressure Factor-004-19 dated 25.02.2019, the Petitioner has stated as follows:-

i) Continuous surveillance of all domestic consumers on monthly (as in case of industrial consumers)/quarterly (as in case of commercial consumers)/annual basis is not possible with available resources and may not be a feasible economical option for the Petitioner.

ii) Petitioner has billed all the domestic consumers across the board under the head of Pressure Factor and has been advertising Pressure Factor application to domestic consumers in print and electronic media.

iii) On the basis of available resources, only one million domestic consumers can be inspected annually which will also take a considerable period of time and even if the Pressure Factor is charged to those consumers who are tampering with the gas

installations, Petitioner apprehends that those consumers will again resort to the illegal pressure enhancement to meet their gas load requirement.

7. On the basis of aforesaid, it is evident that the Petitioner has not physically verified each and every domestic consumer to conclude that they have tampered with the gas installations and manipulated the Pressure Factor. Consequently, charging of Pressure Factor to every gas consumer is a presumptive exercise carried out by Petitioner which has been repeatedly considered by OGRA and rejected on account of there not being sufficient evidence to support its claim to charge Pressure Factor to all the domestic consumers. The record shows that OGRA through its letter No. OGRA 9-(432)/2016 dated 02.01.2019 required the Petitioner to provide proper evidence where it applies Pressure Factor in terms of provisions of Clause 11 of the Contract. This letter clearly provides that incorrect application of Pressure Factor is resulting in escalated gas bills for the domestic consumers. Hence specific evidence of tampering with the Pressure Factor was required to justify charging for Pressure Factor. Again through letter No. OGRA 9-(432)/2016 dated 11.02.2019, OGRA asked the Petitioner to provide data with respect to the additional volume being charged for the period July, 2018 to December, 2018. Although the Petitioner provided some data to OGRA vide letter No. RA-Pressure Factor-003-19 dated 15.02.2019 this data was in the form of Pressure Factor applicable in various different regions where its consumer base is available. The said letter contains the Petitioner's explanation that continuous surveillance of about 6.5 million consumers is practically impossible and monitoring of each and every domestic consumer for Pressure Factor is economically not viable. Hence region-wise data was provided which OGRA rejected and asked for specific details of the consumers who were liable to pay for the illegal modes applied for obtaining higher pressure than what they were entitled to under the Gas Contract. However, the Petitioner was unable to provide special data.

8. Therefore in terms of the aforesaid correspondence, it is clear that the Petitioner's contention that physical verification of each and every consumer with reference to the Pressure Factor was carried out is incorrect. It is also clear on the basis of the Petitioner's own admission that it has applied Pressure Factor across the board on all the domestic consumers which includes those consumers who have not manipulated the Pressure Factor nor caused any loss to the Petitioner. This practice was rightly rejected by OGRA through the Impugned Decisions on the ground that there cannot be a presumptive calculation with respect to Pressure Factor. If at all, a domestic consumer is made liable to pay for Pressure Factor, it has to be on the basis of physical verification and an inspection report which finds that the specific consumer has tampered with the gas installations and enhanced the Pressure Factor. This is as per the terms of the Gas Contract where, if the Petitioner is of the opinion that a domestic consumer has violated any provision of the Gas Contract, then liability can be imposed only upon a consumer after a finding of fact that the said consumer has in fact tampered with the gas installations.

9. Although learned counsel for the Petitioner has at length tried to explain all the reasons available to the Petitioner on the basis of which it has justified its position to charge Pressure Factor to all domestic consumers, the regulator being OGRA has considered the stated factors and concluded that the Petitioner cannot make presumptive charges to all domestic consumers, without verification as to whether or not any tampering with the gas installations has been made. The Impugned Decisions also show that the Petitioner was directed vide decision dated 15.01.2019 to re-examine the application of correct Pressure Factor in the domestic consumers' bills and make any adjustments on this account where necessary. The Petitioner did not comply with the orders and again vide the impugned decision dated 27.02.2019, the matter was considered and the Petitioner was once again directed to verify the imposition of Pressure Factor in the bills of all domestic consumers and to refund/adjust all the amounts to those consumers who were not liable to pay Pressure Factor. The Petitioner once again disputed this decision by issuing letters of explanation and by way of making a presentation before OGRA and filing a Review of the Estimated Revenue Requirement (RERR) for the Financial Year 2018-2019. However once again OGRA concluded that Petitioner cannot charge Pressure Factor above 8 inches of water column which is its contractual obligation and any consumer who is receiving a higher pressure, firstly has to be made liable for receiving a higher pressure in terms of Pressure Factor Policy and secondly there has to be a physical verification for the same on the basis of which there will be a finding of fact that such domestic consumer has tampered with the gas installations and has consumed gas at a higher pressure than that it was entitled to. Finally the consumer can be billed as per excessive consumption based on proper verification. So far as management issues, economic considerations and resources availability is concerned, in the decision dated 31.05.2019, the Petitioner has been advised by OGRA to take necessary measures for the resolution of these issues and consider revising its contract to cater for such consumers who are repeatedly tampering with the gas installations in order to prevent any further bottlenecks of its distribution network. The Petitioner has also been told that this is an operational issue for SNGPL, which it should rectify, but it cannot unnecessarily inflate the bills of all domestic consumers. Consequently, the Petitioner's contentions and justifications for charging all domestic consumers Pressure Factor were totally rejected for being not in compliance with the contractual understanding.

10. Even subsequent to decision dated 31.05.2019, the Petitioner has issued its comments on this determination and once again tried to justify the reasons and its inability for compliance of the orders of OGRA. In this regard, it is noted that the Petitioner has impugned three decisions of OGRA before this Court under Section 12(2) of the Ordinance 2002. The matter has been looked into at great length and no illegality or irregularity has been found in the impugned decisions of OGRA. Therefore, SNGPL does not have any option but to comply with the orders of OGRA as OGRA is the front line regulator of SNGPL and has given clear directions which require compliance. In terms of the preamble of the Ordinance 2002, OGRA is mandated to protect the public interest while respecting individual rights. In this case, OGRA has repeatedly required the Petitioner to honour the

terms of its contracts with domestic consumers and to bill only those consumers who have tampered with the gas installations to obtain higher Pressure Factor and not to make presumptive billing with reference to Pressure Factor to all the domestic consumers. On the face of it, the stance of the Petitioner that it is entitled to charge all domestic consumers with Pressure Factor on account of enhanced demand for gas and enhanced use of illegal modes to fulfill gas requirements does not justify charging all domestic consumers with Pressure Factor as those consumers who are not involved in any tampering with gas installations cannot be made liable to pay compensation for excessive use of gas as per the terms of the Gas Contract. Even otherwise, the Petitioner cannot devise its own reasons for billing all domestic consumers for an illegality which has not been established. As per the Petitioner's own Policy and terms of the Gas Contract the liability to pay for Pressure Factor is for those domestic consumers who have tampered with the gas installations and the Petitioner does not have any data to support its contention that all domestic consumers have undergone physical verification. Hence its charging of Pressure Factor is illegal.

11. In view of the aforesaid, no case for interference by this Court is made out. This Petition being meritless stands dismissed.

KMZ/S-8/L Petition dismissed.

2020 P L C (C.S.) 437
[Lahore High Court]
Before Ayesha A. Malik and Asim Hafeez, JJ
PROVINCE OF PUNJAB through SECRETARY FINANCE, LAHORE and others
Versus
KANWAL RASHID
I.C.A. No.50253 of 2019, heard on 27th January, 2020.
Per Ayesha A. Malik, J; Asim Hafeez, J agreeing

(a) Civil service---

----"Pension"---Meaning and concept of ---Pension was a retirement benefit, paid regularly based generally on length of service of a pensioner and was series of periodic money payments made to a person who retired from employment because of age, disability, or completion of an agreed span of service---Such payments generally continued for remainder of natural life of recipient or to a widow or any other survivor, as case may be---Grant of pension to public officers or public employees served public purpose, and was designed to induce competent persons to enter and remain in public service or employment, and to encourage retirement from public service of those who become incapacitated from performance of duties---Pension system is intended to promote efficient, continued and faithful service to the employer and economic security to the employees and their dependents, by an arrangement under which, by fulfillment of specified eligibility requirements, pension became property of individual as a matter of right upon completion of public service---Right to pension depended upon statutory provisions and existence of such right in particular instances was determinable primarily from terms of statute under which such right or privilege was granted---Right to a pension may be made to depend upon such conditions, as grantor may see fit to prescribe and it may be provided in a general through a pension act.
H.R.C. No.40927-S of 2012 PLD 2013 SC 829; Corpus Juris Secundum. Vol. 67 pages 763-764; American Jurisprudence, Vol. 40, pages 980 and 981; Ghulam Sadiq v. Government of Pakistan 2005 PLC (C.S.) 1114; Pakistan Telecommunication Employees Trust (PTET) v. Muhammad Arif 2015 SCMR 1472; Secretary, Government of Punjab, Finance Department v. M. Ismail Tayer 2015 PLC (C.S.) 296 and Federation of Pakistan v. I.A. Sharwani 2005 SCMR 292 rel.

(b) Punjab Civil Servants Act (VIII of 1974)---

----Ss.18 & 23---Punjab Civil Services Pension Rules, 1955, R. 4---Law Reforms Ordinance (XII of 1972) S. 3---"Pension" and "gratuity"---Entitlement of family to receive pension after death of civil servant---Unmarried daughter of deceased civil servant---Entitlement to receive concurrent pensions from both deceased parents who were civil servants---Scope---Question before High Court was whether respondent, who was unmarried daughter of two deceased civil servants, was

entitled to receive pension benefits of both her parents concurrently---Held, that pension was a right of civil servant by way of statute, which could not be taken away arbitrarily by Provincial Government and such right accrued in favour of retired civil servant due to length of their service and said right was then bestowed upon persons mentioned in Punjab Civil Services Pension Rules, 1955 in the event of their death---Contention that respondent was not entitled to two pensions was misconceived because each one parent of respondent had earned their pension in their own right, while working for Provincial Government and on their death, said right was now vested in respondent who was entitled to collect the pension subject to the terms provided in Punjab Civil Services Pension Rules, 1955---As per applicable notification, respondent being an unmarried daughter was entitled to receive pension of both her parents until her marriage or on acquiring regular source of income, whichever was earlier---Contention that where a child was to receive two pensions, one pension would be deemed to be regular income thereby denying such child pension from other parent was flawed as such pension could not be considered as an independent or regular source of income said child was earning in her own capacity--- Respondent was therefore entitled to receive both pensions---Intra-court appeal was dismissed, in circumstances.

The Government of NWFP through the Secretary to the Government of NWFP, Communication and Works Department, Peshawar v. Mohammad Said Khan and another PLD 1973 SC 514 rel.

Per Asim Hafeez, J, agreeing with Ayesha A. Malik, J, giving his own reasons.

(c) Punjab Civil Services Pension Rules, 1955---

----R.4.10---"Pension" and "gratuity"---Entitlement of family to receive pension after death of civil servant---Nature of family pensions---Unmarried female child of deceased civil servant---Interpretation of Rule 4.10 of the Punjab Civil Services Pension Rules, 1955---Expression "acquiring regular source of income, interpretation of----Scope---Question before High Court related to Family Pension as per Rule 4.10 of Punjab Civil Services Pension Rules, 1955, which provided no family pension was payable to unmarried female on "acquiring regular source of income"---Issue to be determined was whether where an unmarried female was entitled to receive pension of both her deceased parents, and did the receipt of one pension constitute "regular income" thereby disentitling said unmarried female from the second pension of the other parent---Held, that in expression "acquiring regular source of income", used in Rule 4.10 of Punjab Civil Services Pension Rules, 1955; preceding word "acquiring" essentially controlled meaning and effect of following expression "regular source of income" and thus significance of expression "acquiring" had to be underscored while interpreting said condition---Right of parent to receive pension was an "acquired right", achieved in lieu and consideration of services performed, however, it was not an acquired right of an unmarried female daughter of such deceased civil servant as it simply devolved on her after death of parent(s), as cause and effect of relationship with deceased persons--- Construction of the expression "regular source of income", without the prefix, may simply indicate income coming from any source whatsoever, but when

read with expression "acquiring", it had a definite connotation and meant more than mere assumption of devolved rights or receiving pensions and indicated acquiring of income by dint of some conscious effort, personal ability, skills, special qualification, experience or as consequence of any action or behaviour---Mere receipt of pension(s) by such unmarried female, as continuing right of her parents, could not be construed or termed as "acquiring regular income".
Don Basco High School v. The Assistant Director, E.O.B.I and others PLD 1989 SC 128 rel.
Shan Gul, Additional Advocate-General, Punjab on behalf of the Appellant along with Abdul Rauf, Deputy Secretary (SR), Finance Department, Nasir Mahmood, Law Officer, Finance Department and Chaudhry Asif Javaid, Accounts Officer in the Office of Appellant No.2.
Rana Asad Ullah Khan for Respondent.
Date of hearing: 27th January, 2020.

JUDGMENT

AYESHA A. MALIK, J.----Through this ICA, the Appellant Province of Punjab has challenged judgment dated 15.2.2019 passed by the learned Single Judge in W.P. No.24111/2017.

2. The basic facts of the case are that the Respondent being the daughter of government servants, received pension of her father, Professor S.A Rashid who died on 22.10.1983 and the pension of her mother, Professor Mrs. Shamshad Rashid who died on 12.8.2009. The Respondent was receiving the pension until October 2016 when the pension of her father was not released in her favour. On inquiry, the Respondent was informed that she is only entitled to receive the pension of her mother in terms of the clarification issued by the Finance Department vide notification dated 11.9.2015. The Respondent challenged the matter by filing W.P. No.24111/2017 before this Court wherein the said petition, after hearing both parties was decided in favour of the Respondent vide judgment dated 15.2.2019 (impugned herein). The Court while relying on the meaning and purpose of pension concluded that Notification dated 11.9.2015 cannot be applied retrospectively on the Respondent whose parents died in the years 1983 and 2009. The Court also concluded that a vested right provided by the statute cannot be taken away unless the law specifically contemplates the same. The Court held that drawing of pension has been wrongly construed as being a regular source of income as the drawing of pension is a vested right of the government servant and cannot be taken away through a notification, that too with retrospective effect, irrespective of whether there are two pensions that are being drawn by a single child.

3. On behalf of the Appellant, Mr. Shan Gul, Additional Advocate General, Punjab argued that the impugned judgment has failed to take into consideration the Punjab Civil Services Pension Rules, 1963 ("Rules") and the fact that the Finance Department of the Government of Punjab is the rule making authority. Further that the Accountant General, Punjab is the custodian of government money and acts on

behalf of the Government of Punjab; that family pension cases are finalized on the basis of the Rules and the amendments made from time to time by the Finance Department after approval from the competent authority. That the Government of Punjab through Notification dated 11.9.2015 clarified that receiving one pension will be construed as a regular source of income which will automatically disentitle the Respondent from receiving the second pension at the same time. He argued that the question of retrospective application is without basis as the relevant notification was issued on 22.7.1989 whereas the clarification was issued on 11.9.2015.

4. On behalf of the Respondent, Rana Asad Ullah, Advocate argued that the impugned judgment has duly considered the law on the matter and the fact that the Respondent has a vested right to collect pension of both her parents who were government servants and who earned their right to pension, putting in their entire life into the service of Government of Punjab. Further argued that the Appellants through clarification have deprived the Respondent of a statutory right which is provided for in the Punjab Civil Servants Act, 1974 ("Act") and the Rules. He explained that the Finance Department has no authority under the law to deprive the Respondent of the pension of both her parents on the sole ground that one pension will be deemed to be a regular source of income.

5. We have heard the learned counsel for the parties at length and have also gone through the record. In terms of Section 18 of the Act, on retirement from service, a civil servant shall be entitled to receive such pension or gratuity as may be prescribed. In the event of death of a civil servant, whether before or after retirement, his family shall be entitled to receive such pension or gratuity or both, as may be prescribed. In terms of the Act, Section 23 provides that the Governor, or any person authorized in this behalf, may make such rules as appear to him to be necessary or expedient for carrying out the purposes of this Act. Any rules, orders or instructions in respect of any terms and conditions of service of civil servants duly made or issued by an authority competent to make them and in force immediately before the commencement of this Act shall, in so far as such rules, orders or instructions are not inconsistent with the provisions of this Act, be deemed to be rules made under this Act. Under the Rules, Rule 4.7(1) deals with family pension which reads as follows:
The term "family" for the purpose of payment of gratuity under this section shall include the following relatives of the Government:
(a) Wife or wives, in the case of a male Government servant;
(b) Husband in the case of a female Government servant;
(c) Children of the Government servant;
(d) Widow or widows and children of a deceased son of the Government servant.
Rule 4.10 of the Rules provides that family for the purpose of payment of family pension shall be as defined in sub-rule (1) of rule 4.7. It shall also include the Government Servant's relatives mentioned in clause (d) of Rule 4.8. Sub-Rule (3) of Rule 4.10 provides that no family pension shall be payable under this section:
(a) to an unmarried female member of a Government servant's family in the event of her marriage;

(b) to a widow female member of a Government servant's family in the event of her re-marriage;
(c) to the brother of a Government servant on his attaining the age of 21 years;
(d) to a person who is not member of a Government servant's family.
Subsequently Rule 4.10(3) was amended from time to time. The first amendment was made on 25.8.1983 which provided that with effect from 1st July 1983, the family pension will be admissible to the widows for life or until re-marriage of the widow. In the case of death of the widow, the family pension will be admissible to the sons, if any, until they attain the age of 21 years and the unmarried daughters, if any, until they are married or attain the age of 21 years, whichever is earlier. The next amendment was made on 22.7.1989 which provided that with effect from 1.7.1989 family pension in case of widow's death will be admissible to the dependent sons until they attain the age of 24 years or till they are gainfully employed, whichever is earlier and to unmarried daughters till their marriage, or their acquiring regular source of income whichever is earlier. Hence the bar of 21 years age was changed to having the ability to earn a regular source of income for a daughter and the age was enhanced from 21 years to 24 years for the son. Subsequently a clarification was issued by the Finance Department vide notification dated 11.9.2015 with reference to the Respondent's case which was impugned in the writ petition.

6. The basic issue before us is whether the Respondent is entitled to receive the pension of both her parents. In terms of the various dictas laid down by the august Supreme Court of Pakistan, pension is a retirement benefit, paid regularly based generally on the length of service of a pensioner. It is a series of periodic money payments made to a person who retires from employment because of age, disability, or the completion of an agreed span of service. The payments generally continues for the remainder of the natural life of the recipient or to a widow or any other survivor, as the case may be. Reliance is placed on H.R.C. No.40927-S of 2012 (PLD 2013 SC 829).

7. Extract from Corpus Juris Secundum. Vol. 67 pages 763-764 on the meaning of pension, states that the grant of pension to public officers or public employees serves the public purpose, and is designed to induce competent persons to enter and remain in the public service or employment, and to encourage retirement from public service of those who have become incapacitated from performing their duties. It is also stated that a pension system is intended to promote efficient, continued and faithful service to the employer and economic security to the employees and their dependents, by an arrangement under which, by fulfillment of specified eligibility requirements, pension becomes the property of the individual as a matter of right upon the completion of public service.

8. Extract from American Jurisprudence, Vol 40, pages 980 and 981 provides that the right to pension depends upon statutory provisions and the existence of such right in particular instances is determinable primarily from the terms of the statute under which the right or privilege is granted. The right to a pension may be made to

depend upon such conditions, as the grantor may see fit to prescribe. Thus, it has been held that it may be provided in general through a pension Act. In Ghulam Sadiq v. Government of Pakistan (2005 PLC (CS) 1114), a larger Bench of the Federal Shariat Court held that:

It may be noted here that the terms pension denotes to a "grant" after release from service and right of pension depends upon the statutory provisions regulating it, therefore, to our mind, the pensioners retired at different dates cannot claim increase in pension at a particular rate.

In Pakistan Telecommunication Employees Trust (PTET) v. Muhammad Arif (2015 SCMR 1472) and Secretary, Government of Punjab, Finance Department v. M. Ismail Tayer (2015 PLC (CS) 296), the august Supreme Court of Pakistan held that:

It was noted, and such has been done time and again by this Court that pension is a part of a civil servant's retirement benefit and is not bounty or an ex-gratia payment but a right acquired in consideration of his past service which was a vested right with legitimate expectation. The right to pension is conferred by law which could not be arbitrarily abridged or reduced except in accordance with law.

In Federation of Pakistan v. I.A. Sharwani (2005 SCMR 292), the august Supreme Court of Pakistan held that:

As a rule, the right of pension depends upon statutory provisions regulating it, therefore, the existence of such right or otherwise is determined primarily from the terms of the statute under which the right or privilege is granted. In general sense the term 'pension' denotes to a grant after release from service. It is designed to assist the petitioner in providing for his daily wants and it presupposes the continued life after retirement.

9. Therefore in view of the various different dictas of the august Supreme Court of Pakistan, we are of the opinion that pension is the right of the civil servant by way of statute, which cannot be taken away arbitrarily by the Government of Punjab. This right accrues in favour of the retired civil servant due to the length of their service and that right is then bestowed upon the persons mentioned in the Rules in the event of their death. Therefore we find that the basic contention of the Appellant that the Respondent is not entitled to two pensions is misconceived because each of the parents of the Respondent have earned their pension in their own right, while working for the Government of Punjab. Consequently on their death, that right is now vested in the Respondent who is entitled to collect the pension subject to the terms provided in the Rules. As per Notification dated 22.7.1989, the Respondent being an unmarried daughter is entitled to receive pension of both her parents until her marriage or on acquiring regular source of income, whichever is earlier.

10. The Appellants issued clarification dated 11.9.2015 in which Deputy Secretary (SR), Finance Department in the form of an interpretation of the Rules construed that where a child is to receive two pensions, pension of one parent will be deemed to be a regular source of income thereby denying the child/daughter the pension of the other parent. We are of the opinion that this argument is totally flawed. The Rules provide that an unmarried daughter will be denied pension on her acquiring regular source of income which means that she must acquire, of her own vocation

and skill, some form of income as a means of supporting herself. The pension that she receives of her parents cannot be considered as an independent or regular source of income that she is earning in her own capacity. We have considered this argument at great length and find that if this reason is accepted then the widow of a deceased government servant, who may still be in the service of Government of Punjab may also lose the right of pension as they are earning in their own right, yet are also entitled to the spouses pension. In this regard, family pension is admissible to the son until the age of 24 or until he is gainfully employed. In terms of this Rule, it is considered that the son should be able to earn for himself by the age of 24 whereas in the case of a daughter it is either when she gets married or when she is able to earn a regular source of income. In the case of the daughter the age bar has been removed, for a reason, giving the daughter more time to earn a regular form of income, in her own capacity or to get married. Hence we find that the clarification issued on 11.9.2015 is totally without basis as the pension of the parents of the Respondent cannot be construed as a regular source of income since pension is the right of the pensioner on account of length of their service which in turn creates an entitlement in favour of the family members. Furthermore we find that in terms of the Rules, if the daughter gets married or starts earning in her capacity, she is no longer entitled to pension. This reasoning in itself suggests that pension is a means of sustaining the daughter until a more permanent means of sustenance. Hence pension cannot be considered as a regular source of income for the daughter as its whole purpose is to give her time to find a regular source of income.

11. We also note that in terms of Section 23 of the Act, any change in the rules will be made by the Governor. The Deputy Secretary cannot by way of clarification notification dated 11.9.2015 take away a right which the Rules have clearly prescribed. The Rules are beneficial legislation which conditions the right of a family pension and the Appellant cannot take away that right under the garb of a clarification. There is nothing in the Rules that deprives the Respondent from receiving two pensions and in the absence of a clear prohibition under the Rules, family pension to a deceased government servant has to be construed liberally in favour of the child of the civil servant. In terms of the dicta laid down by the august Supreme Court of Pakistan in The Government of NWFP through the Secretary to the Government of NWFP, Communication and Works Department, Peshawar v. Mohammad Said Khan and another (PLD 1973 SC 514) pension can only be refused in the manner provided in the Rules. In this case, the Rules do not prohibit the grant of two pensions, hence it cannot be denied to the Respondent on the basis of a clarification notification. We are of the opinion that to take away this benefit, by construing the meaning of Rule 4.10 of the Rules in a narrow manner would defeat the purpose of the beneficial legislation, being the Rules and would unfairly deprive the Respondent of the benefit of Rule 4.10 of the Rules.

12. Under the circumstances, the instant ICA is dismissed and impugned judgment dated 15.2.2019 passed by the learned Single Judge in W.P. No.24111/2017 is maintained for the aforementioned reasons.

13. One of us (Asim Hafeez, J.) though agree with the findings and conclusion of the instant appeal, has given his observations through a separate note which is part of this judgment.
Sd/- Sd/-

(ASIM HAFEEZ) (AYESHA A.MALIK)

ASIM HAFEEZ, J.---I have had the privilege to go through the judgment delivered by esteemed colleague Ayesha A. Malik, J., and concur with the conclusion drawn therein. However, in view of the significance of the issues raised, I would like to give my own reasons through this additional note.

2. The appellant has questioned the alleged right of the respondent to concurrently claim two family pensions, allegedly devolved on her, being a single daughter, after death of her parents, both of whom had acquired right to receive pensions in the wake of terms and conditions of their respective service; an undisputed fact. The controversy surfaced upon automation of the pension record, whereby factum of withdrawal of two pensions was noticed and demand was raised for reimbursement of amounts already bagged. The challenge posed to alleged disentitlement of the respondent is founded on the condition contained in Department's Letter No. SR-III-4-111/89 dated 22.07.1989 (Letter of 22.07.1989) and subsequent clarification extended in terms of Department's clarification letter No. FDR-SR-III-4-471/2014 dated 11.09.2015 (Letter of 11.09.2015). It is expedient to reproduce condition in Letter of 22.07.1989, which reads as;
"The Governor of Punjab has been pleased to decide that w.e.f. 1.7.1989 family pension in case of widow's death will be admissible to the dependant sons until they attain the age of 24 years or till they are gainfully employed, whichever is earlier and to unmarried daughters till their marriage or their acquiring regular source of income, whichever is earlier"
[emphasis supplied]

3. The elemental question, for determination, is not regarding the authority to issue clarification or respond to the queries raised with respect to the notifications / letters regarding pension liberalization rules, but entitlement of the respondent to claim two pensions concurrently in the wake of clarification issued, whereby respondent's entitlement to claim dual pension was disputed on the premise that one of the two pensions constitute a regular source of income, and therefore second pension was not admissible in the circumstances. The clarification has merely interpreted the condition, i.e. "their acquiring regular source of income". It is this condition, which is subject matter of controversy. In terms of letter of 22.07.1989 an unmarried daughter is entitled to claim pension, a right devolved on her by operation / act of law, which entitlement continues till she marries or acquire a regular source of income, whichever is earlier. No specific restriction has been placed in the family pension liberalization rules regarding entitlement to two family pensions, to this extent there was no real controversy. The controversy surfaced once eligibility condition was construed to the disadvantage of the respondent, by way of issuance

of clarification. The interpretation / clarification of the expression "regular source of income" simplicitor without giving effect to prefix, "acquiring" is wholly misconceived and flawed. The condition has to be construed in the light of doctrine of 'Ejusdem Generis', which rule of construction is attracted and the general words have to be interpreted or read within the scope of the preceding specific words. Reference is made to an illustrative judgment in the case of Don Basco High School v. The Assistant Director, E.O.B.I and others (PLD 1989 Supreme Court 128). In the light of the ratio of the decision, it is clear that preceding word - acquiring - will essentially controls the meaning and effect of following expression - regular source of income. Hence, the significance of expression "acquiring" has to be underscored while interpreting the condition, otherwise exclusionary and calls for strict interpretation. Is pension an acquired right of the respondent? The right of each of the parent to receive pension was, certainly, an acquired right, achieved in lieu and consideration of the services performed. However, it is not an acquired right of the respondent, but simply devolved on her after death of parents, as cause and effect of relationship with the deceased persons. The respondent cannot claim pension as a proximate cause of some personal effort and / or services performed. She simply became eligible to receive pensions, of her parents, by way of operation of law, as prescribed under the liberalization of family pension rules. Construction of the expression "regular source of income", without the prefix, may simply indicate income coming from any source whatsoever, but when read with expression "acquiring", it has a definite connotation and means more than a mere assumption of devolved rights or receiving pensions. It indicates acquiring of income by dint of some conscious effort, personal ability, skills, special qualification, experience or as consequence of any action or behaviour. Mere receipt of pension(s) by respondent, as continuing right of her parents, cannot be construed or termed as acquiring regular income.

4. This case has another aspect. The condition(s) prescribed to disentitle a dependent son or unmarried daughter showed meaningful distinction, both in terms of intent and scope, especially when analysed in the context of present controversy. A dependent son is eligible to get receive pension till the age of 24 or unless gainfully employed, whichever is earlier. On the contrary, unless a regular income is acquired by a surviving daughter, her right to get pension(s) remains intact-unless she marries earlier. The intention is evident, provisioning of sustainable support and protection extended to an unmarried daughter is higher in degree. We are not asked to dilate upon this specific aspect. Let's hypothetically consider that if respondent is a surviving son and drawing two family pensions concurrently, can said claim be denied on similar grounds pleaded, to deny right of the respondent? The issue is that whether interpretation suggested through clarification can equally be applied to disentitle a dependant son? And whether the expression gainfully employed would also be construed to mean regular source of income of a dependent son, below the age of 24, while determining his entitlement to dual pensions? Apparently, no such restriction can be read or construed with reference to a dependent son. So, does it imply that clarification suggested was case specific only, applicable to an unmarried daughter only. This has no rational. The clarification suggested, if applied, would be

discriminatory and tantamount to arbitrary denial of right of an unmarried daughter, which was neither intended nor prescribed.

5. In these circumstances, I declare that clarification suggested is erroneous, contrary to the mandate of liberalization of family pension rules and inherently flawed. And in terms of conditions prescribed through Letter of 22.07.1989, until respondent, either marries or acquires regular source of income, whichever is earlier [other than receiving two family pensions concurrently], her entitlement cannot be denied. The notices issued for seeking return of the pension amounts received is declared void and no legal effect. I endorse the conclusion that appeal is without merit and same is, therefore, dismissed.

KMZ/P-3/L Appeal dismissed

2020 Y L R 1096
[Lahore]
Before Ayesha A. Malik and Jawad Hassan, JJ
ESSEM HOTELS LIMITED and others---Appellants
Versus
The BANK OF PUNJAB---Respondent
Execution First Appeal No.64797 of 2019, decided on 6th November, 2019.

Civil Procedure Code (V of 1908)---

----O. XXI, Rr. 66, 67 & 68---Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001), S. 15---Sale of mortgaged property---Proclamation of sale by public auction---Mode of making proclamation---Time of sale---Determination of reserve price---Scope---Appellants assailed order of executing court whereby it had approved the valuation determined by the valuator, which was appointed with the consent of parties---Contentions of appellants were that the impugned order was passed in violation of O. XXI, R. 68, C.P.C.; that the impugned schedule of auction was approved without affording opportunity of hearing to the appellants; that mandatory requirements of O.XXI, Rr. 66(2) & 67(2), C.P.C. were not fulfilled; that the description of property given by the Court Auctioneers in the schedule of auction was not correct and that the report of valuators was self-contradictory---Validity---Order relating to appointment of valuator was passed by providing proper opportunity to the parties therefore, it could not be said that the appellants were not provided any opportunity of hearing---Schedule of auction revealed that time and place of auction was mentioned under the heading "Schedule of Auction" and the requirement of O. XXI, R. 67(2), C.P.C. was fulfilled by giving publication of proclamation in the newspaper---Record revealed that the court had appointed several valuators for valuation of property from time to time, and the reports submitted by them reflected the same property---Valuation report and the schedule of auction approved by court mentioned the same property falling under the same khasra number---Impugned order was passed strictly in accordance with law---Appeal, being devoid of any merit, was dismissed in limine.
Muhammad Imran Malik for Appellants.
Hafeez Saeed Akhtar for Respondent.

ORDER

Through this Execution First Appeal (the "Appeal"), filed under Section 22 of Financial Institutions (Recovery of Finances) Ordinance, 2001 (the "Ordinance") the Appellants have assailed order dated 11.10.2019 passed by learned Executing Court in Ex.A.No.6-B of 2017.

2. Precise facts of the case are that a suit for recovery of Rs.285,658,427/- was instituted by the Respondent Bank against the Appellants which was decreed with consent of the parties on 12.09.2011 for a sum of Rs.278.102-million in the light of Settlement Agreement dated 07.05.2010 and out of aforesaid amount, the

Appellants paid certain amount to the Respondent Bank. However, on default of payment of remaining amount, the Respondent Bank filed an execution petition and sought auction of property measuring 37 Kanals 11 marlas situated at Hadbast Mouza Niaz Baig, Main Canal, Near Doctor Hospital, Lahore. The Appellants earlier sought rejection of valuation report dated 31.08.2018 by filing objection petition bearing No.C.M.No.02 of 2018 which was dismissed on 17.09.2019 with directions to Court Auctioneers to submit schedule of auction on 11.10.2019 and on the said date, the Court approved the schedule of auction. Hence this Appeal.

3. Learned counsel for the Appellants inter alia contended that the impugned order has been passed in clear violation of Order XXI, Rule 68 of C.P.C.; that the impugned schedule of action was approved without affording an opportunity to the Appellants; that mandatory requirement of Order XXI, Rule 66(2) and Rule 67(2) of C.P.C. have not been fulfilled while passing impugned order; that the description of property given by the Court Auctioneers in the schedule of auction is not correct; that the report of Messrs Indus Surveyors (Pvt.) Ltd. is self-contradictory; that the impugned order has been passed in slipshod manner as such same is the result of mis-reading and non-reading of evidence which is liable to be set-aside.

4. On the other hand, learned counsel for the Respondent vehemently controverted the arguments advanced by the learned counsel for the Appellants and prayed for dismissal of instant Appeal.

5. Admittedly, suit filed by the Respondent Bank against the Appellants was decreed with consent of the parties on 12.09.2011 as per terms and conditions mentioned in settlement agreement dated 07.05.2011 wherein the Respondent Bank admitted receiving of certain payment from the Appellants however, due to default in payment of remaining amount, execution petition was filed by the Respondent Bank on 01.02.2017 and Court appointed Court Auctioneers for filing draft of terms of the proclamation. Later on C.M. No.316-B of 2017 was submitted by the Court Auctioneers for undertaking fresh valuation of the properties and with consent of the parties, Messrs Harvester Pvt. Limited was appointed for doing the needful. Meanwhile, an objection petition bearing C.M.No.01 of 2017 was filed by the judgment debtors which too was dismissed on 07.05.2018. After dismissal of aforesaid application, the Court on 05.06.2018, with consent of the parties, appointed Messrs Indus Surveyors (Pvt.) Limited as third valuator who filed its valuation report on 31.10.2018. The Appellants being dissatisfied from aforesaid valuation report filed another objection petition bearing C.M. No.02 of 2018 which was also dismissed and the Court Auctioneers were directed to file schedule of action. The relevant portion of the order is as follows:--

"The appointment of Messrs Indus Surveyors (Pvt.) Ltd. was made with consent of the parties and therefore it does not be hope the applicant/judgment to raise any objections to the valuation determined by the valuators which is to the tune of Rs.805.82-million. Therefore, the valuation determined by the valuators appointed

by this Court is hereby approved. This shall be the reserve price for the purposes of proclamation to be drafted by the Court Auctioneers.
6. The Appellants have disputed the order dated 11.10.2019 on the ground that schedule of auction submitted by the Court Auctioneers on 10.10.2019 was approved without affording an opportunity to them. Perusal of record reveals that vide order dated 05.06.2018, the Court appointed Messrs Indus Surveyors (Pvt.) Limited with consent of parties for valuation of the property and report in this respect was submitted on 31.10.2018 and subsequently, an objection petition filed by the Appellants on aforesaid report was also dismissed vide order dated 17.09.2019 with the observation, mentioned supra; meaning thereby schedule of auction submitted by the Court Auctioneers on 10.10.2019 was approved pursuant to valuation report conducted by Messrs Indus Surveyors. So the orders relating to appointment of Messrs Indus Surveyors were passed by providing proper opportunity to the parties therefore, it cannot be said that the Appellants had not been provided any opportunity of hearing.

7. It is the argument of learned counsel for the Appellants that mandatory requirements of Order XXI, Rule 66(2) and Rule 67(2), C.P.C. have not been fulfilled. Perusal of schedule of auction reveals that time and place of auction has been mentioned under heading "Schedule of Auction" as "Auction at 2:00 PM on 09.11.2019 at site" and requirement of Rule 67(2), C.P.C. has been fulfilled by giving publication of proclamation in the News Papers dated 24.10.2019 under heading "Schedule of Auction". So this argument of learned counsel is not tenable.

8. Another stance taken by learned counsel that correct address of the property has not been given by the Court Auctioneers in their schedule of auction. Perusal of record attached with this Appeal reveals that the Court appointed certain valuators, for valuation of the property from time to time, and reports submitted by them reflect same property measuring 37-kanals and 11-marlas falling under Khasra No.13176, Near Doctor Hospital, Mauza Niaz Baig, Lahore. Furthermore, valuation report submitted by Messrs Indus Surveyors (Pvt.) Ltd on 31.10.2018 and schedule of auction approved by the Court also mentions same property falling under the same khasra. Therefore, this argument is also not confidence inspiring one.

9. As far as the argument of learned counsel with regard to variation in value of property is concerned, it is pertinent to mention here that the Court, in order to resolve the issue, appointed certain valuators for determination of value of the property during different span of time who determined the value of property at the time of their respective inspections and finally Messrs Indus Surveyors (Pvt.) Ltd., appointed with consent of the parties, determined the value to the tune of Rs.805.82-million, as reflected in order dated 17.09.2019 and that the Court Auctioneers submitted schedule of auction on 10.10.2019 also depicts the same amount under the heading of "Reserve Price". So this argument is also not reasonable. It is noted that the Appellants had objected to earlier valuation report by filing objection petition which was dismissed and now they cannot take any other objection/point to set-aside the approved schedule of auction submitted by the Court

Auctioneers in the light valuation report submitted by Messrs Indus Surveyors (Pvt.) Ltd.

10. In view of above, we do not see any illegality or perversity in the impugned order which has been passed strictly in accordance with law, as such does not warrant any interference by us. Consequently, the Appeal in hand, being devoid of any merit, is hereby dismissed in limine.

SA/E-7/L Appeal dismissed.

2020 P L C (C.S.) 645
[Lahore High Court]
Before Ayesha A. Malik, J
MAKHDOOM NAWAZ and others
Versus
PAKISTAN ELECTRIC POWER COMPANY (PVT.) LIMITED and others
W.P. No. 67866 of 2019, heard on 4th February, 2020.

Constitution of Pakistan---

----Art. 199---Government posts in Electricity distribution companies (DISCOs)---Recruitment process --- Recruitment policy, change in---Weightage ratio for academic qualification, written test and interview---Increase in weightage given to interview and written test in changed policy---Admittedly, the petitioners applied for the various different posts offered by the DISCOs pursuant to the new changed policy---Recruitment process was under way and interview stage had not arrived, hence the challenge was premature---Interview marks did play a decisive role in the recruitment process, however at present stage there was nothing available on the record on the basis of which the petitioners could assert that the increased percentage allocated for interview in the changed policy was not structured, reasoned or objective---Grounds of challenge against the changed policy were based on apprehensions of the petitioners---Weightage ratio of written test was increased and made equal to that of academic qualification so as to broaden the base of applicants for the purposes of recruitment---As such it was a policy decision and there was no basis to challenge the policy such that it favoured graduates of a particular university---Petitioners did not have any data to show how they had been prejudiced at present stage given that the new changed policy had just been introduced and the recruitment process was still underway---High Court directed that the DISCOs should proceed with the recruitment process as the petitioners' entire case was based on apprehensions---Constitutional petitions were dismissed.
Barrister Haris Azmat, Barrister Maryam Hayat and Muhammad Faizan Azhar for Petitioners (in W.P. No.67866 of 2019).
Barrister Lamia Niazi for Petitioners (in W.P. No.69022 of 2019).
Ambreen Moeen, DAG for Respondent.
Muhammad Shahzad Shaukat and H.M. Zeeshan Khan for Respondent PEPCO along with Farrukh Aftab Khan, Director PEPCO.
Mehar Shahid Mehmood for LESCO along with Muhammad Yusaf Raza, Chief Law Officer, LESCO and Muhammad Yasin Badar, Legal Consultant, LESCO.
Muhammad Javaid for IESCO and PESSCO.
Ms. Erum Masood Chughtai for HESCO.
Date of hearing: 4th February, 2020.

JUDGMENT
AYESHA A. MALIK, J.----This common judgment decides upon the issues raised in W.P. No.67866/19 and W.P. No.69022/19 as both the Petitions raise common questions of law and facts.

2. Through these Petitions, the Petitioners have impugned the recrunment policy of the Respondents as prescribed by Respondent Pakistan Electric Power Company ("PEPCO") for the post of amongst others, Junior Engineers. The Petitioners are all Electrical Engineers, B.Sc. graduates of University of Engineering and Technology, Lahore. It is their case that the Respondents were guided by the recruitment policy of 28.7.2016 which essentially gave a ratio of 85:15 for academics and interview respectively. However, this policy was changed on 16-8-2019 where the ratio was changed to 40:40:20, such that 40% marks for academic qualification, 40% marks for a written test and 20% marks for the interview. The petitioners are collectively aggrieved by this change in policy as they believe that 20% marks for interview suggests arbitrariness, excessive delegation due to lack of structure. They state that 20% marks for the interview means that the Respondents are able to manipulate the recruitment process and hire candidates of their liking. They are also aggrieved by the distribution of marks between academic qualification and written test as they are all of the opinion that candidates with higher marks from better universities are not catered to since the overall ratio for academic qualification has been reduced to 40% from 85%.

3. Learned counsel for the Petitioners argued that unstructured discretion has always been questioned through judicial review by the Courts and the arbitrariness and colourful excise of authority has always been struck down by the constitutional Court. In this regard, reliance has been placed on Syed Muhammad Raza v. General Manager, WAPDA and others (1994 MLD 1647), Muhammad Tanveer v. Government of Pakistan and others (2012 PLC (C.S.) 807), Muhammad Asif Jan and others Chairman Selection through Chairman and others (2013 PLC (C.S.) 502) and Qazi Mustafa Kamal v. Federation of Pakistan through Secretary Establishment Division and others (PLD 2014 Islamabad 123). They also argued that change in recruitment policy during pending recruitment process is illegal. In this regard, reference was made to Respondents Nos.6, 8 and 10 ("DSICOs") where the recruitment process started in June, 2019 before the policy was announced on 16.8.2019.

4. Report and parawise comments have been filed by the Respondents. Learned counsel for the Respondent PEPCO and for other Discos argued that a policy was floated by PEPCO for the purposes of creating uniformity in the recruitment process among all the DISCOs. As per the policy a written test is required for which 40% marks have been allocated, 40% marks for academic qualification and 20% marks for the interview. Learned counsel stated that the process has just begun when the Petitioners challenged the same even though they participated in the recruitment process. Therefore at this stage no case of arbitrariness is made out as the recruitment process has not been finalized and the Petitioners' contention that it is not structured discretion is based on apprehensions and not on any data.

5. On behalf of the Federation Ms. Ambreen Moeen, DAG argued that the Petitioners have all participated in the recruitment process and they are challenging a policy decision calling it arbitrary and stating there is lack of structure whereas

there is nothing to support their contentions as the recruitment process has not been completed. She has placed reliance on an earlier decision of this Court dated 9.1.2010 passed in W.P. No.360/2020 titled Toqir Ajmal v. Chairman Pakistan Electric Power Company and others wherein the same policy was challenged and the petition was dismissed on the ground that PEPCO has provided the quantification and distribution of marks on the basis of academic qualification, written test and interview giving weightage to the three different cadres. Furthermore she argued that this is a policy decision and does not call for any interference as no illegality is made out. She argued that the Petitioners have participated in the recruitment process and at the same time have challenged the processed obtained an interim order from this Court on 14.11.2019 on the basis or which the entire recruitment process has been stopped.

6. Heard. Record perused.

7. The Petitioners have challenged the guidelines provided by PEPCO for recruitment to DISCOs for the purposes of creating uniformity in the recruitment Process for technical and non-technical posts. The Respondent DISCOs adopted this policy and proceeded to advertise on the basis thereof. Admittedly the Petitioners applied for the various different posts offered by the Respondents pursuant to the policy of 16.8.2019. However, the Petitioners subsequent to applying for the posts have challenged the policy on the ground that it lacks structure and that the policy was changed during the recruitment process, hence this policy cannot be made applicable to them. All the Petitioners are aggrieved by the weightage given to academic qualification, written test and interview. There is no cavil to the assertion that interview marks play a decisive role in the recruitment process, however at this stage there is nothing available on the record on the basis of which the Petitioners can assert that the 20% marks allocated for interview are not structured, reasoned or objective. The process of recruitment is underway and in fact has been stopped on account of an interim order passed by this Court at the behest of the Petitioners. The Respondents have stated that there is a structure, and reasoning objective prescribed for the interview, however that stage has not arrived hence it is premature to question it at this stage. They have placed reliance on letter dated 10.10.2019 issued by PEPCO which gives detailed breakdown for the 40% academic marks. Essentially the grounds of challenge against the policy are based on apprehensions of the Petitioners that they will not be duly considered and that the Respondents may exercise arbitrariness at the stage of the interview. Hence on this account no ground is made out.

8. With respect to marks given to academic qualification and written test, the Petitioners are that aggrieved greater weightage should be given to the academic qualification so that students with higher GPAs and from better universities have a stronger chance to be recruited. There is no justification in this ground whatsoever. The Respondents have allocated 40% marks for the academic qualification and 40% marks for the written test so as to broaden the base of applicants for the purposes of recruitment. As such it is a policy decision and there is no basis to challenge the

policy such that it favours UET graduates. There is no data available with the petitioners to show how they have been prejudiced at this stage given that the policy has just been introduced and the recruitment process is still underway. So far as Respondents Nos.6, 8 and 10 are concerned, they state that the meeting in which this decision was made was held on 15.7.2019 and the advertisements do not provide for any process that will be adopted. Moreover it mentions that a test will be taken and interview and states the given educational requirements. Hence the contention that the Petitioners are being misled by changing the policy is without basis. At this stage it is still premature as the process is still underway. The Respondents should proceed with the recruitment process as the Petitioners' entire case is based on apprehensions. There is nothing on the record to show why they have applied and with which DISCO, hence no case for interference is made out.

9. Under the circumstances and what has been discussed above, both the Petitions are dismissed.

MWA/M-69/L Petitions dismissed.

2020 P L C (C.S.) 697
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
Syed MUNTAZIR MEHDI BUKHARI
Versus
GOVERNMENT OF THE PUNJAB and others
Intra Court Appeal No.73514 of 2019, decided on 4th December, 2019.

Civil service---

----Contract employee---Master and servant, relationship of---Termination from service---Constitutional petition filed by the employee was dismissed by Single Judge of High Court---Contention of employee was that no opportunity of hearing had been provided to him before his termination from service---Validity---Petitioner who was appointed on contract basis had accepted the terms and conditions of his employment---Employee had been afforded an opportunity of hearing by the department---Relationship of master and servant existed in the matter of contract appointment and constitutional petition was not maintainable---No illegality or infirmity had been pointed out in the impugned order passed by the Single Judge---Intra-court appeal was dismissed in limine.
Muhammad Riaz v. Medical Superintendent, Service Hospital, Lahore and 2 others 2016 PLC (C.S.) 296; Jahanzaib Khan Niazi v. Government of Punjab through Secretary Irrigation, Lahore and 8 others 2016 PLC (C.S.) 1039; Aamir Junaid and 143 others v. Government of the Punjab through Chief Secretary and 5 others 2014 PLC (C.S.) 1 and Dr. Sitara Abdul Rehman v. Government of Punjab through Secretary Health, Lahore and 3 others 2012 PLC (C.S.) 1203 ref.
Lt. Col. Rtd. Aamir Rauf v. Federation of Pakistan through Secretary Ministery of Defence and 3 others 2011 PLC (C.S.) 654 and Nadeem Ahmed v. Pakistan State Oil Company Limited and another 2005 PLC (C.S.) 1447 rel.
Muhammad Ilyas Bhatti for Appellant.
Ms. Aliya Ejaz, Assistant Advocate-General, Punjab.

ORDER

Through this Intra Court Appeal filed under Section 3 of the Law Reforms Ordinance, 1972 (the "Ordinance"), the Appellant has challenged the validity of impugned order dated 14.11.2019 passed in Writ Petition No.68293 of 2019 by the learned Single Judge (the "Impugned Order") whereby the Constitutional petition filed by the Appellant was dismissed.

2. Learned counsel for the Appellant contended that the impugned order is against law and facts; that the impugned order is the result of mis-reading and non-reading of record; that the learned Single Judge has failed to appreciate the fact that the Respondents have dismissed the Appellant on the basis of bogus and fake report; that no opportunity of hearing was provided to the Appellant before his termination which offends Article 10-A of the Constitution as such the same is liable to be set

aside. He has relied on "Muhammad Riaz v. Medical Superintendent, Service Hospital, Lahore and 2 others" (2016 PLC (C.S.) 296), "Jahanzaib Khan Niazi v. Government of Punjab through Secretary Irrigation, Lahore and 8 others" (2016 PLC (C.S.) 1039), "Aamir Junaid and 143 others v. Government of the Punjab through Chief Secretary and 5 others" (2014 PLC (C.S.) 1) and "Dr. Sitara Abdul Rehman v. Government of Punjab through Secretary Health, Lahore and 3 others" (2012 PLC (C.S.) 1203).

3. Learned Law Officer vehemently contested the arguments advanced by the learned counsel for the Appellant and prayed for dismissal of the appeal on the ground that the Appellant was a contract employee whose contract was rightly terminated under Clause-18 of the Letter of Appointment as such there is no illegality or perversity in the impugned order.

4. We have heard the arguments of both the sides and have perused the record.

5. The main grievance of the Appellant is that he was terminated from job without adopting proper procedure and affording an opportunity of hearing. It evinces from record that the Appellant was appointed on purely contract basis in the Respondents/Department vide appointment letter dated 28.02.2012. The Appellant after accepting the terms and conditions of his contract employment submitted his joining report. Specific terms in the employment contract, containing certain terms and conditions, are inserted which explicitly reveal that initially this offer of appointment is only for a period of One Year however, period of contract was extended from time to time. Clause 18 of the Letter of Appointment reads as under:
"Your contract will be liable to be terminated on one month's notice or on deposit of one month pay in lieu thereof, on either side, without assigning any reason. Your contract will also be liable to be terminated without any notice on administrative ground or on account of poor performance/undesirable conduct or unauthorized/wilful absence from duty."

6. So far as stance of the Appellant regarding violation of Article 10-A of the Constitution is concerned, it is pertinent to mention here that order dated 22.06.2019 challenged in constitutional petition was passed pursuant to directions given in W.P.No.212480 of 2018 dated 16.05.2018. Perusal of order dated 22.06.2019 reveals that the Appellant was afforded an opportunity of hearings on 22.04.2019 and 13.06.2019 at 10:00 A.M. in the office of Deputy Commissioner/Chairman District Health Authority, Lahore hence; this stance of the Appellant is not tenable.

7. Learned counsel for the Appellant argued that the Appellant was terminated without issuing any show-cause notice or conducting regular inquiry. The learned Single Judge in paragraph No.2 of the impugned order observed as under:
"He was served with show-cause notice dated 22.08.2016 on the allegation that he remained absent from duty from 06.06.2016 to 12.08.2016. The Petitioner did not file any reply to the show-cause notice whereafter the District Health Officer through order dated 25.01.2017 terminated the contract of service of the Petitioner".

8. It is the argument of learned counsel that the Respondents have terminated the Appellant on the basis of a bogus and fake report. In this regard, learned Single Judge observed as follows:
"The record does not support the version of the Petitioner in as much as the attendance register does not show his presence from 06.06.2016 onward. Be that as it may, the Deputy Commissioner in the impugned order also stated that the Petitioner went abroad without seeking permission. When confronted, the learned counsel conceded that the Petitioner went abroad during the period in question for visiting the holy sites. It was stated that the Petitioner sought oral permission from his superior which was granted. Needless to state that the explanation furnished by learned counsel is without any merit. The Petitioner being a Government Servant was required to obtained ex-Pakistan leave. Be that as it may, this Court is satisfied that service contract of the Petitioner was rightly terminated by the Respondent".

9. During the course of arguments, learned counsel for the Appellant has drawn our attention towards The Punjab Regularization of Service Act, 2018 (the "Act") and case law, referred above. Needless to add that case of the Appellant does not fall within the ambit of Sections 2(c) and 4 of the Act. Section 2(c) clearly states that "contract employee" means an eligible person appointed on contract in a department immediately before the commencement of the Act but does not include a person appointed to a post in a project, programme, project management unit, project management office, time bound (one-time) development activity or as work-charged employee or an employee on daily wages". Offer of Appointment letter depicts that the Appellant was appointed on contract basis under Prevention and Control of Dengue Program. Whereas Section 4 prescribed procedure for regularization which clearly demonstrates that "the case of a contract employee appointed on the recommendations of the Commission shall be submitted to the appointing authority for regularization without reference to the Commission or the Scrutiny Committee".

10. It is an established principle that where employment is on contract, there is a relationship of master and servant and in such like cases the Constitutional petition under Article 199 of the Constitution is not maintainable. Reliance in this regard can be placed on "Lt. Col. Rtd. Aamir Rauf v. Federation of Pakistan through Secretary Ministry of Defence and 3 others" (2011 PLC (C.S.) 654) and "Nadeem Ahmed v. Pakistan State Oil Company Limited and another" (2005 PLC (C.S.) 1447).

11. In view of above, we see no illegality or legal infirmity in the impugned order which has been passed by the learned Single Judge in consonance with the spirit of law, as such does not warrant any interference by us. Consequently, the instant Appeal is devoid of any merit and is accordingly dismissed in limine.

ZC/M-199/L Appeal dismisse

2020 P L C (C.S.) Note 25
[Lahore High Court]
Before Ayesha A. Malik, J
MEHREEN RAHIM
Versus
PROVINCE OF PUNJAB through Secretary Health, Lahore and 3 others
W.P. No. 4328 of 2013, heard on 19th February, 2020.

Civil service---

----Ad-hoc appointment---Regularization of service---Petitioners filed representation for regularization of their Service but same was rejected---Validity---Petitioners were working in the hospital for more than twelve years with no promotion and said posts were of a permanent nature---Nurses and Audit Officers had been regularized pursuant to the order passed in the earlier constitutional petition---Government had regularized the services of Budget and Accounts Officers of the hospital---Petitioner being Assistant Audit/Accounts Officer of the said hospital was entitled to the same relief---Government had control over the hospital and had regularized the services of its employees---Petitioners had been discriminated as similarly placed employees had been regularized in different hospitals---Contract employees serving against permanent post could not be deprived of their right to be regularized---Other employees of the hospital had been regularized having same terms and conditions of their appointment and petitioners were also entitled to the same treatment---Authorities were directed to regularize the services of petitioners from the date of their appointments---Constitutional petition was allowed, in circumstances. [Paras. 7, 8, & 9 of the judgment]
Izhar Ahmed Khan and others v. Punjab Labour Appellate Tribunal, Lahore and others 1999 SCMR 2557 ref.
Ayaz Ahmed Memon v. Pakistan Railways, Ministry of Railway, Islamabad through Chairman and anothers 2011 PLC (C.S.) 281; Hakim Ali Ujjan and others v. Province of Sindh and others 2012 PLC (C.S.) 127 and Muhammad Faisal Khan and 48 others v. Secretary (Health), Government of Punjab, Lahore and another 2012 PLC (C.S.) 130 rel.
Naveed Ahmed Khawaja and Ms. Asifa Manzoor for Petitioners.
Akhtar Javed, Addl. A.G. with Dr. Amjad Deputy Medical Superintendent and Syed Khalid Shah, Litigation Assistant, Sir Ganga Ram Hospital, Lahore for Respondents.
Date of hearing: 19th February, 2020.

JUDGMENT

AYESHA A. MALIK, J.----This judgment decides upon the issue raised in the instant, petition as well as in connected Writ Petition No.4327/2013 whereby the Petitioners seek regularization of their service as Assistant Audit/Account Officer (BS-16) and Senior Auditor (BS-11).

2. The case of the Petitioner of Writ Petition No.4328/2013 is that she was appointed as Assistant Audit/Account Officer (BS-16) on contract basis for three years on 04.02.2008, which was extended from time to time. On 19.01.2010 and 15.05.2010 Respondent No.2 issued Notifications for regularization of contract employees in BS-16 and BS-17 and on the basis thereof 114 contract employees in BS-16 and BS-17 were regularized but the Petitioner has been deprived without assigning any reason and justification. Again Respondent No.2 issued Notifications dated 18.06.2010 and 01.06.2011 and on the basis of said Notifications 192 contract employees in BS-16 have been regularized but the Petitioner has not been regularized. Hence this Petition.

3. The case of Petitioner of Writ Petition No.4327/2013 is that he was appointed as Senior Auditor (BS-11) on contract basis for three years on 04.02.2008, which was extended from time to time. On 14.10.2009. Respondent No.1 issued Notification for regularization of all the contract employees in BS-1 to BS-15 and on the basis thereof, Respondent No.4 vide order dated 22.04.2010 regularized most of the employees of the hospital including the colleagues of the Petitioner who were appointed with the Petitioner on the same day and by the same committee but the Petitioner has not been regularized without assigning any reason and justification. The Petitioner being aggrieved by the act of Respondent No.4 filed Writ Petition No.12378/2011, which was disposed of vide order dated 06.06.2011 with the direction to respondent No.4 to hear the grievance of the Petitioner and pass appropriate orders in accordance with law. Ultimately, Respondent No. 4 vide order dated 12.11.2011 refused to regularize the services of the Petitioner. Hence this Petition.

4. Learned counsel argued that almost all the employees working in BS-16 and BS-17 in Finance Wing of Health and Medical institutions under the contract Policy, 2004 have been regularized but the Petitioners have been ignored by the Respondents. Learned counsel further argued that the employees who were appointed along with the Petitioners and recommended by the same Committee on the same date have been regularized by the Respondent from the date i.e. 14.10.2009 but the Petitioners have been refused the same benefit without any reasons, who are working since 2008, hence they are entitled to be regularized. While relying on the dicta laid down by the august Supreme Court of Pakistan in "Izhar Ahmed Khan and others v. Punjab Labour Appellate Tribunal, Lahore and others" (1999 SCMR 2557) learned counsel argued that if a work is of permanent nature then a person working as such post is required to be a regularized. Learned counsel argued that all the posts of the Respondent Hospital have been regularized but the petitioners have been deprived of their right. Therefore, this act is discriminatory. In this regard, learned counsel has placed reliance on the Notifications of regularization issued in (sic) our of Medical Technologist, Budget Officers, Budget Account Officers, Account Officers, Nurses and Audit Officer dated 9.01.2010, 15.05.2010, 18.06.2010 and 03.07.2019 of other hospitals and of Respondents Nos.3 and 4.

5. On behalf of Respondents Nos.1 and 2, it is argued that the post of the Petitioners is not a sanctioned post, hence the Petitioners cannot be regularized. It is also argued that the posts of the Petitioners were created by the Board of Management of Respondents Nos.3 and 4 in the year 1999, hence the Petitioners do not fall within the category of sanctioned post and are not eligible for regularization. Learned Law Officer further argued that the there is a distinction between permanent and regular appointments as those posts which are not sanctioned by the Government of the Punjab can attain permanent status by the institution itself as per their discretion. However, for the purposes of being a regular employee of the Government of the Punjab, the post has to be a sanctioned post.

6. Report and parawise comments have been filed by the Respondent Hospital wherein it is stated that the posts of the Petitioners were created by the Board of Management of Respondents Nos.3 and 4, that they are paid by the Board of Management and that the petitioners were aware of this fact that their seats have been adjusted by the Board of Management and that they are not entitled to regularization. During the course of arguments, it was clarified that the pay slips of the Petitioners clearly indicate that they are drawing their pay against the seats created by the Board of Management.

7. The basic issue before the Court is whether the Petitioners have a right to be a regularized. Admittedly, the Petitioners have been working with the Respondent Hospital since 2008 as Assistant Audit/Account Officer (BS-16) and Senior Auditor (BS-11) which means that they have been working for more than twelve years at the posts of Assistant Audit/Account Officer and Senior Auditor with no promotion and that the said posts are of a permanent nature. On the Court's query, learned Law Officer clarified that Nurses and Audit Officers have all been regularized pursuant to the order of this Court dated 16.07.2010 passed in W.P. No.7782/2010 against sanctioned posts.

8. In the judgment referred to by the learned Law Officer, a similar matter was considered with reference to the Respondent Hospital whereby the services of Nurses, Plumbers, Helpers and Sweepers were regularized as the posts were sanctioned by the Government of the Punjab through the Finance Department, hence it was directed that they be given the benefit of being a declared regularize under the prevailing policy at the time. So far as Mehreen Raheem, Petitioner in W.P. No.4328/2013 is concerned, the basic issue is that her post has not been regularized by the Government of the Punjab. As per the record available on the file, the Government of the Punjab itself regularized the services of Budget and Account Officers of the said hospital vide order dated 15.05.2010 and Audit Officer vide order dated 03.07.2019 therefore, the Petitioner Mehreen Raheem being the Assistant Audit/Account Officer of the said hospital is also entitled to the same relief as her case is at par with the above stated two employees, who have been regularized by the Government of the Punjab vide notifications dated 15.05.2010 and 03.07.2019. As far as, Haroon Shahzad, Petitioner in W.P. No.4327/2013 is concerned, as per the record available on the file, the employees' working in BS-1 to

BS-15 have been regularized by the Respondents in terms of the notification dated 14.10.2009 issued by the Government of the Punjab whereby the employees working on contract basis were declared eligible to be regularized but the Petitioner Haroon Shahzad has not been regularized without any legal justification rather his case is at par with the employees who have been regularized by the Respondents as he was also recommended by the same Committee on the same day. In terms of the record and what has been argued before the Court, the Government of Punjab has not given any satisfactory response as to why the posts of the Petitioners have not been considered for regularization. As per the record, the Respondents contention that the matter cannot be considered by the Government of Punjab or Finance Department is incorrect as the Government of Punjab exerts control over some hospitals, including Respondent No.3 and has regularized the services of its employees. Hence a clear case of discrimination is made out as similarly placed employees have been regularized. Furthermore, contract employee, serving at a permanent post cannot be deprived of his right to regularize especially since the Government has framed a policy on this issue and has regularized similarly placed employees in other Hospitals. Reliance is placed on "Ayaz Ahmed Memon v. Pakistan Railways, Ministry of Railway, Islamabad through Chairman and another" (2011 PLC (C.S.) 281), "Hakim Ali Ujjan and others v. Province of Sindh and others" (2012 PLC (C.S.) 127) and "Muhammad Faisal Khan and 48 others v. Secretary (Health), Government of Punjab, Lahore and another" (2012 PLC (C.S.) 130). In fact since other employees of the Respondent Hospital have been regularized having the same terms and conditions of their appointment letters as compared to the appointment letter of the Petitioners, the Petitioners are also entitled to the same treatment.

9. In view of the aforesaid, this petition is allowed. Since it is an admitted position that other contract employees in the same hospital were regularized, Respondents Nos.1 and 2 are directed to regularize the services of the Petitioners from the date being 14.10.2009.

ZC/M-66/L Petition allowed.

PLJ 2020 Lahore 466
***Present*: MRS. AYESHA A. MALIK, J.**
KHURAM SALEEM--Petitioner
versus
CHAIRMAN PUNJAB BAR COUNCIL etc.--Respondents
W.P. No. 28255 of 2020, decided on 23.6.2020.

Constitution of Pakistan, 1973--

----Art. 199--Dismissal from service--Application for enrolment as an advocate--Eligibility for grant of enrolment as an advocate--Challenge to--Petitioner admittedly was appointed as Traffic Warden in City Traffic Police, Lahore but was dismissed from service and is now desirous of enrolment as an Advocate and at same time he is also pursuing his appeal against dismissal from service, which violates requirements given in Intimation Form--Therefore, Petitioner is not only desirous of getting his old job of Traffic Warden but also at same time desirous of enrolment as an Advocate--Impugned condition merely sets out the requirement for enrolment as an Advocate and does not infringe on any fundamental right of Petitioner--Petition was dismissed.
[P. 467] A
Petitioner in Person.
Date of hearing: 23.6.2020.

ORDER
Through this petition, the Petitioner has impugned the condition provided at Sr. No. 3 of Note in the Intimation Form of Punjab Bar Council, Lahore whereby a person is not eligible to apply for enrolment if he/she is in any government/semi government/private service or business.

2. The Petitioner in person states that this is against his fundamental rights. However, at the very outset, it is noted that no right is absolute and reasonable restrictions may be imposed. The Petitioner admittedly was appointed as Traffic Warden in City Traffic Police, Lahore but was dismissed from service on 23.08.2019 and is now desirous of enrolment as an Advocate and at the same time he is also pursuing his appeal against dismissal from service, which violates the requirements given in the Intimation Form. Therefore, the Petitioner is not only desirous of getting his old job of Traffic Warden but also at the same time desirous of enrolment as an Advocate. The impugned condition merely sets out the requirement for enrolment as an Advocate and does not infringe on any fundamental right of the Petitioner.

3. Under the circumstances, no case for interference is made out. Petition stands **dismissed in** *limine.*
(M.M.R.) Petition dismissed

PLJ 2020 Lahore (Note) 122

Present: **MRS. AYESHA A. MALIK AND JAWAD HASSAN, JJ.**

SECRETARY, FOOD DEPARTMENT, GOVERNMENT OF PUNJAB through Director Food, Lahore etc.--Appellants

versus

BUTT FLOUR MILLS etc.--Respondents

I.C.A. No. 90076 of 2017, heard on 18.12.2017.

Law Reforms Ordinance, 1972 (XII of 1972)--

----S. 3--Filling of writ petition--Allowed--Direction to release of rebate/security for export of wheat or wheat flour--Submission of bank guarantee--Requirement of swift code--Establishment of actual export--Non-availability of banking system in Afghanistan--Requirements of notification, EPD circular and agreements--Exports proceeds realization in cash foreign exchange for export to Afghanistan--Mandate in terms of notification, EPD circular--Challenge to--In terms of agreements, Appellant clearly recognizes that there can be cash payment received against export as it is requirement as per Foreign Exchange Manual, 2017--Therefore, any demand by Appellant to satisfy themselves of actual export will have to be within requirements prescribed under Notification, EPD circular and agreements entered into between parties--We note that clarification sought from Bank confirms contentions of Respondents as it was clarified that Bank instructions allow for exports proceeds realization in cash foreign exchange for export to Afghanistan--Under circumstances, demand raised by Appellant--Food Department for swift code is beyond its mandate in terms of Notification, EPD circular and Foreign Exchange Manual, 2017--Appeals was dismissed. P. 6] A & B

Mr. Siraj-ul-Islam Khan, Addl. AG on behalf of Appellant along with *Mian Subah Sadiq Wattoo* AAG, *Muhammad Afzal*, Deputy Director, Punjab Food Department and *Muhammad Sharif Shahid*, Assistant Accounts Officer, Punjab Food Department for Appellants.

Mr. S.N. Khawar Khan, Advocate and *Mr. Muhammad Riaz Malik*, Advocate for Respondents.

Date of hearing: 18.12.2017.

JUDGMENT

Mrs. Ayesha A. Malik J.--This common judgment decides upon the issues raised in the instant ICA along with connected ICAs detailed in Schedule "A", appended with the judgment, as all appeals raise common questions of law and facts.

2. The Appellant, Secretary Food Department, Government of Punjab is aggrieved by judgment dated 19.9.2017 passed by learned Single Judge in WP No.

24377/2017 along with connected matters wherein the learned Single Judge has set aside order dated 22.3.2017 issued by Director Food, Punjab and directed the present Appellant to release the rebate/security of the Respondents for export of wheat.

3. The facts of the case are that in terms of Notification dated 19.8.2016 ("Notification"), the Appellant pursuant to a decision of the Economic Coordination Committee of the Cabinet ("ECC") approved the export of 0.600 million tons of *wheat* or equivalent quantity of *wheat flour* (atta) from the stocks stored at the centres of Punjab Food Department in DG Khan, Bahawalpur, Multan, Sahiwal, Faisalabad and Sargodha Divisions through-private parties. The export of the wheat or wheat flour was subject to the conditions contained in the Notification from (a) to g(i), in terms whereof the exporter was bound to export the wheat or wheat, flour within 60 days of lifting it from government godowns. The exporter also had to submit a bank guarantee along with the documents provided in clause g(i) to (vii). There is no dispute between the parties with respect to the permission granted under the Notification or to the fact that the Respondents exported the wheat or wheat flour, as the case may be, within 60 days of lifting of the same from the government godowns. The dispute between the parties pertains to the requirement of the Director Food, Punjab through order dated 22.3.2017 for a swift code to establish the actual export of the wheat or wheat flour by the Respondents and to prove that payments made outside of Pakistan came into Pakistan through proper banking channel.

4. Learned Law Officer on behalf of the Appellant argued that in order to establish and ascertain that wheat or wheat flour was actually exported and that payment was received from abroad, the requirement of a swift code was sought from all beneficiaries of the Notification. He also explained that this was done out of abundant caution to ensure that there was no misuse of the facility granted. Learned Law Officer placed reliance on clause g (vii) of the Notification to justify the demand for a swift code, as it provides for *any other documents or evidence can be required in order to establish the actual export of wheat or wheat flour*. Learned Law Officer argued that the demand for the swift code was in accordance with the Notification and the learned Single Judge has erred in law by allowing the petitions without proper proof of the actual export.

5. On behalf of the Respondents, it is argued that there is no such requirement under the EPD Circular No. 4 of 2013 dated 8.3.2013 ("EPD Circular"), or the State Bank letters dated 18.8.2015 and 19.8.2015 or even under Chapter 12 of the Foreign Exchange Manual, 2017. Learned counsel argued that there is no requirement to provide a swift code in order to establish actual export particularly when the Foreign Exchange Manual, 2017 recognizes the peculiar nature of trade with Afghanistan and permits cash convertible currencies by exporters as there is no proper banking system available in Afghanistan.

6. We have heard the learned counsel for the parties and have gone through the judgment and record and are in agreement with the findings of the learned Single Judge. A plain reading of the Notification clarifies that the following documents are required for verification in order to claim the rebate:

i) Copy of bill of lading/manifest whichever is applicable

ii) Copy of export commercial invoice

iii) Copy of Fonn-E

iv) Copy of L/C for export

v) Goods declaration duly verified by the custom authorities

vii) Declaration to the effect that no fraud/forgery has been committed in export documents

viii) Any other documents/evidence which may be required for establishing the actual export of wheat/wheat flour (atta).

In terms of clause (viii) any other document or evidence can be called for to establish the actual export. In this context "any other" means in relation to the documents provided in clause g (i) to (vii) and not some totally new document or requirement which was never sought for in the first place or which has no nexus with the documents called for under the Notification. "We also find that in terms of the EPD Circular, it is emphasized that the Authorized Dealers will accept cash convertible currencies brought over their counter by the exporters and convert the same at the prevailing buying rate applicable for normal export proceeds for credit to the PKR account of the exporter when trading with Afghanistan. Even as per the agreements entered into between the Appellant and the Respondents, the relevant documents sought for are contained in clause 4 whereas clause 4(iv) requires that Copy of L/C for export or cash against documents (CAD) or bank to bank transactions covered under the State Bank regime. Hence, in terms of the agreements, the Appellant clearly recognizes that there can be cash payment received against the export as it is the requirement as per the Foreign Exchange Manual, 2017. Therefore any demand by the Appellant to satisfy themselves of the actual export will have to be within the requirements prescribed under the Notification, EPD circular and the agreements entered into between the parties. The Respondents argued that they exported wheat or wheat flour to Afghanistan after fulfilling all legal requirements, however, the proceeds were released in cash foreign exchange instead of through banking channel, hence the swift code is neither available nor relevant to the transaction. In this regard, we note that the clarification sought from the State Bank of Pakistan on 18.8.2015 and 19.8.2015 confirms the contentions of the Respondents as it was clarified that the State Bank

instructions allow for exports proceeds realization in cash foreign exchange for export to Afghanistan. Under the circumstances, the demand raised by the Appellant. Food Department for swift code is beyond its mandate in terms of the Notification, EPD circular and Foreign Exchange Manual, 2017.

7. For what has been discussed above, all the appeals are **dismissed** and impugned order dated 19.9.2017 passed by the learned Single Judge in WP No. 24377/2017 is maintained. The Appellant is directed to release the rebate/security of the Respondents immediately.

(Y.A.) Appeals dismissed

PLJ 2020 Lahore 325

***Present*: MRS. AYESHA A. MALIK, J**

***Syed* ZIA-UL-HUSSNAIN SHAMSI etc.--Petitioners**

versus

GOVERNMENT OF PUNJAB through CHIEF SECRETARY, LAHORE etc.--Respondents

W.P. No. 17858 of 2011, heard on 15.2.2019.

Payment of Wages Act, 1936 (IV of 1936)--

----Ss. 15 & 17--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Writ of *quo warranto*--Maintainability--Pensionary benefits--Labour and welfare of labour--Exercising of authority--Question of jurisdiction--A writ of *quo warranto* was not maintainable against a designation where no specific person had been named and that jurisdiction of Authority was not limited to deal with cases involving workman--Petitioners then refilled writ petition in terms of order in form of instant petitions--Through these petitions, Petitioners have named persons acting as Authority under Act and have challenged their appointments as Authority on ground that they cannot hold public office since they are not eligible in terms of Section 15 of Act--Petitioners are Financial Institution being trans-provincial in nature, hence Authority cannot exercise jurisdiction over their employees as jurisdiction in such case vests with National Industrial Relations Commission ("NIRC")--Impugned orders are set aside as Authority acting under Provincial law does not have jurisdiction over Financial Institutions which are trans provincial organizations--It is noted that these petitions have been filed by employers against orders passed by Authority in favour of employees for whom statutory remedy of appeal is available under Section 17 of Act--Petitions was allowed.

[Pp. 328, 329 & 330] A, B, C & D

PLD 2016 Lah. 433 and 2018 SCMR 802 *ref.*

Mr. Farooq Zaman Qureshi and *Mr. Riaz Hussain Haleem*, Advocates for Petitioners (in W.P. No. 17858 of 2011)

Syed Hammad Raza, Advocate for Petitioner (in W.Ps. No. 8016, 8017, 8018, 8019, 8020 and 8021 of 2013).

Mr. Muhammad Muzamil Qureshi, Advocate for Petitioner (in W.Ps. No. 14254/12, 24473/12, 3643/13, 7151/13 and 6191/14).

Mr. Umer Abdullah, Advocate for Petitioner (in W.P. No. 250646 of 2018).

Mr. Salim Baig and Mr. Khurram Saleem Baig, Advocate for Petitioner Bank (in W.P. Nos. 28270, 28271, 28272, 28273 and 28274 of 2011).

Nemo for Petitioner Bank (in W.P. Nos. 19795, 19796 of 2012 and 677/13).

Mr. Nasar Ahmad, DAG for Respondents.

Mr. Shoaib Zafar, Additional Advocate General, Punjab along with *Raj Maqsood*, Law Officer, in the office of Respondent No. 2, Secretary Labour Department, Lahore.

Malik Ghulam Rasul, Advocate for Private Respondents No. 10 to 12 (in W.P. No. 17858 of 2011).

Malik Muhammad Afzal Khokhar, Advocate for Private Respondents (in W.P. Nos. 28270 to 28274 of 2011).
Date of hearing: 15.2.2019.

JUDGMENT

This common judgment decides upon the issues raised in the petitions detailed in Schedule **"A and B"** appended with the judgment as all the petitions raise common questions of law and facts.

2. There are two sets of petitions before the Court. The first set of petitions mentioned in Schedule-A have been filed by employers who have challenged the orders of the Authority under Payment of Wages Act, 1936 (**"Authority"**) where payment of wages in favour of the employees have been ordered by the Authority through the orders impugned before the Court. The second set of petitions mentioned in Schedule-B have been filed by Financial Institutions against the orders of the Authority with respect to the claims filed before them by retired bank officers claiming retirement benefits. The Authority decided to proceed with the claims holding that it has jurisdiction in the matter. As most of the issues are common, these cases have been heard together.

3. The basic challenge in the petition detailed in Schedule A are that Authority does not have jurisdiction in the matter because after the 18th Amendment in the Constitution of Islamic Republic of Pakistan, 1973 (**"Constitution"**), the matter pertaining to labour and welfare of labour devolved on to the Provinces and the Authority established under the Federal law had become incompetent and cannot hear the matter. In some of these cases apart from 18th Amendment argument, merits of the impugned order have also been challenged, interim orders have been challenged and in some petitions orders passed on miscellaneous applications have also been challenged.

4. The second set of petitions filed by the Financial Institutions (Schedule B) the Petitioners have challenged, in the form of *quo warranto*, the exercise of Authority by persons appointed under Section 15 of the Act. The basic grievance is that the Respondents acting as the Authority under the Act are not eligible to hold office as they do not meet the qualifications provided in Section 15 of the Act. In this regard, in an earlier round of litigation, WP No. 14499/2009 was filed wherein retired Executive Officers of the Bank claimed certain pensionary benefits, which was denied to them *vide* judgment dated 15.12.2009 on account of the fact that they had accepted a revised pay package on the basis of which their pension was given. The petition was ultimately dismissed as being not maintainable as it was filed by a registered body of the retired Executive Officers against a private Bank. Subsequently, the question of jurisdiction was agitated before the Authority in the applications filed under Order VII Rule 11 of the Civil Procedure Code, 1908 (**"CPC"**), which were rejected as the Authority claimed that it had jurisdiction in the matter. These orders have been challenged in WP No. 9650/2010, which was dismissed by a learned Division Bench *vide* order dated 21.02.2011 on the ground

that a writ of *quo warranto* was not maintainable against a designation where no specific person had been named and that the jurisdiction of the Authority was not limited to deal with cases involving workman. The Petitioners then refiled the writ petition in terms of order dated 21.02.2011 in the form of the instant petitions. Through these petitions, the Petitioners have named the persons acting as Authority under the Act and have challenged their appointments as the Authority on the ground that they cannot hold public office since they are not eligible in terms of Section 15 of the Act. In the meanwhile, the same matter was challenged in WP No. 13792/2011 which was accepted *vide* judgment dated 30.09.2015, the impugned orders were set aside and the claim filed by the Respondents before the Authority were dismissed with respect to the Financial Institutions. Learned counsel for the Petitioners have relied on the stated judgment dated 30.09.2015 to urge the point that the matter raised in the instant petition stands decided.

5. The second ground urged before the Court in these petitions is that the Petitioners are Financial Institution being trans-provincial in nature, hence the Authority cannot exercise jurisdiction over their employees as jurisdiction in such case vests with the National Industrial Relations Commission ("NIRC"). In this regard, reliance has been placed on the judgment of this Court *"Imran Maqbool President, MCB Bank Limited v. Federation of Pakistan through v. Secretary Law, Justice and Human Rights Division, Islamabad etc."* (2018 LHC 1960) and the august Supreme Court of *Pakistan Messrs Sui Southern Gas Company Ltd. and others v. Federation of Pakistan and others* (2018 SCMR 802). Learned counsel for the Petitioners argued that this matter has already been addressed in WP No. 13792/2011 in Paragraph No.15 wherein it is held that since the Financial Institutions are trans-provincial in nature, the Authority does not have jurisdiction. The said judgment was then appealed against before the august Supreme Court of Pakistan in which leave granting order was passed on 22.07.2016 and the operation of Paragraph Nos. 25 to 28 of the impugned judgment have been suspended. However, so far as the decision given in paragraph 15, that remains intact.

6. Report and parawise comments have been filed on behalf of the Respondents No. 2, Secretary Labour, Government of Punjab, Lahore as well as private Respondents No. 3, 5, 6, 7, 8, 10 to 12. It is argued that the Respondents, who are acting as Authority, have been appointed in accordance with law. Moreover, the legal challenge has been defended while upholding the law and the manner in which the appointments have been made. It is also alleged that since the matter is sub-judice before the august Supreme Court of Pakistan where the operative part of the judgment has been suspended, this Court is not bound by the leave granting order.

7. With respect to the *quo warranto* challenge to the appointment of the Authority that matter is sub-judice before the august Supreme Court of Pakistan *vide* leave granting order dated 22.07.2016. However, so far as the argument that the Banks are trans-Provincial Organization, the matter stands decided in terms of the judgment of the august Supreme Court of Pakistan 2018 SCMR 802 (*supra*) and of this Court 2018 LHC 1960 (supra) wherein it was has held as under:

This issue was considered by the august Supreme Court of Pakistan in the NIRC case at great length. The term 'trans-provincial organization' means an organization which operates at a trans-provincial level, that is they operate in more than one province. In terms of the NIRC case the federal legislature has extra territorial authority to legislate on matters which pertain to trans-provincial organizations. The Court relied on Item No. 13 in Part II of the Federal Legislative List of the Constitution which provides for inter-provincial matters and coordination, meaning that the Federation has to make laws relating to inter-provincial matters. Therefore in the NIRC case, the august Supreme Court of Pakistan concluded that the federal legislature has extra territorial authority to legislate, however the same authority does not lie with the provincial legislature. The august Supreme Court of Pakistan also held that in order to preserve and regulate a right which transcends provincial boundaries, only the Federation is competent to legislate on such matters and Item No. 58 and 59 of the Federal Legislative List provide the relevant entries to bring it in the federal domain. The Provincial legislature does not have extra territorial legislative competence, therefore it cannot legislate with regard to rights which transcend its provincial boundaries.

Under the circumstances, on this point alone, the petitions filed by the Banks mentioned in Schedule-B are **allowed** and the impugned orders are set aside as the Authority acting under the Provincial law does not have jurisdiction over Financial Institutions which are trans provincial organizations.

8. With respect to the second set of cases it is noted that they were filed soon after the 18th Amendment, whereafter the Federal law was adopted by the Province law in terms of the Punjab Payment of Wages (Amendment Act) 2014 on 19.3.2014 and these cases are now being tried under the Provincial law. Even otherwise, in terms of the judgment of this Court cited at *"Salim Javed Baig and others v. Federal Ombudsman and others"* (PLD 2016 Lahore 433) and the judgment passed by the august Supreme Court of Pakistan 2018 SCMR 802 (supra) under Article 270AA (6) of the Constitution all applicable Federal laws remain in force as a Provincial law until such time that the Federal law is repealed or amended or adopted by the Province. Therefore, to this extent there is no merit in the ground for challenge as the Province has adopted the Federal law and the Authority is acting in its capacity as Provincial Authority. Even otherwise it is noted that these petitions have been filed by the employers against the orders passed by the Authority in favour of the employees for whom statutory remedy of appeal is available under Section 17 of the Act. Hence the petitions mentioned in Schedule-A being not maintainable are **dismissed.**(Y.A.) Petitions allowed

P L D 2020 Lahore 801
Before Ayesha A. Malik, J
NAZIR A.M. JOINT VENTURE through Chief Executive---Petitioner
Versus
The NATIONAL HIGHWAY AUTHORITY through Chairman and 4 others---Respondents
Writ Petition No. 19175 of 2020, heard on 19th June, 2020.

(a) Rules of Procedure and Conduct of Business in the National Assembly, 2007---

----R. 203---Constitution of Pakistan, Arts. 69 & 199---Majlis-e-Shoora (Parliament)---Public Accounts Committee of the National Assembly, functions of---Constitutional jurisdiction of High Court---Scope---Public Accounts Committee of National Assembly was a recommendary committee which was required to examine accounts of relevant year and to make recommendations---Report of Public Accounts Committee was to be presented along with recommendations to National Assembly for decisions---Per Art. 69 of the Constitution, there existed a bar on questioning and inquiring into proceedings of Majlis-e-Shoora (Parliament) which included any decision/proceeding(s) of Public Accounts Committee of National Assembly---Proceedings of Public Accounts Committee being internal proceedings were immune from being inquired into by High Court under Art. 199 of Constitution.
Muhammad Azhar Siddiqui and others v. Federation of Pakistan and others PLD 2012 SC 774; Nawab Khan Khattak v. Public Accounts Committee and others 2002 YLR 2209 and BNP (Pvt.) Ltd. v. Capital Development Authority and others 2016 CLC 1169 rel.

(b) Constitution of Pakistan---

----Arts. 69 & 199---Majlis-e-Shoora (Parliament)---Public Accounts Committee of the National Assembly, functions of---Statutory audit of Public Authorities---Nature of audit of public authority---Audit objection, effect of---Construction contracts---National Highway Authority ("NHA")---Scope---Petitioner which held a construction contract with National Highway Authority, impugned demand made by NHA for recovery of certain amounts paid to petitioner, allegedly on instructions of Public Accounts Committee of National Assembly--- Validity---As per record, audit report of National Highway Authority was placed on agenda of Public Accounts Committee however, paragraph which stated an audit objection on payment made to petitioner was not discussed and no instructions/recommendations on same were given by Public Accounts Committee---National Highway Authority was using an audit objection as basis for recovering of amount from petitioner, which was not valid as audit objection was merely an observation which required probe and by itself was merely information to be placed before an authority---Audit objection therefore could not form basis for recovery of amount from petitioner and NHA could not ignore terms of the construction contract---High Court held that NHA

could not seek to recover the amount from petitioner as there existed no instructions by Public Accounts Committee in this regard, and even otherwise Public Accounts Committee was a recommendary committee and as such could not issue directions to NHA to initiate any recovery---Constitutional petition was allowed, accordingly.
Mian Muhammad Kashif and Imran Iqbal for Petitioners.
Ms. Ambreen Moeen, D.A.G. along with Shaukat Ali, Audit Officer in the office of Respondent No.4.
Chaudhary Muhammad Shabbir Ahmed for Respondent NHA.
Date of hearing: 19th June, 2020.

JUDGMENT

AYESHA A. MALIK, J.---Through this Petition, the Petitioners have impugned the actions of the Respondent National Highway Authority ("NHA") and two letters both dated 9.3.2020 issued by the NHA.

2. The case of the Petitioners is that they were awarded a construction contract for the road project known as the Gwadar-Ratodero Road Project, Khuzdar Shahadakot, Package III, Section IV of the Motorway, M-8 (KM 35+000 to KM 84+500) on 9.8.2004 ("the Construction Contract"). Subsequently some variation was required with the terms of the Construction Contract for which meetings were held under the Chairmanship of Member (Motorways), NHA who finalized the amendments known as Variation Order No.2 to reflect changes in Appendix C to the Construction Contract vide minutes of meeting dated 26.6.2006. Variation Order No.2 was approved by the Executive Board of the NHA in its meeting held on 18.8.2006. Variation order No.2 was placed before the Executive Board of the NHA in its meeting held on 12.3.2008 and was approved by the Board on the said date as is apparent from the appended minutes of meeting dated 12.3.2008. In the light of this decision by the Executive Board of the NHA, the Construction Contract including Appendix C was amended through Amendment No.1 dated 20.5.2008 and in terms thereof. Subsequently escalation payments have been made to the Petitioners on the basis of the amended contract especially the amendment to Appendix C.

3. The present dispute arose on account of a direction given by Respondent No.2, Public Accounts Committee ("PAC") to the Respondent NHA to recover amounts from the Petitioner. NHA followed the same notwithstanding the fact that they have approved all amendments made to the Construction Contract including amendments to Appendix C and without application of mind. Learned counsel for the Petitioner argued that the precise dispute is with respect to the audit objection noted in paragraph 4.4.13.5 of the Audit Report 2015 to the effect that escalation payments made to the contractor with respect to input element of skilled labour cost is not admissible under the Standard Procedure and Formula for Price Adjustment issued by the Pakistan Engineering Council ("PEC Procedures"). Learned counsel further argued that Respondent NHA does not deny the amendment to Appendix C whereas PAC has denied the same and submits that the amendments are unlawful and should

not have been made. Learned counsel also argued that initially an audit objection was raised on the same issue in the year 2010 and an inquiry was called. The inquiry report issued on 28.10.2015 comprehensively dealt with the objection of PAC and the stance of the NHA. As per the inquiry report, the Petitioners are entitled to escalation payment as per its requirements as fuel and labour factors were revised in Appendix C with the approval of the NHA Board and implemented through necessary amendments in the contract. Subsequent to the inquiry, the matter stood settled and the Petitioners were paid accordingly.

4. Learned counsel stated that on 9.3.2020 the same objection was raised as audit para 4.4.13.5 in the Audit Report 2015 with respect to the same escalation payments and the factors relevant thereto. Learned counsel for the Petitioners stated that NHA claims that an over payment has been made to the Petitioners on account of the price escalation of skilled labour which was not part of the original agreement and hence these amounts must be recovered. The matter was discussed by the Departmental Accounts Committee ("DAC") in its meetings held in November 2014 and December 2014 and a direction was given to recover the said amount which has allegedly been paid in excess. Learned counsel argued that the NHA has not denied the amendments to the Construction Contract particularly Appendix C in which the weightage for skilled labour was agreed upon between the parties and Respondent No.4 and Respondent No.2, PAC cannot seek recovery of the excess amounts since the parties to the contract agreed to the amendments. Furthermore in case any excess amount is alleged to have been paid due process must be followed by issuing notice to the Petitioners, granting opportunity of hearing and allowing an adjudicatory forum to settle the dispute. Learned counsel argued that even otherwise the objection that the amendments are in violation of the PEC Procedures is not relevant as the PEC Procedures were issued later in time and cannot be applied retrospectively to the amended contract. Learned counsel further argued that there is no inquiry or recovery directed by PAC against the Respondents yet despite the same their invoices are not being processed and Respondent NHA is attempting to pursue recovery of amounts which they are not entitled to.

5. Report and parawise comments have been filed on behalf of Respondent No.4, Auditor General of Pakistan. Learned DAG argued that any decision made by the NHA with reference to the Construction Contract is subject to DAC approval and the Audit Department approvals; that PAC is responsible to see how public money is being spent and Respondent NHA cannot enter into any contractual arrangement which is contrary to the rules. Hence the recovery is justified.

6. Report and parawise comments have also been filed by Respondent No.1, NHA in which they admit the amendments in the Construction Contract were made by their Board; that PAC has given instructions to recover amounts from the Petitioner in 2017 and that NHA is bound by the decision of PAC. However, on behalf of PAC, learned DAG was unable to show any order seeking any inquiry or recovery in terms of the audit objection raised in para 4.4.13.5 of the Audit Report 2015. Learned DAG also raised the objection that this dispute is subject to arbitration; that

it is a contractual obligation and the parties have agreed to a dispute resolution method, hence the instant Petition is not maintainable.

7. Heard and record perused. The basic issue before the Court is with respect to the stance taken by NHA that the Petitioners are not entitled to the weightage factors with reference to the price escalation of skilled labour as agreed in Appendix C to the amended Construction Contract. The Petitioners' contention that Appendix C was amended; that an audit objection on the same issue was raised in 2010, inquired into and settled as per the inquiry report which is apparent from the record is not denied by any of the Respondents. Subsequent to the inquiry report issued by NHA, the audit objection of 2010 was removed and the Petitioners were admittedly paid price escalation in terms thereof. The same issue arose again with the same audit objection with reference to the financial year 2014-15 in the Audit Report for the year 2015. The objections noted in paragraph No.4.4.13.5 of the Audit Report 2015 in essence provides that price escalation was paid on input element of skilled labour cost which is not admissible in the light of the PEC Procedures which does not allow price escalation on input element of skilled labour cost. Hence as per the objection, the Petitioner has been paid in excess under the Construction Contract.

8. At the very outset, it is noted that this is not a contractual dispute, hence is not arbitrable in terms of the dispute resolution clause contained in the construction contract. This dispute pertains to the decision taken by the NHA to recover amounts from the Petitioners on the instructions of PAC, which is not subject to the terms of the contract, hence not subject to the dispute resolution clause. Therefore, there is no merit in the preliminary objection with reference to the arbitrability of the dispute.

9. The Respondent NHA does not deny the amendments made to the Construction Contract including Appendix C, the decisions of its Executive Board dated 18.8.2006 and 12.3.2008 and payments made to the Petitioners pursuant to these decisions. Hence the question before this Court is whether NHA can recover amounts from the Petitioner based on an audit objection raised by PAC and whether the decision of PAC can form the basis of recovery without due process and adjudication on the issue of recovery.

10. Article 69 of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution") provides that (i) The validity of any proceedings in [Majlis-e-Shoora] (Parliament) shall not be called in question on the ground of any irregularity of procedure (ii) No officer or member of [Majlis-e-Shoora] (Parliament) in whom powers are vested by or under the Constitution for regulating procedure or the conduct of business, or for maintaining order in [Majlis-e-Shoora] (Parliament), shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers. The relevant rules are the Rules of Procedure and Conduct of Business in the National Assembly, 2007 (As modified up to the 13th September, 2019) issued by the National Assembly of Pakistan ("Rules of Business

2007"). Rule 203 of the Rules of the Business 2007 provides for the Functions of the PAC which states that:
The Committee shall examine the accounts showing the appropriation of sums granted by the Assembly for the expenditure of the Government, the annual finance accounts of the Government, the report of the Auditor General of Pakistan and such other matters as the Minister for Finance may refer to it.
Furthermore Sub-Rules (4) and (5) of Rule 203 of the Rules of the Business 2007 provides as follows:
(4) If any money has been spent on any service during a financial year in excess of the amount granted by the Assembly for that purpose, the Committee shall examine with reference to the facts of each case the circumstances leading to such an excess and make such recommendation as it may deem fit.
(5) The report of the Committee shall be presented within a period of one year from the date on which reference was made to it by the Assembly unless the Assembly, on a motion being made, directs that the time for the presentation of the report be extended to a date specified in the motion:
Provided that extension in the time for the presentation of the report shall be asked for before the expiry of the time allowed under the rule.
Therefore as per the Rules of Business 2007, PAC is a recommendary committee which is required to examine the accounts of the relevant year and make recommendations as it deems fit. The report of the PAC is then to be presented along with its recommendations to the Assembly for a decision. Consequently in terms of Article 69 of the Constitution, there is a bar on the decision of the [Majlis-e-Shoora] (Parliament) taken with respect to any decision of questioning and inquiring to the proceedings of the National Assembly. This will include any decision taken by PAC.

11. Article 69 of the Constitution has been interpreted in Muhammad Azhar Siddiqui and others v. Federation of Pakistan and others (PLD 2012 SC 774). The provisions of Article 69 of the Constitution were elaborately examined by the august Supreme Court of Pakistan wherein it was held that:
It is, therefore, obvious that the proceedings of a formally constituted Committee of either House falls within the ambit of internal proceedings of the Majlis-e-Shoora (Parliament) and consequently are immune from challenge in Courts in the light of the bar contained in Article 69 of the Constitution. The proceedings of the Public Accounts Committee are, therefore, the internal proceedings of the Parliament and as such immune from being inquired into by this Court.
The judgment finds that the proceedings of a formally constituted committee of Majlis-e-Shoora (Parliament) falls within the ambit of internal proceedings and consequently is immune from challenge in courts in the light of the bar contained in Article 69 of the Constitution. Consequently the proceedings of PAC are internal proceedings of Parliament and immune from being inquired into by this Court. Therefore in view of the clear stipulation provided in Article 69 of the Constitution, as interpreted by the august Supreme Court of Pakistan a decision taken by PAC is not subject to writ jurisdiction. In the case of Nawab Khan Khattak v. Public

Accounts Committee and others (2002 YLR 2209) the findings of PAC were also considered wherein the Court held:

It will, therefore, be seen that the functions of the PAC are confined to the scrutiny of the audited accounts to satisfy itself, that money shown in the accounts as having been disbursed were legally available and applicable to the service purpose to which applied; the expenditure conforms to the authority; and that every re-appropriation has been made in accordance with the rule framed by the Government. Indeed, the report of the Committee, preliminary or final, is to be laid before the House, under rule 186 of the Rules of Procedure.

It was further held in 2002 YLR 2209 (supra) as follows:

Even after hearing the affected persons the PAC could at the most recommend/suggest the action to the concerned Agency/ Department of the Government. We are clear in our view that the PAC could not straightaway direct action against the petitioners, for it could only recommend and the Government was to judge each and every case independently in accordance with law. It is mentioned that if the recoveries were made voluntarily in time then no Department/criminal action whatsoever may be taken and no adverse entries in the A.C.Rs be reflected but an Officer involved in the misdeeds hesitates to make the loss good, he is to be proceeded under the Rules without raising technical points. We are clear in our mind that the PAC could be straightaway direct action against the petitioners; it could only recommend and the Government was to judge each and every case of the petitioners independently in accordance with law.

Furthermore in a recent judgment BNP (Pvt.) Ltd. v. Capital Development Authority and others (2016 CLC 1169) two questions were discussed firstly as to whether the proceedings of PAC are barred or immune from judicial review in the light of Article 69 of the Constitution and secondly, whether the authority could have acted without application of mind and in a mechanical manner pursuant to the directives of the PAC. In this regard, the Hon'ble Islamabad High Court held that:

It is, therefore, obvious that the proceedings of a formally constituted Committee of either House falls within the ambit of internal proceedings of the Majlis-e-Shoora (Parliament) and consequently are immune from challenge in Courts in the light of the bar contained in Article 69 of the Constitution. The proceedings of the Public Accounts Committee are, therefore, the internal proceedings of the Parliament and as such immune from being inquired into by this Court.

It was further held in 2016 CLC 1169 (supra) as follows:

There is no cavil to the proposition that the Public Accounts Committee, being an integral part and its proceedings falling within the ambit of 'internal proceedings' of the Parliament, has to be given utmost respect and treated with deference. Its findings and recommendations carry immense sanctity and, therefore, have to be considered and acted upon with great care and diligence. However, as already pointed above, Rule 201(4) of the Rules of 2007 expressly provides that after the Public Accounts Committee has forwarded its report of findings and recommendations to a Ministry or its associated public body, then the latter is under an obligation to submit its reply to the Committee. It is implicit in Rule 201(4) that after receiving the report of findings or recommendations of the Public Accounts

Committee, the Ministry or its associated public body, as the case may be, shall consider the same and, if required, afford an opportunity of hearing to the person being adversely affected, and then submit its reply to the Committee. The requirement of submitting a reply contemplated in Rule 201(4) essentially involves a process of considering the relevant factors, deliberations and taking appropriate decisions and actions. The recommendations, therefore, if acted upon in a mechanical manner, would not be in consonance with the law, particularly the Rules of 2007.

It was also held in 2016 CLC 1169 (supra) as follows:
The Board, in the instant case, was required to have considered the recommendations/directives of the Public Accounts Committee and ought to have taken decisions based on the exercise of independent judgment, and thereafter to have submitted a reply to the latter. However, admittedly, as conceded by the learned counsel and also apparent from the record, the Board, instead of considering the directions/ recommendations of the Public Accounts Committee, issued the impugned letter in a mechanical manner.

Hence only after following due process as contemplated under the Rules of Business 2007, can any recovery be made. In this regard only after PAC has placed its recommendations before the relevant department or authority whose accounts were audited for due consideration and necessary action, after it has been approved by the National Assembly.

12. In this case the Petitioner has challenged the decision of Respondent NHA wherein it is seeking to recover amounts from the Petitioner allegedly on the instructions of PAC. In this regard, the National Highway Authority Act, 1991 ("NHA Act") establishes a National Highway Authority for planning, development, operation and maintenance of National Highways and strategic roads and to provide for matters connected therewith or incidental thereto. Section 24 of the NHA Act provides for the Audit of its accounts, in terms of which the accounts of the Authority shall be audited every year by the Auditor General in such manner as may be prescribed by the Federal Government. Hence the accounts of the NHA are subject to audit by the Auditor General. In terms thereof during the audit of the 2015 accounts an audit objection noted in paragraph No.4.4.13.5 stated that price escalation was paid on input element of skilled labour cost which is not admissible in the light of the PEC Procedures. As per the record there has been no recommendation by PAC on the audit objection. The record also shows that even though the objection was placed before PAC, it was not taken up in that meeting. Notwithstanding, NHA issued letter dated 9.3.2020 wherein it conveyed to the Petitioner that on a direction given by PAC, they seek to recover amounts under audit para No.4.4.13.5. On the same date, another letter was issued to General Manager (Const-North), National Highway Authority, Quetta to recover amounts as per audit para No.4.4.13.5. Both letters clearly stipulate that this is being done on the instructions of PAC.

13. As per report and parawise comments filed by PAC, audit para 4.4.13.5 of the audit report for the year 2014-15 was on the agenda of PAC meeting held on 14.9.2017, however the said para along with other paras could not be discussed and the meeting was adjourned. Therefore in terms of the report and parawise comments filed, PAC never gave any instructions to NHA to recover any amounts from the Petitioner. Hence the contention of NHA is belied on the basis of the report and parawise comments filed by PAC before this Court.

14. Learned counsel for NHA during the course of proceedings was asked to show the recommendation of PAC and the instructions given by PAC on the basis of which they claim that they have been directed to recover amounts from the Petitioner. Learned counsel was unable to show any such letter or report. Learned counsel for the Petitioner however has relied upon the report of the Inquiry Committee on the directives of PAC dated 28th and 29th July 2015 regarding printed para 3.2.48 for the year 2010-11 which is on the same subject matter and the same dispute, however pertaining to the year 2010. As per this report, the amendments to the contract were made with the approval of NHA on the initiation of the Planning Commission and was binding on the parties. All codal formalities were duly followed and were duly approved by NHA Executive Board and ultimately the Inquiry Committee concluded that the revisions made to Appendix C were all made in accordance with law as per the procedures laid down, therefore the recovery is not justified. Hence even the decision of NHA itself as per its own Inquiry Report suggest that they cannot make any recovery against the Petitioner on account of the amendments made to the Construction Contract which was all done in accordance with law after following due process.

15. On the basis of the aforementioned it is evident that NHA has used the audit objection as a basis for recovering amounts from the Petitioner. An audit objection is merely an objection highlighting irregularities under the relevant finance related rules. The purpose of the audit and audit objection is to ensure that public money is spent as per rules and regulations. An audit objection requires evaluation, recommendations and settlement. Until the audit objection is settled, it is merely an observation which requires probe, after giving the relevant department an opportunity to explain its position. By itself an audit objection is merely information placed before the authority which requires looking into, to determine whether there is breach of any finance related rule or regulation. Hence an audit objection cannot form the basis for recovering amounts from the Petitioner, that too without following due process. Furthermore in this case NHA is bound by the terms of its Construction Contract and cannot simply ignore the terms of its contract and initiate recovery without following due process and without raising the dispute before the Petitioner.

16. Under the circumstances, the Respondent NHA cannot recover the disputed amounts from the Petitioner as there are no instructions by PAC in this regard. Even otherwise PAC is a recommendatory committee which presents its recommendations to Parliament and cannot as such issue directions to NHA to

initiate any recovery. Furthermore if at all there is an audit objection, that objection has to be considered and dealt with as per law where after due process must be initiated if at all recovery is to be taken of any amount from the Petitioner which means acting under the Construction Contract, giving notice to the Petitioner and obtaining a declaration from the competent forum that the Petitioner owes amounts to the Respondent NHA as amounts paid in excess under the Construction Contract.

17. In view of the aforesaid, the instant Petition is allowed and the impugned recovery letters both dated 9.3.2020 issued by the Respondent NHA are set aside.

KMZ/N-19/L Petition allowed.

2020 C L D 1207
[Lahore]
Before Ayesha A. Malik, J
WASEEM MAJID MALIK---Petitioner
Versus
FEDERATION OF PAKISTAN through Cabinet Secretary and 23 others---Respondents
Writ Petition No. 27842 of 2020, heard on 26th June, 2020.

(a) Companies Act (XIX of 2017)---

----Ss. 159, 160, 164 & 165---Election of Board of Directors of Company Federal Government members of the Company---Judicial review---Scope---Petitioner intended to contest election of Board of Directors of Company and assailed decision of Federal Government to be represented on Board through contesting of elections---Plea raised by authorities was that Constitutional petition was not maintainable as remedy before Company Judge was available---Validity---Entire dispute was with respect to the decision of Federal Government to participate in elections---Decision and actions of Federal Government was assailed before High Court, therefore, Constitutional petition was maintainable---High Court, in exercise of Constitutional jurisdiction, could determine whether or not Federal Government had acted in accordance with law or whether it had abused its authority---Powers under S. 160 of Companies Act, 2017 vesting with Company Bench of High Court was the power to determine whether or not the elections were conducted under Companies Act, 2017 and did not deal with judicial review of actions or decision of Federal Government challenging as interference in election process---Shareholder had a statutory right under S. 160 of Companies Act, 2017, to ensure that elections of directors were conducted under Companies Act, 2017 as required---Such provision was not available to petitioner to challenge actions of Federal Government---Federal Government was a member of the Company and enjoyed all rights of a member under Companies Act, 2017--- Federal Government could exercise all rights as a member under Companies Act, 2017, which included the right to appoint and remove directors under Companies Act, 2017---Federal Government could either appoint a director on Board of Directors through election under S. 159 of Companies Act, 2017 or through nomination under Ss. 164 & 165 of Companies Act, 2017---Constitutional petition was dismissed in circumstances.
Mian Misbah-ur-Rehman v. Sui Northern Gas Pipelines Limited through Secretary and others Writ Petition No. 21451 of 2019; Mian Misbah-ur-Rehman v. SNGPL and others I.C.A. No.14622/2020; Muhammad Shafique Khan Sawati v. Federation of Pakistan and others 2015 SCMR 851; Mian Javed Amir v. United Foam Industries (Pvt.) Ltd. and others 2016 SCMR 213; M. Fuwad A. Mughal v. Federation of Pakistan and others 2018 YLR 26; Allied Bank of Pakistan Ltd. v. Khalid Farooq 1991 SCMR 599; Munir Hussain Bhatti, Advocate and others v. Federation of Pakistan and another PLD 2011 SC 407 and Arshad Mehmood v. Commissioner/Delimitation Authority, Gujranwala and others PLD 2014 Lah. 221 ref.

(b) Companies Act (XIX of 2017)---

----Ss. 159, 164 & 165---"Nominee" and "elected directors"---Distinction---Fundamental difference between a nominee director and elected director is that a nominee holds office at the pleasure of the nominator whereas 'elected director' is given a three years tenure under Companies Act, 2017---'Nominee director' has to safeguard interests of its nominator first and foremost whereas 'elected director' has a fiduciary duty to company and all its shareholders---'Nominee director' participates in proceedings of Board of Directors as per terms of its arrangement with nominator to ensure that nominators' investment or interest is safeguarded, to act as a liaison between nominator and company and also consider overall policies and working of company.

Saad Amir for Petitioner along with Petitioner in person.

Ms. Ambreen Moin, DAG along with Umer Saeed Khan, Section Officer (Gas) in the office of Respondent No.2.

Muhammad Raza Qureshi, Asad Raza and Syed Shahid Hussain, for Respondent No. 3, SNGPL with Ahmed Arslan, Chief Law Officer, SNGPL and Imtiaz Mehmood, Company Secretary, SNGPL.

Ruman Bilal and Hafiz Talha for Respondent No. 4 SECP.

Anwaar Hussain, Imran Khan Klair and Mian Saad Ali for Respondent No. 16.

Muhammad Ahmad Qayyum for Respondent No. 21.

Fahad Malik for Respondent No. 22.

Mirza Nasar Ahmad for Respondent No. 24.

Date of hearing: 26th June, 2020.

JUDGMENT

AYESHA A. MALIK, J.---Through this Petition, the Petitioner seeks a declaration that Election Notice dated 2.5.2020 issued by Respondent No.3, SNGPL be declared illegal and without lawful authority; that the Federal Government be permitted representation on the Board of Directors ("BOD") of Respondent No.3 only through directors nominated under section 165 of the Companies Act, 2017 ("Act") in proportion to its shareholding in Respondent No.3; that the Federal Government is not eligible to contest elections under section 159 of the Act, hence be restrained from participating in the elections scheduled for 23.6.2020.

The case of the Petitioner

2. The Petitioner is an advocate by profession and a shareholder in Respondent No.3, SNGPL holding 3000 shares. The Petitioner intends to contest the election for the BOD of the Company for which he filed his nomination papers and consent forms as required under the Act. Learned counsel for the Petitioner argued that the Company has set a total strength of eleven directors for its BOD and thereafter invited interested candidates to take part in the election. Learned counsel further argued that in this context the Federal Government proposed some names of members and non-members who will contest the elections on its behalf. Learned counsel argued that the Federal Government through letter dated 9.6.2020 addressed

to Respondent No.3 nominated eleven persons to contest the election for the BOD of Respondent No.3 under section 159 of the Act. Out of these eleven persons only three are members of SNGPL, in their own right, being Roohi Raees Khan, Rizwan Ullah Khan and Dr. Sohail Razi Khan. The remaining eight persons are not members of SNGPL, hence not eligible to contest the election. Learned counsel further argued that Section 159 of the Act makes it clear that a person contesting the election of directors must be a member in his own right and cannot be construed to be representing anyone other than himself. He stated that section 159 of the Act is a complete code which regulates the conduct of elections, such that only a member of the Company can contest the election for the director of the Company. He further stated that so far as the Federal Government is concerned, they can only nominate directors under section 165 of the Act and cannot put up directors for election under section 159 of the Act. He argued that elected directors are totally separate and distinct from nominated directors and the Federal Government is trying to blur this distinction by appointing directors through elections, which the law does not permit. Learned counsel stated that this issue has already been decided by this Court through judgment dated 27.2.2020 passed in W.P. No.21451/2019 titled Mian Misbah-ur-Rehman v. Sui Northern Gas Pipelines Limited through its Secretary etc. and the Federal Government is acting in contravention to the law laid down by this Court. Therefore the Petitioner prays that the persons mentioned in the letter dated 9.6.2020 issued by the Federal Government should be barred from contesting the election as they are not members of the company in their own right and as such they cannot represent the Federal Government as an elected director. Learned counsel argued that the same will apply to the nominees of State Life Insurance Corporation and National Investment Trust Limited who are also not members of the Respondent No.3 Company.

3. Effectively the case of the Petitioner is that the Federal Government being member of SNGPL cannot contest elections in terms of section 159 of the Act and that it can only nominate directors under sections 164 and 165 of the Act. The Petitioner consequently argues that the Federal Government can only nominate three persons to the BOD under section 165 of the Act.

Arguments of Respondents' counsel

4. On behalf of the Federal Government report and parawise comments have been filed. Learned DAG stated that the Petitioner's reference to W.P. No.21451/2019 (supra) is totally misconceived. In fact the Federal Government based on the findings in the said case decided to propose candidates to contest the election under section 159 of the Act. She argued that the Petitioner has no locus standi before this Court and in fact the instant Petition raises a company dispute for which remedy is available under section 160 of the Act. She stated that the Federal Government is exercising its rights as a shareholder strictly in accordance with law and that section 153(i)(i) of the Act read with its proviso is self-explanatory wherein the Federal Government can appoint directors who are non-members to represent it in the election of the BOD. She explained that the Ministry of Energy, Petroleum Division proposed the names of candidates to contest the election for the BOD. Eleven

names were provided which are duly mentioned in the election notice and the advertisement. Since the Federal Government is a shareholder of Respondent No.3, it is merely exercising its right as a shareholder and has opted to appoint directors by election being distinct from nominee directors.

5. On behalf of the SECP, report and parawise comments have been filed. Learned counsel has clarified that if a person holding shares in a company is not a natural person then such person can nominate any person to contest the election for director on its behalf in terms of section 153(i)(i) of the Act and that such person need not be a member of the company. It is their case that as per the provisions of the Act, there is no restriction on the number of persons who can contest the election of directors as the election shall be conducted as per the procedure laid down in section 159 of the Act. Further that an artificial person can participate in the election through its nomination of a natural person, who is not a member of the company.

6. Report and parawise comments have also been filed on behalf of Respondent SNGPL. Learned counsel argued that while proceeding with the process for carrying out election for the BOD of SNGPL, the Federal Government being a member of SNGPL has proposed candidates to contest the election in terms of section 159 of the Act. There are eleven names proposed out of which some are members holding proxy on behalf of the Federal Government while others are not members but eligible in terms of section 153 of the Act. He stated that SNGPL has acted as per law and duly advertised the election date. He has also raised objections on the maintainability of this Petition and the locus standi of the Petitioner. Learned counsel explained that the shareholders of SNGPL comprises of 634,216,665 shares and the required threshold for a member to participate in the election is the holding of 9.09% shares. The Petitioner does not meet this threshold, hence cannot allege any grievance or breach of any right. The Federal Government is a member holding 31.68% shares directly and 57.68% shares through government owned entities, corporations and companies bringing its total shareholding to over 70%. Hence the Federal Government can contest elections in its own right as a member of SNGPL and can name non-members as its candidates to contest the election in terms of section 153 of the Act.

7. Learned counsel for Respondent No.22 clarified that Respondent No.22 has withdrawn from the election process, hence he is no longer contesting the election. Learned counsel for Respondent No.21 provided a copy of order dated 16.3.2020 passed by this Court in I.C.A. No.14622/2020 titled Mian Misbah-ur-Rehman v. SNGPL and others wherein he raised an objection with respect to the election of the BOD wherein a status quo order has been passed, hence prays that this Court should not proceed with the case until a decision is made in the aforementioned I.C.A. Learned counsel for Respondent No.24 essentially argued that there is no concept of non-natural person contesting election of the BOD in terms of section 154 of the Act. Learned counsel further argued that there is nothing in the law which bars a non-natural person from directing a natural person to offer himself for election and then vote for such person in the election to be conducted, meaning that it can give

its proxy to a member. In fact, it appears to be common practice for non-natural persons to transfer the requisite shareholding in favour of persons it desires to contest election so that the requirement of section 159(3) and section 153 may be met as any such person who offers himself for election would have to be a member in his own right. Learned counsel also argued that a person offering himself for elections has to be a member and there can be no exception to the same, therefore it is clear that there is no concept of a non-natural person contesting elections under the applicable law. Learned counsel argued that there is no concept of a "nominee" contesting elections. The only reference to nominees in relation to a BOD of a company under the Act is persons being nominated to a BOD directly without going through the process of elections under sections 164 and 165 of the Act.

Preliminary Objections

8. Learned counsel for Respondents raised three preliminary objections. Firstly that the Petitioner has appropriate, efficacious and alternate remedy available to him under section 160 of the Act; Secondly that the Petitioner has no locus standi to file the instant Petition as no fundamental right of the Petitioner has been infringed; Thirdly, section 5(2) of the Act is an ouster clause which ousts the jurisdiction of this Court specifically on matters related to election of directors which are to be dealt with exclusively by the Company Bench of the High Court having jurisdiction. Reliance is placed on Muhammad Shafique Khan Sawati v. Federation of Pakistan and others (2015 SCMR 851), Mian Javed Amir v. United Foam Industries (Pvt.) Ltd. and others (2016 SCMR 213) and M. Fuwad A. Mughal v. Federation of Pakistan and others (2018 YLR 26).

9. With respect to the first objection that remedy under section 160 of the Act is available to the Petitioner who seeks to challenge the eligibility of eleven candidates named by the Federal Government for the purposes of election to the BOD. Section 160 of the Act provides that the Company Bench of the relevant High Court can declare the election of directors invalid on an application of a member holding 10% of the voting power in the company filed within the thirty days from the date of election, if there is material irregularity in the holding of the elections and matters incidental or related thereto. The contention is that the Petitioner does not have locus standi under section 160 of the Act as he does not have the requisite 10% of the voting power. Since he does not qualify for the remedy under section 160 of the Act, he cannot bypass the mandatory provisions of the Act and challenge the elections through this Petition. In this regard, it is noted that the Petitioner's challenge is specifically with the decision of the Federal Government to put up eleven candidates for the election to the BOD of SNGPL on the ground that the Federal Government cannot put up any candidates to participate in the election of directors and that by doing so they are abusing their authority and acting in error of law. In this regard, it is noted that the entire dispute is with respect to the decision of the Federal Government to participate in the elections. Since the decision and actions of the Federal Government have been impugned before this Court, the instant Petition is maintainable and this Court in constitutional jurisdiction can determine whether or not Federal Government has acted in accordance with law or

whether it has abused its authority. In this regard, it is noted that the powers under Section 160 vesting with the Company Bench of the relevant High Court is the power to determine whether or not the elections have been conducted under the Act and does not deal with the judicial review of actions or decisions of the Federal Government challenged as interference in the election process. Section 160 of the Act is a statutory right of a shareholder to ensure that elections of directors are conducted under the Act as required and this provision is not available to the Petitioner to challenge the actions of the Federal Government. Hence there is no merit in this objection. So far as the issue of locus standi is concerned, for the purposes of constitutional jurisdiction the Petitioner claims to be aggrieved as he is a member of SNGPL and does not want the Federal Government to usurp his rights as a member who wants to contest elections for the BOD.

10. With respect to the third objection on the ouster of jurisdiction, section 5(2) of the Act provides that Notwithstanding anything contained in any other law no civil court as provided in the Code of Civil Procedure, 1908 or any other court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Court is empowered to determine by or under this Act. In terms of this Section, the jurisdiction of a civil court or any other court has been ousted to entertain any suit or proceeding in respect of any matter which the court is empowered to determine by or under this Act. Consequently section 5(2) of the Act vests jurisdiction with the Company Bench of the relevant High Court to deal with all matters under the Act. While interpreting the ouster clause, the august Supreme Court of Pakistan has in several cases held that the ouster clause has to be interpreted strictly and based on the facts of the case. More specifically that the ouster clause cannot be read or inferred to oust constitutional jurisdiction.

11. In Allied Bank of Pakistan Ltd. v. Khalid Farooq (1991 SCMR 599), the august Supreme Court of Pakistan has held as under:
the exclusion of jurisdiction of superior Courts is not to be readily inferred, that there is a strong leaning against any such exclusion, that this rule is deep seated and if it is to be overturned, it must ordinarily be done by a clear, definite or positive provision, not left to mere implication.
In Munir Hussain Bhatti, Advocate and others v. Federation of Pakistan and another (PLD 2011 SC 407), the august Supreme Court of Pakistan has held as under:
There is a vast body of precedent in our legal corpus which has consistently held that the Court's jurisdiction may only be ousted through express words in a legal text. This principle of law is by now well settled.
In Arshad Mehmood v. Commissioner / Delimitation Authority, Gujranwala and others (PLD 2014 Lahore 221), it has been held that:
The ouster clause under section 10A of the Act does not, in the slightest, abridge or curtail the constitutional jurisdiction of this Court to judicially review the orders, notifications and the acts of the executive i.e., the Delimitation Authority and Delimitation Officer in this case. It also matters little if the ouster clause is considered to be a time specific clause, as argued by some of the respondents. Courts usually give due weightage to any administrative urgency of the Executive

but this does not mean that the doors leading to courts can be shut down as this would result in curtailing and abridging the judicial power. This is opposed to independence of judiciary and the constitutional framework of separation of powers. As per citations the ouster clause must be read in the context of the language of the statute. So far as constitutional jurisdiction is concerned, this Court will guard its jurisdiction jealously and will not oust its constitutional jurisdiction on inference as section 5(2) of the Act does not explicitly bar this Court's jurisdiction.

12. In the instant case, the ouster clause specifically mentions civil courts or any other court to entertain suits or proceedings in respect of matters which the Company Bench of the High Court has jurisdiction by or under the Act, meaning thereby that no other court can interfere in matters for which jurisdiction has been specifically vested with the Company Bench of the relevant High Court. Section 5 as the ouster clause does not protect unlawful actions and decisions of the government which are otherwise amenable to judicial review under constitutional jurisdiction. The ouster clause protects the jurisdiction of the Company Bench of the relevant High Court to ensure that no other court impedes on its jurisdiction. The Company Bench of the relevant High Court under Section 160 of the Act can consider irregularities in the election of directors wherein the requirements of the Act have not been followed or considered by it but cannot consider issues which go beyond irregularities under the Act. The ouster clause therefore does not cover decisions and actions taken by the executive being the Federal Government in this case. More importantly the application of section 5 of the Act will not in any manner curb the jurisdiction vested in this Court under Article 199 of the Constitution as has been held in PLD 2014 Lahore 22 (supra). Hence if an authority has acted in contravention to the law or its authority or contrary to the principles of natural justice, the same will be amenable to writ jurisdiction and it cannot be argued that such decisions will fall within the mandate of section 5(2) of the Act. Importantly, the objective of the ouster clause is to ensure that no other court will carry out parallel proceedings with respect to claims and complaints and issues specifically arising under the scheme of the Act. However, when an action is taken by the Federal Government which is stated to be without jurisdiction or authority or is termed as misuse of power, tainted with mala fide, the same will not fall within the scope of the ouster clause being section 5(2) of the Act or within the scope of section 160 of the Act.

13. Respondent No.21, Mian Misbah-ur-Rehman relied upon order dated 16.3.2020 passed in I.C.A. No.14622/2020 to urge that on account of the status quo order, this Court cannot decide the issue of election for the BOD as a status quo order has been passed by a learned Division Bench of this Court in I.C.A. No.14622/2020. As per the record and copy of the order produced before this Court, the matter in issue in I.C.A. No.14622/2020 is specifically with respect to the status of Mian Misbah-ur-Rehman in the outgoing BOD, which Board's tenure ended on 22.6.2020. The order relied upon does not prevent future elections with respect to the BOD of SNGPL as any determination made in the said I.C.A. is with respect to the status of Mian Misbah-ur-Rehman in the previous BOD but not with respect to the BOD that is to

be elected, pursuant to the notice dated 2.5.2020, hence there is no merit in this objection.

Opinion of the Court

14. On 2.5.2020 in terms of Section 159 of the Act, the BOD of SNGPL fixed the number of directors to be elected as eleven and notified the election to be held on 23.6.2020. On 1.6.2020 notice for extraordinary general meeting was issued to SECP and Pakistan Stock Exchange that eleven directors were to be elected for SNGPL and the names of the retired directors who are eligible for re-election. This notice was also issued in the newspaper on 16.6.2020. On 9.6.2020 the Government of Pakistan, Ministry of Energy, Petroleum Division informed SNGPL of its proposed candidates for appointment of directors by election to the BOD. These names are as follows:

Sr. No.	Name	Member's Status as on 9.6.2020
1	Ms. Roohi Raees Khan	Member
2	Mr. Rizwan Ullah Khan	Member
3	Dr. Sohail Razi Khan	Member
4	Mr. Mohammad Haroon	Non-Member
5	Mr. Muhammad Ayub Chaudhry, Additional Secretary (P) Petroleum Division	Non-Member
6	Mr. Sajid Mehmood Qazi, Joint Secretary (A/CA) Petroleum Division	Non-Member
7	Mr. Naveed Kamran Baloch	Non-Member
8	Mr. Yousaf Naseem Khokhar	Non-Member Name proposed by State Life Insurance Company
9	Mr. Manzoor Ahmed	Non-Member Name proposed by NIT
10	Mr. Afan Aziz	Non-Member
11	Syed Akhtar Ali	Non-Member

All candidates were required to submit their intention to contest the election by 9.6.2020. On 16.6.2020 after scrutinizing the names of the candidates an advertisement was published wherein 20 names were declared as a final list of candidates to contest in the election to the BOD of SNGPL. The dispute before the Court is with respect to the proposed names of the Federal Government being the candidates who will contest the election on its behalf. Out of the eleven names, three candidates are members where the dispute is limited to whether they can represent the Federal Government on the BOD as elected directors and eight names are of non-members where the dispute is whether a non-member can contest the election while representing the Federal Government. This includes the nominee of State Life Insurance Corporation and National Investment Trust Limited who are

also non-members. The issue, before the Court is whether the Federal Government can appoint directors through election under section 159 of the Act and whether it can propose the names of non-members to contest the election on its behalf. The second issue is whether the Federal Government is restricted to appoint nominee director under sections 164 and 165 of the Act, thereby prohibited from proposing names of candidates who will contest the election for the BOD on its behalf.

15. The entire dispute before this Court revolves around interpretation of section 153(i)(i) of the Act and section 159 of the Act which are reproduced hereunder: (Emphasis in bold added for convenience)

Section 153. Ineligibility of certain persons to become director. A person shall not be eligible for appointment as a director of a company, if he:

(a) is a minor
(b) is of unsound mind;
(c) has applied to be adjudicated as an insolvent and his application is pending
(d) is an undischarged insolvent;
(e) has been convicted by a court of law for an offence involving moral turpitude;
(f) has been debarred from holding such office under any provision of this Act;
(g) is lacking fiduciary behaviour and a declaration to this effect has been made by the Court under section 212 at any time during the preceding five years;
(h) does not hold National Tax Number as per the provisions of Income Tax Ordinance, 2001
Provided that the Commission may grant exemption from the requirement of this clause as may be notified

(i) It is not a member
Provided that clause (i) shall not apply in the case of
(i) a person representing a member which is not a natural person
(ii) a whole-time director who is an employee of the company
(iii) a chief executive; or
(iv) a person representing a creditor or other special interests by virtue of contractual arrangement.
(j) has been declared by a court of competent jurisdiction as defaulter in repayment of loan to a financial institution.
(k) is engaged in the business of brokerage or is a spouse of such person or is a sponsor, director or officer of a corporate brokerage house:
Provided that clauses (j) and (k) shall be applicable only in case of listed companies.
Section 159. Procedure for election of directors. (1) Subject to the provision of section 154, the existing directors of a company shall fix the number of directors to be elected in the general meeting, not later than thirty five days before convening of such meeting and the number of directors so fixed shall not be changed except with the prior approval of the general meeting in which election is to be held.

(2) The notice of the meeting at which directors are proposed to be elected shall among other matters, expressly state:
(a) the number of directors fixed under subsection (1); and
(b) the names of the retiring directors

(3) Any member who seeks to contest an election to the office of director, shall, whether he is a retiring director or otherwise, file with the company, not later than fourteen days before the date of the meeting at which elections are to be held, a notice of his intension to offer himself for election as a director
Provided that any such person may, at any time before the holding of election, withdraw such notice.

(4) All notices received by the company in pursuance of subsection (3) shall be transmitted to the members not late than seven days before the date of the meeting, in the same manner as provided under this Act for sending of a notice of general meeting. In the case of a listed company such notice shall be published in English and Urdu languages at least in one issue each of a daily newspaper of respective language having wide circulation.

(5) The directors of a company having a share capital shall, unless the number of persons who offer themselves to be elected is not more than the number of directors fixed under subsection (1), be elected by the members of the company in general meeting in the following manner, namely:
(a) a member shall have such number of votes as is equal to the product of the number of voting shares or securities held by him and the number of directors to be elected;

(b) a member may give all his votes to a single candidate or divide them between more than one of the candidates in such manner as he may choose; and

(c) the candidates who gets the highest number of votes shall be declared elected as director and then the candidate who gets the next highest number of votes shall be so declared and so on until the total number of directors to be elected has been so elected.

(6) The directors of a company limited by guarantee and not having share capital shall be elected by members of the company in general meeting in the manner as provided in articles of association of the company.

16. In terms of section 153 of the Act certain persons are not eligible to be directors of a company, where one disqualification is that a person shall not be eligible to be appointed as director if they are not a member of the company. Section 118 of the Act defines member of a company being the subscribers to the memorandum of association who are allotted shares and whose name is entered in the register of members. Section 154(2) of the Act also requires that only a natural person can be a director. Hence to be a director a person must be a member and must be a natural

person. The Proviso to section 153(i) of the Act states that section 153(i) shall not apply in the case of a person representing the member who is not a natural person. As per this Section in order to be eligible as a director of a company, the person must be a natural person and must be a member, however an exception has been created for members, who are not natural persons such as corporate bodies or the Federal or Provincial Governments to appoint a director on their behalf. They can appoint a director who is not a member of the company. So for the purposes of the dispute before this Court, the Federal Government can appoint a non-member as a director of SNGPL. Now the question is does section 153 apply to section 159 of the Act which is argued to be a stand alone provision. Section 159 of the Act lays down the procedure for the election of directors whereby any member who seeks to contest in the elections for the BOD is required to provide his notice of intention to offer himself for election as a director. It has been argued that under section 159 of the Act only members can participate in the election of directors, that too a member, who is a natural person, because such member has to communicate his intention to offer himself for election as director, meaning thereby that only a natural person who is a member can offer himself as a director of the company and cannot offer himself on behalf of anyone else.

17. Under the Act, a director can be appointed under section 159 of the Act being appointment through an election or under sections 164 and 165 being nominated directors of creditors or special interests by virtue of contractual arrangements. Section 165 of the Act provides that special interest directors are those who are nominated by a body corporate or a company or any other entity owned or controlled directly or indirectly by the Federal Government or Provincial Government on the Board of a company on account of any investment made. So for the purposes of section 165 of the Act, the contention of the Petitioner that the Federal Government can only appoint directors through section 165 of the Act as nominee directors is totally misconceived and against the mandate of the Act. A shareholder of a company enjoys certain rights of which the right to elect directors and remove directors; the right to contest in the elections to the BOD and the right to appoint proxy are relevant for the purposes of this case. A member of a company by virtue of holding shares in a company has the right to participate in the decision making process either in their capacity as shareholders or through the BOD based on their shareholding. For the purposes of meetings, section 137 of the Act provides that a member of a company is entitled to attend and vote at meetings of the company through a proxy. Section 138 of the Act provides that a body corporate or corporation which is the member of a company can attend a meeting through an authorized representative and exercise all powers as member through the authorized representatives. Section 139 of the Act provides that the Federal Government as a member of the company can appoint any person it deems fit to act as its representative at any meeting of the company or meeting of class of members of the company. Essentially these sections enable a member to participate in the meetings either through proxy or through an authorized representative. The relevance of these sections for the purposes of a body corporate, corporation or in the context of the Federal or Provincial Government where it is a member of a company is that such

members who are not natural persons will act through their proxies or authorized representatives who are exercising their right, in the meetings, to participate and to vote. In the same context, since a member has the right to participate in the election to the BOD of a company, where that member is not a natural person it can exercise this right through proxy or through its representatives. The Petitioner has essentially argued that the Federal Government cannot appoint elected directors on the BOD and can only appoint nominee directors on account of section 159 of the Act. His understanding of section 159 of the Act when read with section 153 of the Act is totally flawed. If accepted it would mean that the Federal Government is prohibited from exercising the basic right of a member as given under section 159 of the Act to elect directors to the BOD. This is totally against the mandate of the Act. Section 159 of the Act also provides the procedure for holding elections of the BOD. It cannot be read as prohibiting the right of certain members when it comes to appointing directors. In this context section 153(i)(i) clearly provides that a director of a company must be a member of company except when such director is representing a member which is not a natural person. The rationale behind section 153(i)(i) of the Act is that a body corporate or corporation and Federal or Provincial Government, as the case may be, can only be represented on the BOD through a natural person as the body corporate or corporation or the Federal or Provincial Government have to act through their representatives to attend meetings to vote or participate in the decision making process. In fact section 153(i)(i) of the Act gives the body corporate or corporation and the Federal or Provincial Government the additional right to consider appointing a member or a non-member as its elected director under section 159 of the Act. It creates an exception to the rule that a person representing a member which is not a natural person, though not a member themselves qualify to be a director.

18. In this context it was argued that the Federal Government, as a member of SNGPL can only appoint a member as a director, specifically because section 159(3) of the Act requires a director to be a member, who in his own capacity will give his consent to be appointed as a director and gave his intimation to participate in the elections. A plain reading of section 159(3) makes it evident that the provision is procedural in nature which essentially lays down the process to be followed for the purposes of election. Section 159(3) of the Act requires any member, be it a body corporate or the Federal or Provincial Government, as the case may be, give their consent and intimation to offer themselves for election as directors. It goes without saying that since the body corporate or the Federal or Provincial Government will act through their representative who has to be a natural person, they will follow the process under section 159(3) and give their consent and intimation to the election. Consequently section 159(3) of the Act does not prohibit the rights of non-natural persons who are members of a company to appoint directors by election on the BOD. Hence, the Federal Government can appoint a member or non-member as its candidate to participate in the election for the BOD of Respondent No.3. In this regard, I have been informed that the candidates mentioned at Serial Nos.1, 6, 13, 16 and 18 of the advertisement dated 16.6.2020 are non-members. Rest are all admittedly members, out of which three are holding

proxy of the Federal Government, hence as such no illegality is made out on this count.

19. The relevance of the right of a shareholder to appoint a director through election is best understood when seen in the context of the difference between a nominee director and an elected director. A nominee director is one who is appointed under sections 164 and 165 of the Act on the basis of a contractual arrangement with the creditors or other special interest holders. Section 164 of the Act provides that in addition to director elected or deemed to have been elected by shareholders, the company may have directors nominated by its creditors or special interests by virtue of a contractual arrangement. A body corporate or corporation owned or controlled by the Federal or Provincial Government may also nominate directors on the BOD to such corporation or company that it has extended credit facilities. In the same manner section 165 provides for the nomination of directors representing special interests where the Federal or Provincial Government as the case may be to nominate a director in a company in which it has made some investments or on the basis of any special interests. A nominee director therefore is nominated by institutions such as financial institutions or the Federal or Provincial Government on the Board to protect its interests as nominator. The fundamental difference between a nominee director and elected director is that a nominee director holds office at the pleasure of the nominator whereas the elected director is given a three year tenure under the Act and secondly that a nominee director has to safeguard the interests of its nominator first and foremost whereas an elected director has a fiduciary duty to the company and all its shareholders. So the nominee director participates in the proceedings of the BOD as per the terms of its arrangement with the nominator to ensure that nominators' investment or interest is safeguarded, to act as a liaison between the nominator and the company and also in the larger picture consider the overall policies and working of the company. In the instant case, the Petitioner's contention that the Federal Government can only act through nominee directors under Section 165 of the Act, notwithstanding the fact that they are members of SNGPL in their own right, is contrary to the mandate of the Act.

20. The Petitioner has also stated that the Federal Government has violated the law laid down by this Court through judgment dated 27.2.2020 passed in W.P. No.21451/2019. This contention is also totally misconceived. The issue before the Court in that case was that whether Mian Misbah-ur-Rehman was a nominee director of the Federal Government or whether he contested the election in his own capacity as a member of the company, hence the matter in issue is not the same. To the extent of Mian Misbah-ur-Rehman who is Respondent No.21 in this Petition, the court concluded that he was elected as a nominee of the Federal Government. The Court also pointed out that there have been some irregularities in the manner in which nominee directors of the Federal Government have not been distinguished from the elected directors However this lapse does not change the fundamental character of Mian Misbah-ur-Rehman who was appointed as nominee director of the Federal Government. Hence there has been no violation of this judgment. In fact it is the position of the Federal Government that they have been instructed by this

judgment and have attempted to remove those irregularities which led to the dispute between the Federal Government, SNGPL and Mian Misbah-ur-Rehman.

21. Therefore the Federal Government is a member of SNGPL and enjoys all rights of a member under the Act and can exercise all rights as a member under the Act which includes the right to appoint and remove directors under the Act. This means that the Federal Government can either appoint a director on the BOD through elections under section 159 of the Act or through nomination under sections 164 and 165 of the Act.

22. In view of the aforesaid, no case for interference is made out. The instant Petition is dismissed and the Respondent SNGPL can carry on with its election process within the stipulated time in accordance with law.

MH/W-4/L Petition dismissed.

P L D 2020 Lahore 899
Before Ayesha A. Malik, J
DAWAKHANA HAKIM AJMAL KHAN (PVT.) LIMITED---Petitioner
Versus
FEDERATION OF PAKISTAN and others---Respondents
Writ Petition No. 3973 of 2017, decided on 5th August, 2020.

(a) Drug Regulatory Authority of Pakistan Act (XXI of 2012)---

----Ss. 3, 4, 7 & 32---Alternative Medicines and Health Products (Enlistment) Rules, 2014---Regulatory regime of Drug Regulatory Authority of Pakistan (DRAP)---Enlisting of products---Health related purposes---Petitioners were manufacturers, importers and sellers of diverse products which included alternative medicines, nutraceuticals, food supplements, sanitizers, disinfectants, baby milk, health and over the counter products---Petitioners were aggrieved of the notification issued by authorities to get such products enlisted with DRAP---Validity---Products in question raised health claims as those were intended for or recommended for a health related purpose, which characterized relationship of any substance to a disease or health related condition---In public interest or public welfare, it was important to note that regulating health claim was about risk management, about safety and disclosure for the benefit of public---Objective of regulatory framework was to ensure that the consumer or user of the product was protected from harm and consumers would know what they were buying or consuming---Products of petitioners were classified under Drug Regulatory Authority of Pakistan Act, 2012, as they could be connected with some health related purpose---Products in question were not ordinary consumer products as those had claimed to have some health benefits---DRAP had to ensure products safety, efficiency and quality for the benefit of public---High Court directed DRAP to devise guidelines setting out acceptable standards of evidence required to support health related claims to prove quality, safety, efficacy and effectiveness of product; to rely on international standards, until guidelines were not available and to make known the standards of evidence that any applicant was required to satisfy under the Rules; to give proper hearing to those petitioners who claim that their products or entities did not fall under DRAP's regulatory regime and to pass a speaking order with regard to falling of the product or entity under Drug Regulatory Authority of Pakistan Act, 2012 or Rules and to deal hand sanitizers in view of the Cabinet Decision dated 5-5-2020 during emergency declared for COVID-19---Constitutional petition was dismissed accordingly.

Messrs Azfar Laboratories Private Limited through Directors and others v. Federation of Pakistan through Secretary Ministry of National Health Services and 4 others PLD 2018 Sindh 448 rel.
Government of Sindh through Secretary Health Department and others v. Dr. Nadeem Rizvi and others 2020 SCMR 1; Messrs Sui Southern Gas Company Ltd. and others v. Federation of Pakistan and others 2018 SCMR 802 and State of M.P. v. Rakesh Kohli and another 2013 SCMR 34 ref.

(b) Interpretation of statutes---

----Regulatory objectives---Object---Regulatory objective defines process which the regulator has to follow to identify products and to ensure that the regulations and regulatory framework serves public interest---Entire regulatory framework is designated to effectively achieve and retain policy objectives---Regulator is identified by its objective and usually its policy objectives are evident from the law.

(c) Drug Regulatory Authority of Pakistan Act (XXI of 2012)---

----Ss.3 & 7---Drug Regulatory Authority of Pakistan (DRAP)---Regulatory regime---Principle---To fall under DRAP's regulatory regime the product must have a health related purpose and must be presented in a pharmaceutical dosage form---When evaluating health related purpose and pharmaceutical dosage form, DRAP has to ensure that the product is safe, qualitative, efficacious and effective in terms of its intended and recommended use.

(d) Drug Regulatory Authority of Pakistan Act (XXI of 2012)---

----Ss. 4 & 7---Enlistment of product---Object, purpose and scope---Enlistment is a provisional allocation of number given to a product or entity (manufacture or import) to authorize manufacture, import and marketing of a product---Provisional certification has become necessary because DRAP has not initiated process of issuing licenses---In order to ensure that a product or entity can continue dealing with its business, the process of enlistment has been devised through Rules---Entity or product has to be enlisted until licensing function becomes operative.

Barrister Haroon Duggal, Mrs. Samia Khalid, Ms. Shafkat Parveen Mughal, Ch. Habib ur Rehman, Hasan Irfan Khan, Ali Mohsin Qazlibash, Miss. Khdija Bukhari, Mirza Saqib Baig, Muhammad Shakeel Taj, Mudassar Hassan, Imtiaz Rashid Siddiqui, Barrister Shehryar Kasuri, Raza Imtiaz Siddiqui, Jamshid Alam, Muhammad Hamza Sheikh, Qadeer Ahmad Qulyar, Sabeel Tariq Maan, Mansoor Usman Awan, Ms. Shazeen Abdullah, Ms. Kashif on behalf of Nawab Saeed Ullah Khan, Muhammad Aslam Sheikh, Sh. Irfan Saeed, Saeed Akhtar Khan Khetran, Ch. Irshad Ullah Chattha, Javaid Aslam, Hafiz Mussab Rasul, Farooq Amjad Meer, Nabeel Rafaqat, Shazad Ahmad Cheema, Dr. Khawaja Tahir Mahmood, Barrister Danyal Ijaz Chadhar, Mian Imran Mushtaq, Syed Kashif Hassan, Zaheer Mirza, Qazi Salman Zahid, Ms. Rafila Anjum Minhas, Muhammad Wasif Shahzad, Muhammad Nadeem Ahmad Malik, Yasir Munawar Cheema, Zahid Imran Gondal, Syed Raza Ali, Sardar M. Ali, Sh. Muhammad Nawaz, Ghulam Murtaza, Ch. Nisar Ahmad Saikhu, Ch. Muhammad Afzal Jutt, Farman Ahmad Bhatti, Muhammad Yousuf Khan-II, Syed Umair Abbas, Mian Abdul Majid, Syed Ali Tahir, Muhammad Asad Riaz, Jabbar Qadir, Muhammad Ahad Nadeem, Rashid Mehmood Khan, Saeed Akhtar Kethran, Munir Hussain Panjutha, Allah Ditta Sial, Muhammad Mustafa Khalid, Muhammad Adeel Gohar, Barrister Asfand Yar Khan Tareen, Qambar Ali Shah, Shamim ur Rehman Malik, Shahid Mehmood Minhas, Ms. Samran Mushtaq Chaudhry, Muhammad Azhar Siddique, Ms. Salma Riaz,

Mian Shabir Ismail, Mian Asghar Ali, Muhammad Asif Butt, Sardar Muhammad Asim Javed, Sardar Muhammad Safian Amin, Hasan Ahsan Mian, Abdul Latif, Mian Muhammad Ahmad Chhachhar, Muhammad Amin Bhatti, Syed Samar Rizvi, Malik Azhar Iqbal Khokhar, Rana Intezar, Arslan Yousaf, Sami ul Hassan Rana and Zubair Ahmad Kundi for Petitioners.
Ch. Ishtiaq Ahmad Khan, Additional Attorney General for Pakistan, Mrs. Ambreen Moeen and Asad Ali Bajwa, Deputy Attorney Generals for Pakistan, Zahid Sikendar and Ms. Zarish Fatima, Assistant Attorneys General for Pakistan for Respondents (Federation of Pakistan).
Akhtar Javed, Additional Advocate General, Punjab along with M. Aleem Akhtar Cheema, Legal Consultant (PDCU), P&SHD and Muhammad Adnan, Law Officer, CDC Officer Punjab for Respondents (Province of Punjab).
Ahmed Pervaiz and Ms. Scheherezade Shaharyar for DRAP along with Shahrukh Ali, Assistant Director Legal Affairs DRAP.
Syed Muhammad Ghazanfar for Respondents (in W.P. No.2776 of 2017).
Zafar Iqbal Bhatti and M. Saad Ghazi for Respondents (in W.P. No.258002 of 2018).
Date of Hearing: 1st, 2nd, 7th, 9th, 13th, 14, 15th, 16th and 17th July, 2020.

JUDGMENT

AYESHA A. MALIK, J.---A challenge has been made against the legislative competence of Parliament to promulgate the Drug Regulatory Authority of Pakistan Act, 2012 ("DRAP Act") as well as a challenge to the vires of the Alternative Medicines and Health Products (Enlistment) Rules, 2014 ("Rules"). Consequently the Petitioners challenge letter dated 03.10.2016 issued by Deputy Drug Controller (Health and OTC), Notification dated 30.10.2019 issued by Ministry of National Health Services Regulations and Coordination, Government of Pakistan, Islamabad and letter dated 21.01.2019 issued by the Chief Drugs Controller Punjab, Lahore. The Petitioners as detailed in Schedule "A, B and C" have raised common constitutional issues by challenging the regulatory authority of Drug Regulatory Authority of Pakistan ("DRAP") over their business and products and have challenged the actions of DRAP requiring the Petitioners to enlist their products or entity under the Rules.
The Petitioner's Arguments:

2. The Petitioners before the Court are involved in the manufacture, import and sale of diverse products which include alternative medicines, nutraceuticals and food supplements, health and over the counter ("OTC") products, disinfectants, cosmetics, veterinary supplements and baby milk. Their common grievance is that Parliament is not competent to legislate the DRAP Act; that their products do not fall in the definition of 'drug' under the DRAP Act; that the Rules go beyond the mandate of the DRAP Act seeking to regulate that which it is not authorized to regulate under the DRAP Act. Consequently, they do not fall within the regulatory regime of DRAP which includes the requirement of enlistment under the Rules.

3. The Petitioner in the instant Petition is Dawakhana Hakim Ajmal Khan (Private) Limited who manufactures and markets herbal remedies. It is their case that herbal remedies are made out of natural products and undergo animal testing; that their remedies are in accordance with established scientific and medical standards related to the science of unani, ayurvedic or tibb and that they have never been regulated as drugs and medicine. It is their case that historically under the Drug Act, 1976 ("Drug Act"), ayurvedic, unani, homeopathic and biochemical system of alternative medicine was not regulated as a 'drug'. It is the Petitioner's case that it is regulated under the Ayurvedic, Unani and Homeopathic Practitioners Act, 1965 ("1965 Act") and that the processes adopted by DRAP does not cater for the distinct sciences of ayurvedic, unani and homeopathy, which in itself are separate traditional forms of medicine. Hence without relying on sector experts to understand the science of traditional medicine, the Petitioner is subjected to a regulatory regime which does not recognize their subject specialty.

4. The Petitioner in W.P. No.36555/2016 is Nestle Pakistan Limited who manufactures and sells food items, in this case, baby milk and milk based baby food which they contend does not fall within the regulatory regime of DRAP. It is their case that food and food based products are legislated under the Punjab Food Authority Act, 2011 ("Food Act") through the Punjab Food Authority ("Food Authority"). Furthermore nutrition relating to children is regulated by the Punjab Infant Feeding Board ("Board") which has been established under the Protection of Breast-Feeding and Child Nutrition Ordinance, 2002 ("2002 Ordinance") read with the Punjab Protection of Breast-Feeding and Child Nutrition (Amendment) Act, 2012. Under the Board's regulatory regime, the products of the Petitioner are regulated to ensure safety and adequacy of nutrition for infants and young children. It is also their case that baby milk and milk based food products are not used for the diagnosis, cure, mitigation, treatment or prevention of disease, hence cannot fall within the regulatory jurisdiction of DRAP. It was argued that they have been classified as a Health and OTC Product under the DRAP Act and placed under the definition of baby milk and foods and compensatory foods for infants and young children under the Rules which is without lawful authority and beyond the mandate of DRAP. It is also argued that Notification dated 3.10.2016 issued by Ministry of National Health Services, Regulations and Coordination, Islamabad has directed the Federal Board of Revenue that no commercial importer is authorized to import categories of ingredients or products as listed in the Notification which includes baby milk and food without their authorization as required under the Rules. It is stated that the Notification dated 3.10.2016 is illegal and beyond the mandate of the DRAP Act.

5. The Petitioner in W.P. No.258002/2018 is Engro Foods Limited which manufactures, markets and sells olpers full cream milk powder, for the preparation of which the Petitioner imports milk powder into Pakistan. The imported milk powder falls under the category of complementary foods for infants and young children as defined in Section 2(xiv) of the Rules, consequent to which DRAP requires the Petitioner to enlist its product so as to have its imports cleared from

DRAP. The Petitioner is engaged in the dairy business and manufactures and sells various different dairy products in compliance with the federal quality standards prescribed by the Pakistan Standards and Quality Control Authority ("PSQCA") under the Pakistan Standards and Quality Control Act, 1996 ("PSQCA Act") and as per the arguments made its products do not fall within the definition of 'drugs and medicine'. It was argued that their products are regulated by the Food Authority and by the PSQCA and is wrongfully treated as a drug by DRAP and the Petitioner cannot be compelled to get itself enlisted with DRAP or submit to its jurisdiction.

6. The Petitioner in W.P. No.14712/2016 is Prospect Group (Private) Limited which imports and distributes food and dietary supplements under the brand name General Nutrition Corporation Centres ("GNC") throughout Pakistan. The product includes vitamins, minerals and herbal products, sports nutrition products and diet products. It is their case that their products are non-therapeutic goods not intended to diagnose, treat, decease or prevent decease; that the ingredients are dietary ingredients and is treated as food and not drugs under the United States, Food and Drug Administration ("FDA"). Hence their grievance is that GNC products do not fall within the regulatory jurisdiction of DRAP; that it is regulated under the Food Act and Food Authority and in any event the import of health products falls outside the scope of the DRAP Act. The Petitioner is also aggrieved by the processes undertaken by DRAP for enlistment purposes under the Rules as they cause delay and lack clarity on how to classify products on account of which the business of the Petitioner suffers. It is their case that world over GNC products are treated as 'food' and not as 'drug' as they make no health or therapeutic claim.

7. Similarly the Petitioner in W.P. No.72010/2019 is Shoaib Sports, who imports food supplements to improve muscle growth and also imports weight loss products. The Petitioners in W.P. No.1774/2016 imports veterinary supplements and nutraceutical products for the use and consumption by animals. The Petitioner in W.P. No.68811/2019 is CCL Pharmaceuticals (Private) Limited which is engaged in the business of production, marketing, distribution and sale of nutraceuticals and health and OTC products, such as 'Once A Day Calstrong Tablet', 'Once A Day Fish Oil Omega 3', 'Once A Day Men Tablet', 'Once A Day Women Tablet'. Their grievance is common to the grievances raised by the Petitioner who imports GNC products. They are also aggrieved by the Notification of 3.10.2016 requiring authorization DRAP for their imports.

8. The Petitioner in W.P. No.18865/2020 is Archroma Pakistan Limited which deals in the business of chemicals which are used for packaging food items as well as making hand sanitizers. The Petitioner's grievance is that it does not deal in the business of drugs and medicine; that its products fall under the category of disinfectant which is not used for the treatment, mitigation, prevention or prevention of disease; that it produces a general sale item being hand sanitizers which cannot be regulated by DRAP as the product is not used for medical purposes. They are also aggrieved as pursuant to a decision of the Cabinet dated 5.5.2020, that hand sanitizer is not to be regulated by DRAP yet they continue to do so.

9. The Petitioner in W.P. No.75250/2017 is Medinostic Health Care (Private) Limited, which produces various different disinfectant products ranging from hand foam sanitizers, hard surface cleaners, instruments disinfectant, water purification tablets, effervescent tables, liquid soaps, skin care wipes, alcohol wipes, disinfectant wipes etc. which are not drugs as they are not used in any form of treatment or diagnosis for human or animals. The main consumers of the Petitioner's product are households and hospitals. These products do not confer any authority on DRAP to regulate them as 'drugs' as they are ordinary household products which have been wrongfully classified as health and OTC products under the DRAP Act.

10. The Petitioner in W.P. No.21476/2018 is Inventive Cosmetics which is the manufacturer of different cosmetics under the name of Dr. Darma Divine, Pure Skin, Genesis, Neutrafresh, Silk Skin and Caviar. These products are used for external use, hence they do not fall under the definition of drugs and medicine as they are not used in the diagnosis or treatment of any medical condition. Hence their products cannot be regulated as drugs. Furthermore there are no guidelines to set out the evaluation criteria for these products. The other Petitioners claim almost similar relief.

11. All Petitioners before this Court are aggrieved as they are required to enlist their products with DRAP under the Rules. It is their contention that this is not lawful requirement as they do not fall within the regulatory jurisdiction of DRAP since they do not deal with 'drugs and medicine' per se. Consequently the Petitioners challenge the vires and legality of the Rules, which were notified vide SRO 412 (I)/2014 dated 27.05.2014 by Respondent No.2, DRAP. It is argued that the Rules go beyond the mandate of the DRAP Act, hence is excessive delegation as the Rules seek to regulate more than 'drugs and medicine'. The Petitioners argue that previously the Drug Act regulated drugs and medicine and did not include the products of the Petitioners; that drugs and medicine is a Provincial subject after the 18th Amendment to the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution"); that the Province of Punjab along with other Provincial Assemblies delegated the authority to legislate on the subject of drugs and medicine to Parliament under Article 144 of the Constitution. The resolutions passed by the respective Provincial Assemblies authorize Parliament to make law and regulate all matters relating to drugs and medicine and does not include the products and the businesses of the Petitioners. It is the case of the Petitioners that through the Rules a new regulatory regime has been introduced, whereby all importers and manufacturers of alternative medicines, health and OTC products, food and dietary supplements for humans and animals, baby milk, disinfectants, hand sanitizers and cosmetics are mandated to enlist with DRAP. The Petitioners argue that this is beyond the scope of the delegated authority by the Provincial Assembly to Parliament and beyond the mandate of the DRAP Act.

12. It has also been argued that the impugned Rules are unjust and unreasonable; that they are against good governance and in violation of the Petitioners' fundamental rights. Learned counsel argued that there are no subject specialists to

advise DRAP with reference to the different and diverse nature of the products and traditional medicine; that DRAP seeks to regulate all products and alternate medicine in the same manner as drugs and medicine which at times is neither practical nor possible. They argued that there are no guidelines and delays in the enlistment process yet a National Task Force was established vide Notification dated 30.10.2019 issued by the Ministry of National Health Services Regulations and Coordination, Government of Pakistan Islamabad to take coercive action against the Petitioners for not complying with the enlistment process under the Rules. Learned counsel argued that the actions of the National Task Force is harsh and unnecessary especially as DRAP has not issued any guidelines as to how the various different products and alternative medicines are to be enlisted and regulated. The Respondents' arguments:

13. Notices were issued under Order XXVII-A, C.P.C. to the Attorney General for Pakistan to respond to the constitutional issues arising out of these Petitions. In response to these notices, report and parawise comments have been filed by the Federation of Pakistan. Learned Additional Attorney General for Pakistan ("AAG") argued that the Parliament legislated the DRAP Act on the passing of resolutions by four Provinces that is Punjab, Sindh, Khyber Pakhtunkhwan and subsequently Baluchistan that Parliament may, by law, regulate matters relating to drugs and medicine as per Article 144 of the Constitution. Learned AAG argued that the Provincial Assemblies have not challenged the DRAP Act nor the Rules framed thereunder nor is there a dispute pertaining to the regulatory framework of DRAP to include therapeutic goods, medicated cosmetics, health and OTC products, food and dietary supplements and alternative medicines. Learned AAG further argued that the Parliament is competent to legislate consequent to the resolutions passed under Article 144 of the Constitution and with reference to Punjab as per the Resolution of the Provincial Assembly dated 15.2.2012. Learned DAG argued that the regulation of drugs and medicine includes the products of the Petitioners and it is for DRAP to determine whether their products fall under the definition of 'drugs' under the DRAP Act; that DRAP was established vide Notification dated 28.11.2012 by the Ministry of National Regulations and Services, Government of Pakistan, Islamabad and has been effectively working since then.

14. Learned AAG further argued that there is a presumption in favour of the constitutionality of law which cannot be declared unconstitutional unless it is established that such law has violated the fundamental rights of the Petitioners or that Parliament lacked the legislative competence to enact the law. Learned AAG also argued that no fundamental right of the Petitioners has been infringed upon nor have they discussed any fundamental right which has been adversely affected. Further states that DRAP ensures that products are safe for the public to use, hence it is for the health and safety of the public as well as to create uniform standards against which drugs can be regulated nationwide. He explained that the Rules are not excessive delegation as they fall within the mandate of the DRAP Act and were approved by the Federal Government. He explained that during the hearing of Suo Motu Case No.1/2012 before the august Supreme Court of Pakistan, the Federal

Government was directed to ensure the process of framing of rules under the DRAP Act vide order dated 28.3.2013, where after the Rules were notified on 27.5.2014. In support of his contentions, he has placed reliance on "Messrs Azfar Laboratories Private Limited through Directors and others v. Federation of Pakistan through Secretary Ministry of National Health Services and 4 others" (PLD 2018 Sindh 448) ("Azfar Laboratories Case") wherein all issues raised before this Court have been decided and neither party filed any appeal against the decision. Hence it is binding on all the Petitioners and on DRAP. He also relied upon Government of Sindh through Secretary Health Department and others v. Dr. Nadeem Rizvi and others (2020 SCMR 1) and Messrs Sui Southern Gas Company Ltd. and others v. Federation of Pakistan and others (2018 SCMR 802) in support of his contentions.

15. Learned counsel for the Respondent DRAP argued that DRAP in exercise of powers conferred by Section 23 of the DRAP Act, with the approval of the Federal Government, promulgated the Rules through which DRAP has the power to enlist alternative medicines, therapeutic medicines, health and OTC products of manufacturers and importers, after scrutinizing the products against the evaluation criteria laid down under Rule 5 of the Rules. He further explained that the Rules call for enlistment of the entity, which is either an importer or a manufacturer and for the enlistment of the product. He explained that a large number of applications were filed for enlistment under the Rules and as of June 2020 all pending applications for enlistment of entities have been decided by the concerned Division. He also stated that several leading multi-national companies such as Abbott Laboratories, Glaxo SmithKline, ICI Pakistan Limited, Muller and Phipps Pakistan (Private) Limited, the Searle Company, Ferozsons Laboratories and Bayer Pakistan (Private) Limited have applied to the Division of Health and OTC Products and have been issued Provisional Certificates for Enlistment as manufacturers or importers. Some of these Petitioners, notwithstanding the fact that they have been issued Provisional Certificates for Enlistment, are before this Court. He also clarified that some of the Petitioners such as Hamdard Laboratories (Waqf) Pakistan, N.B. Sons, Shoaib Sports Company, Dabur Pakistan (Private) Limited, Heal the World, Goldsheff International Nutraceutical, Himont Laboratories (Private) Limited, Wilshire Laboratory (Private) Limited and Bless Laboratories who deal in ayurvedic, unani, homeopathic, herbal products have also applied to the Division of Health and OTC Products and have been issued Provisional Certificates for Enlistment as manufacturers or importers. Therefore he stated that the Petitioners have no grievance before this Court because they have submitted to the regulatory jurisdiction of DRAP and have obtained Provisional Certificate for Enlistment of Products and if at all they are aggrieved by the processes or the delay, those issues cannot become grounds for challenging the vires of the Rules or the competence of Parliament. Learned counsel further explained that at present DRAP is seeking to enlist the entity or the product under the Rules so as to develop its database with respect to therapeutic goods which includes alternative medicines, health and OTC products and medicated cosmetics available in the market so as to ensure that the products meet the regulatory requirements of DRAP which is essentially for the safety and protection of the public.

16. Learned counsel further argued that most countries in the region like India, Bangladesh, Sri Lanka and Iran have similar laws and regulatory regimes which call for registration of similar products in order to promote public health and safety. Furthermore DRAP acts in compliance with the guidelines issued by the WHO and follows international practices and protocols for such purposes. Learned counsel also relied upon the Azfar Laboratories Case to argue that similar challenge was made to the DRAP Act and the Rules before a learned Division Bench of the Sindh High Court which upheld the DRAP Act as well as the Rules for being in accordance with the Constitution. He stated that some of the Petitioners before this Court representing multi-nationals were also before the Division Bench of the Sindh High Court, hence they have no grievance before this Court as the matter has already been decided in the Azfar Laboratories Case, which has not been appealed by any of the Petitioners nor any of the Provinces. He explained that pursuant to the Azfar Laboratories Case, DRAP issued Guidelines for Manufacturers/Importers of Food Supplements or Dietary Supplements or Health Supplements or Nutraceuticals as to what is meant by Alternative Medicine and Health Products Dosage Forms ("Guidelines"), on the directions contained in para 50 of the Azfar Laboratories Case. Even otherwise DRAP regularly holds meetings with the stakeholders to discuss better management, good practices and international standards so as to ensure that its processes are efficient, effective and as per the international practices. He specified that an effort has been made to improve upon the processes, particularly after the guidance given in the Azfar Laboratories Case. Therefore it is the case of DRAP that the Petitioners have no grievance before this Court nor is there any legal basis to challenge the vires of the Rules or the competence of Parliament to promulgate the DRAP Act. Furthermore he argued that the Petitioners' contention that they are regulated under different laws other than the DRAP Act is without basis as each regulatory regime is set up to achieve its purpose, in this case the purpose being to ensure that any product which lays claim to having health benefits must be regulated for its efficacy and to ensure proper disclosure through its packaging and labelling.

17. The Government of Punjab also filed report and parawise comments wherein it is stated that Provincial Assembly of the Punjab passed a Resolution on 15.02.2012 wherein they specifically delegated the subject of drugs and medicine to Parliament. A copy of the Resolution has been placed on file which reads that the Provincial Assembly of the Punjab in its sitting held on 15.2.2012 has passed Resolution in terms of Article 144 of the Constitution, such that the Provincial Assembly of the Punjab resolves that the Majlis-e-Shoora (Parliament) may, by law, regulate matters relating to drugs and medicines in terms of Article 144 of the Constitution of Islamic Republic of Pakistan, 1973. Learned Law Officer stated that a Task Force was notified on 14.7.2016 to ensure compliance under the Rules. He also stated that so far as unani, ayurvedic and homeopathic remedies are concerned, the contention of the Petitioners that they fall within the regulatory framework of Ayurvedic, Unani and Homeopathic Practitioners Act, 1965 is incorrect as the law does not regulate the sale or registration of traditional medicines nor does it check the pharmaceutical form or presentation of the products sold by such practitioners. In

the same way the National Councils for Tib and Homeopathy does not regulate drugs or medicines and does not ensure that the remedies prescribed and the products sold are safe and efficacious for public consumption. He clarified that there is no legal bar that the Petitioners cannot be regulated by more than one regulator. He stated that same argument applies for the Petitioners claiming that they fall under the regulatory regime of Food Act, as the objective and mandate of the Food Act is distinct from that of DRAP Act; that the violation of the constitutional provisions are so glaring that the legislative provisions under challenge could not survive. Reliance was placed on State of M.P. v. Rakesh Kohli and another (2013 SCMR 34) (Supreme Court of India). He has also placed reliance on the Azfar Laboratories Case.

Opinion of the Court:

Legislative Competence

18. The challenge to the legislative competence of Parliament with reference to the DRAP Act is essentially on the ground that drugs and medicine falls within the competence of the Province under the Constitution, after the 18th Amendment. Prior to the 18th Amendment to the Constitution, the subject of drugs and medicine fell under Item 20 of the Concurrent Legislative List of the Constitution. Consequently, the Drug Act was the law on drugs and medicine as enacted by Parliament. Post 18th Amendment Parliament can legislate on a subject which falls within the Provincial domain in terms of Article 144 of the Constitution. Article 144 of the Constitution reads as follow:

(1) If one or more Provincial Assemblies pass resolutions to the effect that Majlis-e-Shoora (Parliament) may by law regulate any matter not enumerated in the Federal Legislative List in the Fourth Schedule, it shall be lawful for Majlis-e-Shoora (Parliament) to pass an Act for regulating that matter accordingly, but any Act so passed may, as respects any Province to which it applies, be amended or repealed by Act of the Assembly of that Province.

As per Article 144 of the Constitution, the Provinces can delegate their power to legislate in favour of Parliament, if one or more of the Provincial Assemblies pass a resolution to such effect. As per the record, Parliament relied upon the resolutions passed by the Provincial Assemblies of Punjab dated 15.02.2012, Sindh dated 15.02.2012, Khyber Pakhtunkhwan dated 16.02.2012 and Balochistan dated 18.03.2015 on the basis of which legislating on the subject of drugs and medicine has been delegated to Parliament. The Respondents also relied upon the judgment passed by a learned Division Bench of the Sindh High Court in the Azfar Laboratories Case to urge the point that this matter has been duly considered by the Division Bench of the Sindh High Court wherein the Court concluded that as per Article 144 of the Constitution, the Provincial Assemblies can grant the power to make law on a matter which falls exclusively within the legislative domain of the Provinces. The Court held that the law made by Parliament can repeal expressly or impliedly or override any existing provincial law in respect of the matter for which the power has been granted to Parliament and if there is conflict between the Provincial law and Federal law then the subsequent law may prevail, depending on the circumstances of the case. While interpreting the different resolutions, passed by

the Provincial Assemblies, the Court, in the Azfar Laboratories Case concluded that the purpose of delegating authority to enact law on the subject of drugs and medicine was to create a unified approach throughout the country on this subject. As the Provincial Assemblies 'invited' Parliament to make law on drugs and medicine no exception can be taken that the DRAP Act exceeds the terms of the resolutions passed under Article 144 of the Constitution. The Division Bench of the Sindh High Court held that the DRAP Act is the controlling statute, operating seamlessly as one unified law that applies trans-provincially across all Provincial boundaries and not the Drug Act, operating in each Province. Hence the challenge to the extent of legislative competence was rejected.

19. The Petitioners before this Court argue that the subject of drugs and medicine does not include their products or alternate medicine. In this regard, the Petitioners specializing in unani, ayurvedic, herbal and chinese remedies state that these are special and distinct sciences, which have to be dealt with separately and cannot be clubbed together as one in the definition of Alternative Medicine under the DRAP Act. The Petitioners who manufacture and import nutraceuticals, food and dietary supplements, infant milk and OTC Products state that their products are regulated under other regulatory regimes and cannot be termed as 'drugs or medicines'. The Petitioners, who manufacture, import and distribute cosmetics, disinfectants and sanitizers argue that their products are not drugs or medicines as they are not consumed rather applied and not used in the treatment, mitigation, prevention or diagnosis of diseases.

20. Interestingly the Petitioners, who manufacture, sell, distribute and import alternate medicine including unani, ayurvedic, tibb, herbal and chinese remedies as well as OTC products, cosmetics, food and dietary supplements for humans and animals were before the Sindh High Court in the Azfar Laboratories Case. The Court duly considered their various different products and concluded that the challenge mounted against the DRAP Act and the Rules must fail with respect to their products. The Court came to the conclusion that these products could fall within the meaning of 'drug' under the DRAP Act, however, this requires a conclusive determination, through a factual inquiry by DRAP. Accordingly the Court directed DRAP to issue proper guidelines so as to give meaning to pharmaceutical dosage form, separately for humans and animals as per the different sub-categories DRAP seeks to regulate. As to the various Petitioners before the Court, they were required to be given a hearing by DRAP so as to determine whether their product comes within the scope of the DRAP Act and the Rules.

21. The Petitioners before this Court do not challenge the findings in the Azfar Laboratories Case yet they argue that to the extent of the Province of Punjab the matter is somewhat different. The Provincial Assembly of Punjab passed the Amendment Act of 2017 and of 2018 respectively, whereby the provisions of the Drug Act to the extent of Punjab stood amended. They argue that the effect of the amendments is that the Provincial Assembly of the Punjab revoked its delegation to legislate on drugs and medicine. The argument is that the amendments should be

read as deeming to revoke the effect of the Resolution dated 15.02.2012 passed by the Provincial Assembly of Punjab. In this regard, Article 144 of the Constitution provides that if one or more Provincial Assemblies pass resolutions to the effect that Parliament may by law regulate any matter not enumerated in the Federal Legislative List in the Fourth Schedule, then it shall be lawful for Parliament to pass a law on the subject matter and at the same time any Province can amend or repeal the law on the subject as it requires. As per the Azfar Laboratories Case, Article 144 of the Constitution does not give Parliament concurrent power to legislate on matters which fall within the Provincial legislative domain rather the Provinces 'invite' the Federal Government to regulate by law the given subject. This invitation can be amended, repealed by law, curtailed or withdrawn by the Provinces as per requirement. Now the question is whether by way of amending the Drug Act, the Provincial Assembly of the Punjab has revoked the Resolution dated 15.2.2012.

22. The Provincial Assembly of the Punjab passed the Punjab Drugs (Amendment) Act, 2016 whereby Section 31 of the Drug Act was amended to establish Drug Courts in the Punjab as notified by the Provincial Government. The second amendment to the Drug Act was through the Punjab Drugs (Amendment) Act, 2017 amending certain provisions of the Drug Act in its application to the Province of Punjab for control and eradication of spurious, adulterated and substandard drugs. As per the intent given in the preamble to the 2017 Amendment Act, the amendments were made to enable the Province of Punjab to cope with the increasing menace of spurious, adulterated and substandard drugs and for updating the enforcement mechanism as well as providing a regular monitoring system with stricter penalties. The 2017 Amendment Act seeks to give the Provincial Government power to devise an enforcement and monitoring system such that it enables the Provincial Government to establish and notify drug laboratories for testing purposes and to establish a Provincial Monitoring System. It also allows the Provincial Quality Control Board ("PQCB") to specify testing by the notified drug laboratory and requires PQCB to send reports to the Provincial Government as well as the Federal Government. By way of the 2017 Amendment Act, some amendments were made to Section 23A, 23B and 23C as well as Section 27, 27-A and 28 of the Drug Act which called for stricter penalties. However, these amendments were omitted and deleted by way of the Punjab Drugs (Amendment) Act, 2018. The Amendment Act of 2018 did not make any other significant amendment. So far as the Amendment Act of 2016, it merely gave the Provincial Government the authority to establish Drug Courts and exercise similar powers as that of the Federal Government within the Province. The argument that the Provincial Government retains some power pertaining to the subject matter on which it delegates its authority to legislate under Article 144 of the Constitution, goes against the constitutional mandate. Therefore, to answer the issue raised by the Petitioners, as to whether the amendments made by the Provincial Assembly of the Punjab to the Drug Act amounts to revocation of the Resolution dated 15.2.2012, the answer is no, it does not revoke the 'invitation' given to Parliament by the Provincial Assembly of the Punjab. The Resolution passed by the Provincial Assembly of the Punjab allows Parliament to make law to regulate the subject of

drugs and medicine. The DRAP Act provides under Section 32 that the Act is in addition to and not in derogation of the provisions made in the Drug Act and any other law enforced. Therefore, by amending the Drug Act the Provincial Assembly of the Punjab has not revoked its Resolution in favour of Parliament to make law on drugs and medicine. These amendments and the continued existence of the Drug Act cannot be taken to mean that the DRAP Act cannot be enforced or be given effect to in all the Provinces as was resolved by the Provincial Assemblies. It is important to note that the DRAP Act calls for a unified law that applies trans-provincially across all Provincial boundaries, whereas the Drug Act is applied in each Province. Hence the impact of the amendments made to the Drug Act are for the benefit of the Province of Punjab in its efforts to enforce and monitor spurious drugs. Furthermore, the 2017 Amendment Act itself provides the intent of the Provincial Assembly of the Punjab so as to make the Province more effective in its enforcement and monitoring of spurious, adulterated and substandard drugs. As to the fact that the Amendment Act in 2017 changed some of the penalties under the Drug Act, it is noted that with the Amendment Act of 2018 these amendments were omitted or deleted. Therefore the change in penalties is not an issue. For this reason the amendments to the Drug Act did not revoke or cancel the invitation to legislate on drug and medicine given to Parliament by the Provincial Assembly of the Punjab vide its Resolution dated 15.2.2012.

23. In the event that a Provincial Assembly decided to revoke the delegation given under Article 144 of the Constitution, the same should be done through a resolution passed by the Assembly in the same way as the delegation is granted and cannot be inferred through amendments in the law, because the Constitution calls for a specific resolution to be passed by the Provincial Assemblies delegating power to Parliament to legislate. Hence, in the same way, if the delegation was to be revoked, the Provincial Assemblies should pass a resolution stating its clear intent to revoke its invitation to legislate on the subject matter. If the delegation of authority to legislate under Article 144 of the Constitution were left to inferences and interpretation it would defeat the mandate of Article 144 of the Constitution. Moreover, the intent of the Provincial Assembly under Article 144 of the Constitution is made clear by way of resolution meaning that the power to legislate which is vested in the Province, has to be specifically delegated to Parliament. In the same way the revocation of that delegation has to be specifically resolved by the Provincial Assembly. Legislative competence when granted under Article 144 of the Constitution by the Provincial Assembly to Parliament through a resolution, requires the same for the purposes of revocation, as the matter falls within the domain of the Provincial Assembly to decide whether its resolution needs to be revoked.

24. The other question with reference to legislative competence is whether the Provincial Assembly of Punjab intended to allow Parliament to regulate more than drugs and medicine, meaning whether the Resolution dated 15.02.2012 passed by the Provincial Assembly of the Punjab authorizes Parliament to make law which includes the different products of the Petitioners. The entire thrust of the Petitioners

arguments on this issue is that Parliament can only make law on 'drugs and medicine' which means only products used in the treatment, mitigation, prevention or diagnosis of diseases. It is argued that the nutraceuticals, food supplements, baby milk are all food products registered with the Food Authority; that disinfectants, sanitizers and cosmetics are regulated under different laws including by the PSQCA; that the traditional systems of medicine have never been regulated as drugs and medicine, hence DRAP has extended its jurisdiction beyond the intended scope of the Resolution by the Provincial Assembly of Punjab. While this argument will be dealt with in greater detail in the context of the nature of the products and the applicable regulatory law, for the purposes of legislative competence there is no legal basis to urge the point that certain products were not intended to be regulated by and under the DRAP Act. Whether or not a product falls under DRAP's regulatory jurisdiction, will be seen in the context of DRAP's regulatory objective and the processes laid out to evaluate the products. It is not the Resolution passed by the Provincial Assembly of Punjab which will determine this issue rather the criterias set out by DRAP to determine whether a product falls under its regulatory jurisdiction. This has to be done in the context of the DRAP Act, the Rules and the regulatory objective of DRAP. Furthermore, classification of products requires a formal determination by DRAP and cannot be broadly categorized as per the dictionary meaning of food or drug or cosmetic for that matter. Similarly alternative medicine encompasses a wide array of traditional remedies, products and therapies which have to be seen in the context of the statutory definition under the DRAP Act. Hence there is no merit in the argument that the Provincial Assembly of Punjab never intended to grant legislative authority for these products, as this issue can only be answered in the context of the DRAP Act and the Rules. In this regard, it is also important to note that the Province of Punjab has not challenged or questioned the competence of Parliament to regulate drugs and medicine under the DRAP Act nor have they stated in their report and parawise comments filed before this Court, there is a dispute. To the contrary the Province of Punjab has taken the position that the DRAP Act is in addition to and not in derogation of the Drug Act and that the objective of the amendments to the Drug Act was to enable the Provincial Government to deal more efficiently with spurious, adulterated and substandard drugs. Therefore based on the aforesaid, Parliament is competent to enact the Drug Act and the amendments to the Drug Act have not revoked or cancelled the Resolution dated 15.02.2012 given by the Provincial Assembly of the Punjab to Parliament to regulate the subject of drugs and medicine.

Vires of the Rules

25. The Petitioners have challenged the vires of the Rules on the ground that the Rules are ultra vires the DRAP Act as the definition of 'drug' under the DRAP Act does not include alternative medicine, medicated cosmetic, food supplements, health and OTC products, baby milk and disinfectant. Consequently, the DRAP Act does not regulate their products; that the DRAP Act does not authorize the process of enlistment as given under the Rules; that the power to license is restricted under the DRAP Act and does not empower DRAP to license all the products of the Petitioners. Hence the Rules are inconsistent with the DRAP Act and have gone

beyond the authority delegated under the DRAP Act. It was also argued that the Rules are vague, arbitrary, discriminatory and unreasonable, hence liable to be declared unconstitutional and illegal as they have brought within the ambit of DRAP a diverse variety of products which in no way qualify as 'drugs and medicine' as they are not used in the diagnosis, treatment or prevention of any medical condition. Furthermore, there is no regulatory infrastructure, no expertise or guidelines with reference to the enlistment process. The enlistment applications do not cater to the specific science and specifications of the products of the Petitioners nor have the evidentiary standards been settled on the basis of which the enlistment criteria has to be satisfied. As a result it causes confusion and delay and compels the enforcement of unreasonable requirements on the part of DRAP.

26. The DRAP Act was promulgated in November, 2012 and as per its preamble it is an Act to provide for the establishment of DRAP in order to provide for effective coordination and enforcement of the Drug Act and to bring harmony in interprovincial trade and commerce of therapeutic goods. The basic objective of DRAP, as per the preamble, is to regulate, manufacture, import, export, storage, distribution and sale of therapeutic goods. Therapeutic goods is defined in Section 2 (xxxvi) of the DRAP Act to include drugs or alternative medicine or medical devises or biologicals or other related products as may be notified by DRAP. Alternative Medicine is defined in Section 2 (ii) of the DRAP Act to mean a product used exclusively in homeopathic, unani, ayurvedic, biochemic, Chinese or other traditional system of treatment. Health and OTC Products (non-drugs) is defined in Section 2 (xv) of the DRAP Act to include probiotics and disinfectant, nutritional products, food supplements, baby milk and foods, medicated cosmetics, medicated soaps and medicated shampoos. Medicated Cosmetics is defined in Section 2 (xix) of the DRAP Act to mean cosmetics containing 'drugs' as specified in Schedule-I and includes products for cleansing, beautifying, promoting attractiveness, or altering appearance but does not include soap. The word 'drug' is defined in Schedule-I of the DRAP Act in the following terms:

2. DRUG includes:-

(a) any substance or mixture of substances that is manufactured, sold, stored, offered for sale or represented for internal or external use in the treatment, mitigation prevention or diagnosis of disease, in abnormal physical state, or the symptoms therefore in human beings or animals or the restoration, correction, or modification of organic functions in human beings or animals' including substance used or prepared for use in accordance with the Ayurvedic, Unani, Homoeopathic, Chinese or biochemic system of treatment except those substances and in accordance with such conditions as may be prescribed:

(b) abortive and contraceptive substances, agents and devices, surgical itigatures, sutures, bandages, absorbent cotton, disinfectants, bacteriophages, adhesive plasters, gelatin capsules and antiseptic solution;

(c) such substances intended to be used for the destruction or repulsion of such vermin, insects, rodents and other organism as cause, carry or transmit disease in human beings or animals or for disinfection in residential areas or in premises in which food is manufactured, prepared or kept or stored;

(d) such pesticides as many cause health hazard to the public'
(e) any substances mentioned as monograph or as a preparation in the Pakistan Pharmacopeia or the Pakistan National Formulary or the International Pharmacopoeia or the British Pharmacopoeia or the British Pharmaceutical Codex or the United States Pharmacopoeia or the National Formulary of the United States, whether alone or in combination any substance exclusively used in the Unani Anyirvedoc, Homoeopathic, Chines or Biochemic system of treatment any and intended to be used for any use of the purposes mentioned in sub-clauses (a), (b) and (c) and
(f) any other substance which the federal Government, may by notification in the official Gazette declare to be a drug for the purpose of this Act.
The DRAP Act also provides in Schedule-VI that the provisions of the Drug Act and the Rules made thereunder are applicable.

27. Collectively, by way of the various different definitions of the products and the definition of 'drug' in the DRAP Act read with the definition of 'drug' in the Drug Act, DRAP sets out to regulate Therapeutic Goods, Alternative Medicine, Health and OTC Products and Medicated Cosmetics. There are the broad classifications of products which are regulated by DRAP. The Rules which have been challenged are the enlistment rules wherein through the process of enlistment, products are evaluated as per the given criteria. The Rules further define products, within the classification given by the DRAP Act for enlistment purposes. If the product falls within the broad classifications under the DRAP Act, they can then be enlisted as per the criteria given under the Rules. Accordingly the definitions contained in the Rules are in furtherance of the definitions given in the DRAP Act and not ultra vires to it.

28. The definition of 'drug' under the DRAP Act is broad based and includes any substance or mixture of substances, which is offered for sale or represented for use in treatment, mitigation, prevention or diagnosis of diseases including substances used or prepared for use in accordance with the ayurvedic, unani, homoeopathic, chinese or biochemic system or any substance which the Federal Government notifies and declares is a 'drug' under the DRAP Act. Effectively the DRAP Act classifies products under different heads so as to enable DRAP to regulate similar products by setting the required regulatory standards based on the nature of the product and its intended use. In this way the definitions under the DRAP Act and the Rules are not exhaustive, such that a product can fall under any of the classifications, for a determination as to whether the product meets the required definition under the DRAP Act and Rules.

29. The Petitioners have also argued that the definition of 'drug' did not historically include their products, especially with reference to unani, ayurvedic, homoepathic and herbal remedies. The definition of 'drug' under the DRAP Act as contained in Schedule-I read with Schedule-IV and Section 32 of the DRAP Act makes it clear that the definition of 'drug' under the DRAP Act is in addition to the definition of 'drug' under the Drug Act and the Rules framed thereunder. Therefore, the definition

of 'drug' under the DRAP Act is not limited or restrictive and by its very nature provides for a diverse and wide range of Therapeutic Goods which can fall within the ambit of DRAP's jurisdiction. This definition of 'drug' was considered at length in the Afzar Laboratories Case in the context of the historical perspective where the learned Division Bench of the Sindh High Court after comparing the definition of 'drug' under the Drug Act, 1940 ("1940 Act"), Drug Act and the DRAP Act concluded that on a combined reading of the definitions of 'drug' traditional medicine such as unani, ayurvedic and homoeopathic were always included in the definition of 'drug' but on account of the policy of the law, they were treated separately and distinctly and not brought within the ambit of the regulatory framework of the Drug Act. The DRAP Act shows a shift in policy where unani, ayurvedic, homoepathic, herbal and biochemic system of treatments were brought within the ambit of DRAP as Alternative Medicine and Therapeutic Goods. The Court in the Afzar Laboratories Case concluded that:-

Thus, from 1940 to 2012 the practical position was that the policy was to keep Unani medicines and substances out of the definition even though it must be reiterated, they would have been very much a part of it but for the exclusion. In 2012 the policy underwent a substantive change and was reversed. There is nothing inherent in Unani Medicines and substances that they did not or could not fall within the definition of drugs. We are, therefore, with respect, unable to accept the submissions that the DRAP Act has impermissibly brought about a situation that never existed before and could not exist. Since we have already held that the entire legislative competence of "drugs and medicines" has been granted to Parliament in terms of Article 144, the change brought about by the DRAP Act is constitutionally unexceptionable. It is not for the Courts to gainsay or defeat the policy that now finds statutory expression in the DRAP Act.

30. So far as food and dietary supplements, baby milk and animal feed were concerned, the Court concluded that it first has to be seen whether these goods fall within the definition of 'drug' under the DRAP Act. The test laid down for this purpose is to see whether they are presented in such pharmaceutical dosage form, which is intended for health related purpose. Hence in the Azfar Laboratories Case Court directed that guidelines be issued to set out the pharmaceutical dosage form for these products. Consequent thereof, DRAP in compliance with Paragraph No.50 of the judgment dated 26.02.2018 issued the Guidelines for Manufacturers/Importers of Food Supplements or Dietary Supplements or Health Supplements or Nutraceuticals as to what is meant by Alternative Medicine and Health Products Dosage Form. As per the Guidelines No.2 human and animal food products are not covered under the DRAP Act and the Rules provided that:-

(i) Any substance or mixture of substance or products do not attract the definition of Drug or Food Supplement or Therapeutic Goods as defined under DRAP Act 2012 and the Alternative Medicines and Health Products (Enlistment) Rules 2014.

(ii) It is not formulated into Alternative Medicine and Heath Products Dosage Form or their subcategories as defined in these guideless.

(iii) It is not presented into the form or manner into believe the general public to be a drug therapeutics good or food supplement.

(iv) It is not presented with any label claim with health related benefits under Alternative Medicine and Heath (Enlistment) Rules 2014.
(v) It does not fall under the definition of adulterated Alternative Medicines and Health Products as defined in the Alternative Medicine and Health (Enlistment) Rules, 2014.
(vi) It does not contain ingredients falling under the definition of prohibited substances as defined under the Alternative Medicine and Health Products (Enlistment) Rules, 2012.
These Guidelines give clarity to the manner in which the product will be evaluated on the basis of its pharmaceutical dosage form and presentation in the context of health related purpose under the Rules. I draw no exception to the reasoning given in the Azfar Laboratories Case as the products of the Petitioners including Alternative Medicine has always been a part of the definition of drug under the Drug Act. In this regard it is noted that the definition of 'drug' under the Drug Act and the DRAP Act are very similar covering a broad base.

31. The Drug Act defines 'drug" as follows:-
(i) any substance or mixture of substances that is manufactured, sold, stored, offered for sale or represented for internal or external use in the treatment, mitigation, prevention or diagnosis of diseases, an abnormal physical state, or the symptoms thereof in human beings or animals or the restoration, correction, or modification of organic functions in human beings or animals, not being a substance exclusively used or prepared for use in accordance with the ayurvedic, unani, homoeopathic or biochemic system of treatment except those substances and in accordance with such conditions as may be prescribed;
(ii) abortive and contraceptive substances, agents and devices, surgical ligatures, sutures, bandages, absorbent cotton, disinfectants, bacteriophages, adhesive plasters, gelatin, capsules and antiseptic solutions;
(iii) such substances intended to be used for the destruction or repulsion of such vermin, insects, rodents and other organism as cause, carry or transmit disease in human beings or animals or for disinfection in residential areas or in premises in which food is manufactured, prepared or kept or stored;
(iv) such pesticides as may cause health hazard to the public;
(v) any substance mentioned as monograph or as a preparation in the Pakistan Pharmacopoeia or the Pakistan National Formulary or the International Pharmacopoeia or the British Pharmacopoeia or the British Pharmaceutical Codex or the United States Pharmacopoeia or the National Formulary of the United States, whether alone or in combination with any substance exclusively used in the unani, ayurvedic, homoeopathic or biochemic system of treatment, and intended to be used for any of the purposes mentioned in sub-clauses (i), (ii) and (iii), and
(vi) immediate packing containers for sterile preparations which are in direct contact with the drug, blood bags, disposable giving sets for infusion or blood, disposable syringes or any other substance or device which the Federal Government may, by notification, in the official Gazette, declare to be a "drug" for the purposes of this Act.

(vii) Infant formulas, follow up milks, milk substitutes, baby foods, baby gruels, baby teas and juices, bottles and treats and any other product used as infant formula as such;
(viii) Cosmetics including hair Sprays, perfumes, facial and talcum powders, hair treatment shampoos, hair conditioning aids and devices and all formulas and lotions connected therewith for conditioning and cleansing of hair, hair colours, facial make-up foundations, vanishing and cold creams, creamy make-up sticks, bath lotions and oils, blushers and blush-ons, texture improvement devices, moisturizers of all kinds mascaras, vaselines, sunnas, wrinkle-care creams, hair oils/herbal preparations for Itexture and facial glow and improvement, shower creams, skin lotions and oils, sun-burn lotions and oils, shaving cream and leathers, after-shave lotions and any other preparation or material connected therewith;
The contention of the Petitioners that historically their products were never regulated as 'drug' under the Drug Act is only correct to the extent that as of policy ayurvedic, unani, homeopathic or biochemic systems were not brought within the regulatory ambit of the Drug Act. Under the Drug Act homeopathic, unani, ayurvedic, biochemic, chinese or other traditional systems of treatment were always part of the definition of 'drug', as per Section 3 (g)(i) of the Drug Act. In this regard, Azfar Laboratories Case dissected the different definitions to show that there are three parts to the definition in the Drug Act wherein the first part defined what drugs are, the second part excluded from the definition unani medicines and substances but the third part allows such unani substances to be brought back into the definition with such conditions as may be prescribed. In the same way under the DRAP Act, the first part of the definition of 'drug' in Schedule-I includes ayurvedic, unani, homeopathic, chinese and biochemic system of treatment hence the policy of law is to include all substances used in the preparation of the same. Therefore, the contention that homeopathic, unani, ayurvedic, biochemic, chinese or other traditional system of treatment was never part of the definition of 'drug' is incorrect. So far as the other products such as disinfectant, nutraceuticals and food supplements, baby milk and cosmetics, they have been included in the definition of 'drug' under the DRAP Act which is reflective of the legislative intent. A bare reading of both definitions show that the intent of the legislature has always been to cover a broad category of products. For the purposes of the dispute at hand the products of the Petitioners are classified under the definition of Alternative Medicine, Therapeutic Goods, Health and OTC Products and Medicated Cosmetics which definitions do not offend any fundamental right or interest of the Petitioners. The intent of the legislature is to provide a broad based definition so as to ensure that if a product falls within the regulatory objective of DRAP it must be compliant with its regulatory requirements. In this context the reference to previous definitions of 'drug' or the historical context of how Alternative Medicine and Therapeutic Goods, Health and OTC Products were treated is of no significance.

32. The question to be determined is why products classified as Therapeutic Goods, Health and OTC Products, Medicated Cosmetics and Alternative Medicine are brought within the ambit of DRAP. DRAP was established vide Notification dated 28.11.2012 issued by the Ministry of National Regulations and Services,

Government of Pakistan, Islamabad. The composition of DRAP is that it is headed by Chief Executive Officer ("CEO") and amongst others there are Director Pharmaceutical Evaluation and Registration, Director Drug Licensing, Director Quality Assurance and Laboratory Testing, Director Medical Devices and Medicated Cosmetics, Director Biological Drugs, Director Controlled Drugs, Director Pharmacy Service, Director Health and OTC Product. As per Section 3 of the DRAP Act, the Federal Government can increase or decrease the number of directors depending on the requirement and functions. Section 7 of the DRAP Act specifically provides the powers and functions to administer the law specified in Schedule-VI meaning the Drug Act read with rules framed thereunder. Amongst other functions is the power to issue guidelines and monitor the enforcement of licensing of the manufacture and registration of Therapeutic Goods. This includes the import and export of such products. DRAP is also authorized to ensure implementation of internationally recognized standards, especially implementation of guidelines issued by World Health Organization. To execute its powers and functions, the composition of DRAP is made of specialist directors in every field and if required the Federal Government can always increase the number of divisions or directors as required. The Drug Act also provided for regulating the import and export of drugs, the manufacture of drugs and the sale of drugs. As per Section 23 of the Drug Act, no person shall export, import or manufacture for sale or sell drugs which are not registered under the Drug Act as per the conditions stipulated in the registration. Hence the Drug Act also contemplated the registration, licensing and regulation of the manufacture of drugs as well as the import and export of drugs. The DRAP Act being in addition to the Drug Act maintains these functions in addition to those stipulated in the DRAP Act. Accordingly the legislative intent is clearly to build upon the regulatory framework under the Drug Act to include Therapeutic Goods, Alternative Medicine, Health and OTC Products and Medicated Cosmetics.

33. The regulatory objective of the DRAP Act is to establish a regulatory framework which will ensure the safety and effectiveness of drugs and medicine sold in Pakistan, through a unified system, operating systematically across Provincial borders. The process of manufacturing, marketing and the sale of drugs, which includes the import and export of drugs has to be regulated to protect the interest and health of the public. The products before the Court statedly raise health claims which means that they are intended for or recommended for a health related purpose, which characterizes the relationship of any substance to a disease or health related condition. When seen in the context of public interest or public welfare, it is important to note that regulating health claims is about risk management, about safety and disclosure for the benefit of the public. The objective of the regulatory framework is to ensure that the consumer or user of the product is protected from harm, and that the consumer knows what they are buying or consuming. The products of the Petitioners are classified under the DRAP Act as they may be connected with some health related purpose, hence they are not ordinary consumer products since they claim to have some health benefit. Consequently DRAP has to ensure the products safety, efficacy and quality for the benefit of the public.

34. The Petitioners have argued at great length that their products do not fall within the regulatory jurisdiction of DRAP and that their products are duly regulated by different authorities created under the law, such as PSQCA, the Food Authority, Punjab Infant Feeding Board. As per the contentions made, various different regulatory regimes have been established which are comprehensive and ensure public safety with respect to the products concerned. Specifically the Petitioners who manufacture, import or sell nutraceuticals, food supplements (for animal or human consumption) and baby milk have argued that their products are food and are regulated by the Food Authority under the Food Act and the Punjab Pure Food Rules, 2011 ("Food Rules"), hence they cannot be regulated by DRAP. They argued that under the Rules, food supplements and dietary supplements are defined under Rule 2(xxxi) of the Rules to mean products containing vitamins, pro-vitamins, multivitamins, minerals including a mineral salt, a naturally occurring mineral, metals and their salts, a lipid, including an essential fatty acid or phospholipids liproteins, amino-acids, proteins, fatty acids, carbohydrates, a mucopolysaccharide, plant or herbal material (or a synthetic duplicate of that kind), including plant fibers, enzymes, algae, fungi, cellulose and derivatives of cellulose and chlorophyll, herbal preparation, resins, balsams, volatile oils, non-human animal material (or a synthetic duplicate of that kind) including dried material, bone and cartilage, fats and oils and other extracts or concentrates, a microorganism, whole or extracted, except a vaccine expressed juices, exudates etc. alone or their combinations and are presented in pharmaceutical dosage forms intended for health related purpose. However, at the same time the Food Rules makes special provision for dietary supplements and food supplements which contain vitamins, minerals and require proper labelling and packaging in accordance with Codex Guidelines. It was also argued that the DRAP Act and the Rules define these products as 'non-drugs' yet regulates them as 'drug and medicine' which reflects inconsistency in the law. Learned counsel relied upon different jurisdictions from around the world to urge the point that these products are regulated as 'food' and not as 'drug and medicine' world over.

35. In order to appreciate the arguments of the Counsel, it is necessary to understand the objective and purpose of the different regulators because the regulatory objective defines the process which the regulator will follow to identify products and to ensure that the regulations and the regulatory framework serves the public interest. The entire regulatory framework is designed to effectively achieve and retain the policy objectives. Hence a regulator is identified by its objective and usually its policy objectives are evident from the law.

36. The Food Act provides for the safety and standards of food which includes regulating adulterated food, misbranded food, food additives. As per the Food Act, the power and function of the Food Authority is to regulate and monitor the food business in order to ensure safe provision of food. For this purpose they are required to formulate standards, procedures, processes and guidelines in relation to any aspect of food including the food business, food labelling, food additives and providing appropriate enforcement system. As per the definition of food under the

Food Act, a thing shall not cease to be a food by reason that it is also capable of being used as drugs and the word drug shall have the same meaning as is assigned to it under the Drug Act. Hence the definition of food itself excludes food that may be capable of being used as a drug. The reason being that the objective of the Food Authority is to regulate the safety and quality of food so as to ensure that it is as per the prescribed standards, hygienic and contains substances which are intended for use in the preparation of food, but are not considered to be a 'drug' as defined under the Drug Act. Hence the Food Act clarifies that it does not regulate 'food' in the context of it being a 'drug'.

37. The 2002 Ordinance establishes the Punjab Infant Feeding Board to ensure the safe and adequate nutrition for infants and young children by promoting and protecting breast-feeding and by regulating products which are substances for breast milk. As per the 2002 Ordinance the complementary food is any food suitable for infant and young children in addition to breast milk or a substitute for breast milk and the Board is required to ensure compliance of the 2002 Ordinance and the rules made thereunder. Section 11 of the 2002 Ordinance assures quality as per the standards prescribed by the Codex Alimentarius Commission and the Codex Code of Hygienic Practice for Foods for Infants and Children, which are international standards. Hence the mandate of the 2002 Ordinance is to protect and promote breast feeding as well as to ensure that infant formula or complementary formula food as necessary nutritionally value as required for infants and young children. Food for infants and children is also regulated by PSQCA which provides for the Pakistan Standard specifications for foods and infants and children. The purpose of maintaining quality and standard is to ensure safe and nutritionally adequate formula products which meet the normal nutritional requirements of infants and young children. The DRAP Act and the Rules regulate Health and OTC Products which includes baby milk, milk based food. In the context of the definition of 'drug', where there is a health related purpose and the product is presented in pharmaceutical dosage form, intended for health related purpose, it falls out of the ambit of 'food' and needs to be evaluated as a 'drug'. Hence by design the very purpose and objective of DRAP is very different from the Food Authority, from the Board and from the PSQCA.

38. The 1965 Act regulates qualifications and requires the registration of practitioners of the unani, ayurvedic and homeopathic system of medicine. A bare reading of the 1965 Act itself shows that it does not consider the quality, safety or health related concerns of unani, ayurvedic and homeopathic system of medicine or its products. The rules framed thereunder called the Unani, Ayurvedic, Homeopathic System of Medicine Rules, 1980 provides for, amongst others, to register as practitioner, as teacher and as teaching institutions under the 1965 Act. Again its regulatory objective is different from the DRAP Act.

39. The DRAP Act and the Rules regulate Therapeutic Goods, Alternative Medicines, Health and OTC Products and Medicated Cosmetics. The Rules require that products which fall within the given classifications are evaluated as per the

evaluation criteria for the purposes of enlistment. The enlistment of products or the entity is a temporary process until the procedure for licensing is finalized. It is through the enlistment process that the regulatory objective of DRAP is achieved because at the time of enlistment manufacturers and importers provide, all relevant information through their application to DRAP's Director of Division of Health related OTC Products (non-drugs). The application for enlistment has to set out the general health claim or traditional use claim or nutritional claim or structure-function claim or therapeutic claim for disease reduction which forms the basis on which the application will be evaluated. DRAP requires that the applicant submit, as per the standards of evidence, proof regarding the quality, safety, efficacy or effectiveness of the product and recommend the conditions for use of the product. Through the evaluation process, DRAP will ensure that the regulatory criteria set out in Rule 5 is satisfied with reference to the product under evaluation. Hence when it comes to Therapeutic Goods, Alternative Medicine and Health and OTC Products and Medicated Cosmetics, DRAP's regulatory objective is to scrutinize the health related purpose for which the product is presented and for which the product is marketed. Health related purpose is a defined term under the Rules which basically means a health based claim which can be curative, preventive, palliative or cosmetic which is intended or recommend for the well being of humans and animals. As per the Guidelines pharmaceutical dosage form is the physical form in which the product should be produced and dispensed with for human or animal use. The dosage form essentially sets out the acceptable standard on which the product can be presented and if it is not presented in the pharmaceutical dosage form, it is not regulated by DRAP. Therefore to fall under the DRAP's regulatory regime the product must have a health related purpose and must be presented in a pharmaceutical dosage form. When evaluating the health related purpose and the pharmaceutical dosage form, DRAP will ensure that the product is safe, qualitative, efficacious and effective in terms of its intended and recommended use. Therefore the regulatory objective of DRAP sets it apart from all the other regulators, as discussed aforesaid, in that its functions and purposes are distinct from other regulators. In this process, since a determination has to be made while evaluating the product, the applicant before DRAP can always raise its objections that its product does not fall under DRAP's enlistment criteria as it does not have a health related purpose and its usage and consumption is neither therapeutic nor one that promotes the general health of its user. Under the DRAP Act decisions of the Authority are appealable before the Appellate Board. Hence such factual disputes can be decided by the Authority which is DRAP. Consequently the contention that the products of the Petitioners should be accepted as food or cosmetics or disinfectant per se, is not against the mandate of the DRAP Act and require a determination by DRAP. Furthermore no injury is caused to the Petitioners through the enlistment process. There is no violation of any fundamental right including the right to be treated as per law.

40. Different regulatory regimes work for different regulatory objectives. The regulatory objective impacts the purpose of the regulator and its policy, therefore, each regulatory regime will work within its regulatory field and achieve its

regulatory objective. The significant factor in this case is that each regulator works in furtherance of its own objective and in doing so there may be a situation when two or more regulatory regimes call for compliance over the same product. This suggests that there can be overlaps and even in some cases conflict between the regulatory regimes. However, neither the overlap nor the conflict can be interpreted to mean that different regulatory regimes cannot co-exist, or that a product or entity cannot be subjected to more than one regulatory regime. Regulatory overlap is possible because the legislature gives regulating authorities broad based delegation of authority to give them flexibility to respond to the changing regulatory environment. This does not make regulatory regimes incompatible or mutually exclusive. Any overlap or conflict will have to be seen on case to case basis, in the context of the facts and circumstances of the case and possibly call for better coordination and harmonization. With reference to the dispute at hand, DRAP regulates health claims, pharmaceutical dosages forms when evaluating the products of the Petitioners. 'Health Claims' go to the intent of the usage of the product, which means the purpose for which the product is recommended, marketed and sold. DRAP looks at the health motive and quality and safety of the product to ensure that the health claim is safe, effective and based on settled standards. In the context of health related purpose and intended or recommended use of product this can be easily illustrated through common examples. Food and dietary supplements or nutritional products often promote wellness and health benefits and may emphasize the prevention and treatment of disease such as alleviate risk of cancer and heart diseases or prevent or treat hypertension, high cholesterol and excessive weight etc. Such claims fall within the regulatory domain of DRAP and not the Food Authority or PSQCA or the Board or under the 1965 Act because these claims have to be assessed and evaluated in the context of the health related claims. The same will be applicable for cosmetics, disinfectant, sanitizers and other OTC Products as they have to be evaluated in the context of its impact on health or any health related condition, which is what, brings it within the ambit of DRAP's jurisdiction.

41. In the same way, food and dietary supplements are regulated by DRAP to determine if they contain ingredients that have biological effect which may conflict with medical or medical conditions or contain hidden drugs falsely marketed which put consumers at risk. The product may contain substances which are associated with potential serious health risks or other health risks such as hair loss, altered mode, irritable, aggression and depression which need to be checked and highlighted for public safety. Non-prescription products whether there are herbal or natural need to be checked to establish whether in fact they are free from hidden drugs as they may contain harmful substances which have not been listed or labelled. Hence when seen in the context of regulatory objective, the Petitioners before the Court may be subjected to more than one regulatory regime, which means that they may be subjected to DRAPs regulatory regime along with other regulatory regimes. Although the products do not fall in the medical sense of 'drug and medicine', with the increase in demand for products (non-drugs) having health or therapeutic claims it is vital that health claims and health purposes are regulated. Firstly it ensures that the claims are not unsubstantiated and secondly it requires the

manufacturer or importer to bring reliable and scientific information with reference to its claim and product. Finally it ensures that proper information is disseminated for the benefit of the public such that if such products are used or consumed necessary and important health risks are made known.

42. In the same context, the Petitioners who manufacture, import and sell cosmetics and Health and OTC Products which include sunscreen, skin care products, personal care products, anti-aging products, also argue that their products are not drugs and cannot be regulated as drugs. However, Cosmetics, Health and OTC Products are evaluated in the context of their intended use whether for cleansing or beautifying or altering appearance. Where a therapeutic or health claim is made the product will fall within DRAP's jurisdiction for evualuation. The cosmetic or drug distinction is based on how the manufacturer has marketed/promoted the product and the promises made to that effect as these claim may affect the body in a way that a drug can. It was also argued that Health and OTC Products includes disinfectants and hand sanitizers which are neither therapeutic nor related to the diagnosis or treatment of any disease. It was also argued that these are general sale items which are neither drugs nor therapeutic goods nor consumed in any manner for any health purpose. They are used to remove contaminants and germs and for cleaning surfaces, household or other. It was further argued that these products are regulated by the PSQCA which ensures quality and standard which does not fall within the regulatory objective of DRAP. However, these arguments run counter to the regulatory objective. If a product is used or recommended for a health related purpose, DRAP can evaluate it for enlistment purposes. In the USA disinfectant are regulated by the Environmental Protection Agency and some by FDA as they may contain active ingredients like biocide. In India they are regulated under the Drugs and Cosmetics Act. In Australia under the Therapeutic Goods Act, 1989 based on the intended use which may be for skin, medical devices, household use or hospital use. Therefore, there is no justification to the argument that the Petitioners cannot be regulated by DRAP because even globally there is a practice to regulate such products to ensure they are safe for human healths.

The Enlistment Process:

43. The Petitioners have argued that process of enlistment is beyond the scope of the DRAP Act as it is not provided for under Section 7 of the DRAP Act and they have placed reliance on Section 4(h) of the DRAP Act which provides for a Director Health and OTC Products (non-drugs), who is Incharge of the Division of Health and OTC Products (non-drugs) and is responsible for the assessment, licensing and registration of alternative medicines such as ayurvedic, chinese, unani and homeopathy, enlistment or registration of nutritional products and food supplements for human beings, animals and to perform other functions connected therewith. The Rules provide that enlistment means provisional allocation or entry of proper number to the firm or the product in the enlistment register for the purpose of temporary manufacturing and marketing authorization until the procedure for issuance of license and product registration is finalized. This means that enlistment is a provisional allocation of number given to a product or entity (manufacture or

import) to authorize the manufacture, import and marketing of the product. This provisional certification has become necessary because DRAP has not initiated the process of issuing licenses, hence in order to ensure that a product or entity can continue dealing with its business, the process of enlistment has been devised through the Rules. The entity or the product has to be enlisted until the licensing function becomes operative. Therefore the argument that enlistment is not prescribed for under the DRAP Act or is beyond the scope of DRAP Act is totally misconceived. To the contrary, DRAP has facilitated the process of regulating by ensuring that before the function of licensing commences a process of enlistment is undertaken by way of which the product or entity is evaluated and enlisted and given a provisional authorization to continue with the manufacture, import or marketing as per the Rules. The process started in 2014 when the Rules were made after which time was given to ensure that manufactures and importers could switch towards DRAP's regulatory regime. In this regard the record shows that meetings were held with stakeholders to discuss the regulatory objective and process.

44. When seen in the context of the process of enlistment, the Rules provide for the procedure under Rule 3 of the Rules that an application for enlistment shall be made to the Authority, addressed to the Director of Division of Health and OTC Products (non-drugs) in the prescribed manner. The application of enlistment of local manufactured products which contain a general health claim or traditional use claim or nutritional claims or structure function claims will be evaluated as per the criteria in Rule 5 of the Rules. In the same way any product which makes a disease reduction by therapeutic claim will also be evaluated as per the criteria given in Rule 5 of the Rules. An enlistment process has also been prescribed for imported products to ensure that all imported products, that may make a general health claim or traditional use claim or nutritional claims or structure function claims is enlisted. The term health related purpose has been defined under Rule 2 (xxxv) of the Rules and is fairly broad based. This further the objective of the DRAP Act and the Rules, to enlist all products which make any kind of health claim or well being claim. In this regard, the applicants are required to provide evidence with reference to the quality, safety, efficacy, effectiveness and recommended conditions for use as per standards of evidence in terms of Rule 4 (ii) of the Rules. To facilitate this process as per the direction given in the Azfar Laboratories Case the Guidelines were introduced which prescribes the pharmaceutical dosage form on the basis of which the product will be assessed and evaluated. Therefore the Petitioners' contention that the Rules are ultra vires the DRAP Act is without basis as DRAP is duly authorized to license the entity or the product or enlist them and the Rules are in furtherance of the purpose of the DRAP Act.

45. So far as the contentions with respect to the enlistment process being ambiguous, unreasonable and impractical as it lacks product specifics, counsel for DRAP explained in great detail that DRAP conducted meetings with stakeholders to understand mark dynamics, best practices and international standards. Minutes of various meetings have been placed on file to demonstrate the issues discussed, which includes enlistment issues product related ambiguities, evidentiary standards

and settlement and of Recommended Dietary Allowances ("RDA") to keep products safe. In the context of alternative medicine, meetings look place to settle the authoritative books on unani, ayurvedic, homeopathic remedies. Therefore clearly the differences in the traditional systems of treatment were considered and endorsed through the authoritative books. These documents show that DRAP made a participatory effort to finalize its regulatory requirements where product specifics diverse sciences and established practices were considered. In this regards it can be said that this is an evolving process and market dynamics and concerns should be raised directly with DRAP to ensure effectiveness of the process under the Rules.

46. Globally drug regulations are considered to be more extensive and devoted to safety aspects. The definition of 'drug' is expansive and not confined to the strict medical definition of the word 'drug' due to the blurring of divides between what is a drug and what is not. Products may be on the borderline and may fall within the regulatory ambit of 'drug' due to their intended use. However, the balance between commercial interest and regulatory objective has to be for the greater public good. The objective is to protect the consumer before harm occurs, as products professing a health related purpose will be seen in the context of public health and safety. Hence, no illegality is made out with reference to the enlistment requirements.

47. The Petitioners have also emphasized on the lack of regulatory infrastructure under the DRAP Act and the rules not only by way of capacity issues and expertise but also due to lack of clarity of what DRAP seeks to regulate and what is required to be established before DRAP for determination on whether the product can be classified as Therapeutic Goods, Alternative Medicine, Health and OTC Products and Medicated Cosmetics. It has also been argued that when the required regulatory infrastructure and the regulatory guidelines are not available, DRAP should not use coercive actions against the Petitioners by seizing their products or sealing the premises as has been ordered by the National Task Force in fact for which the National Task Force was set up. The Petitioners contend that DRAP needs to set out its guidelines such as the acceptable standards of evidence which will be used, as per the product classification, during the enlistment process so that the Applicant is aware of the basis of the evaluation of the application for enlistment. It has also been argued that DRAP is required to furnish guidelines on what are the standards to determine quality and safety as well as efficacy and effectiveness, as it is not necessary that every product has to be efficacious or effective. As per the arguments made, these guidelines are readily available with similar regulators around the world which makes the process of regulating easier and efficient. In some cases DRAP is required to declare active ingredients and expedient ingredients in order to establish therapeutic claims. The Counsel argues that until these guidelines are not made, in the very least DRAP should resort to standard international practices so that the industry and the business of the Petitioners do not suffer. Further that they should not use coercive measures to enforce enlistment where it is not possible. The arguments raised before the Court with respect to the methods adopted by DRAP to ensure compliance of the Rules have merit especially since the Counsel for DRAP admits that matters are still under process and will take time to evolve.

Notwithstanding the same, if DRAP sets out to regulate the products of the Petitioners and it does not have the required guidelines or standards against which the products can be regulated then at least they should rely on acceptable international guidelines and adopt the same on the basis of which the enlistment processes can continue and the Petitioners are facilitated. As per the Rules standards of evidence is a defined term, which in itself requires clearly defined criteria used by regulators to evaluate safety, quality and effectiveness as per the product. These standards of evidence need to clearly define the required criteria for enlistment process. As per the record the 'standards of evidence' are not clearly defined as yet. DRAP can also simplify its procedures and streamline its processes to reduce administrative burden and ambiguities. The issue of delay where imports are concerned should also be dealt with not only to facilitate the importers but also the public for whose consumption the products are imported.

48. Therefore in view of the aforesaid:
(i) with respect to the issues on lack of guidelines on acceptable standards of evidence, DRAP is directed to devise guidelines setting out the acceptable standards of evidence required to support health related claims to prove quality, safety, efficacy and effectiveness of the product. Until guidelines are not available, DRAP should rely on international standards and make known the standards of evidence that the applicant is required to satisfy under the Rules. The acceptable standards of evidence should be publicized within 30 days either as per international practices or in terms of DRAP's Guidelines;
(ii) with respect to the Petitioners who claim that the products or entities do not fall under the DRAP's regulatory regime, a proper hearing should be given by DRAP, who should pass a speaking order as to whether the product or entity falls under the DRAP Act or Rules. Any person aggrieved of the order of the Authority order may file an appeal or seek remedy as required under the law;
(iv) with reference to the Petitioners who deal in hand sanitizers, in view of the Cabinet Decision dated 5.5.2020 and Notification dated 21.05.2020, during the period of declared emergency on account of the pandemic Covid-19, DRAP should act accordingly;

49. To the extent of the challenge to legislative competence of Parliament and the vires of the Rules, the claims of the Petitioners are without merit, hence dismissed.

MH/D-6/L Order accordingl

2020 C L C 2078
[Lahore]
Before Ayesha A. Malik, J
HAFIZ MUHAMMAD AMAN ULLAH----Petitioner
Versus
MUHAMMAD ANEES JAVED----Respondent
Civil Revision No.133552 of 2018, decided on 5th June, 2020.

Specific Relief Act (I of 1877)---

----Ss.42, 8 & 54---Civil Procedure Code (V of 1908), O.XXVI, Rr.10---Commission for local investigations---Procedure---Un-signed report---Scope---Petitioner filed suit for declaration, possession along with consequential relief of permanent injunction---Trial Court dismissed the suit---Appellate Court on an application for additional evidence ordered for the appointment of local Commission with consent of the parties for demarcating the property---Local Commission submitted the report, however, on the objections of respondent the same was set aside and a fresh local Commission was ordered to be appointed---Petitioner filed review application against said order, which was dismissed---Validity---Review application was dismissed on the ground that the report of local Commission was incomplete as there was no report of the revenue authorities supporting the findings of the local Commission nor were there any documents appended with the report on the basis of which local Commission had made his report---Impugned order had been made after consulting the record---Petitioner had admitted before the High Court that the report submitted by local Commission was not a signed document--- Revision petition was dismissed.

Ch. Hafiz ur Rehman Atif for Petitioner.
Muzammil Hussain Qasmi for Respondent.

ORDER

AYESHA A. MALIK, J.----Through the instant petition, the Petitioner has impugned orders dated 1.11.2017 and 20.12.2017 passed by Additional District Judge, Chiniot.

2. The basic facts of the case are that the Petitioner filed a suit for declaration along with possession with reference to land falling in Khata No.2519/2498, Khasra No.15804/9883/2 land measuring 10-M 0-S 15/90th share measuring 01-M 06-S and Khata No.2510/2489, Khasra No.9882 land measuring 02-K 0-M 79/432th share measuring 08-M 07-S total land measuring 10-M 04-S according to jamabandi for the year 1999-2000 situated in Chah-Isawali Mouza Chiniot along with consequential relief of permanent injunction. The Respondent contested the suit which was ultimately dismissed vide judgment and decree dated 20.3.2015 passed by Civil Judge 1st Class, Chiniot. Feeling aggrieved, the Petitioner filed an appeal before the Additional District Judge, Chiniot and in the appeal moved an application

for additional evidence. The court ordered for the appointment of local commission on 28.3.2017 with the consent of both the parties for demarcating the property in order to settle the dispute between the parties. The local commission submitted its report, however the Respondent moved objections against the said report of the local commission essentially stating that they were never issued notice or called for the purposes of demarcation. The court on hearing the objections of the Respondent, set aside the report of the local commission and ordered for a fresh local commission to be appointed vide impugned order dated 1.11.2017. Feeling aggrieved, the Petitioner filed a review application calling for recall of order dated 1.11.2017 which application was dismissed vide impugned order dated 20.12.2017 against which the instant Civil Revision has been filed.

3. Learned counsel for the Petitioner argued that the application filed by the Petitioner for additional evidence simply sought the demarcation of the property which both parties agreed to vide order dated 28.3.2017. Learned counsel argued that there was no reason to appoint a fresh local commission as the original local commission had filed his report and the contention of the Respondent that they did not participate in the demarcation process is totally against the record.

4. On the other hand, learned counsel for the Respondent argued that the Respondent was never issued any notice to participate in the demarcation proceedings nor was he called upon at the time of demarcation and that the report was filed without the signatures of the local commission. The court duly considered this matter and set aside that report and appointed a fresh local commission since the report in question was not made in accordance with law.

5. As per the record, the parties requested for demarcation of the suit property through the appointment of the local commission vide order dated 28.3.2017. The Petitioner then moved an application calling for the local commission to appear as a witness in the court with respect to the report of the local commission. However, this application was dismissed on the ground that report of the local commission has not been tendered and at this stage there is no requirement of calling him as a court witness. In the said order the court concluded that the local commission has tendered a report which has not been accepted by the court on account of the fact that the Respondent was not issued notice to participate in the demarcation process. The Court concluded that there is nothing available on the record in support of the Petitioners' contention that notices were served, therefore a fresh local commission was ordered to demarcate the property vide order dated 1.11.2017. Against this order, the Petitioner filed a review application seeking to have the order of 1.11.2017 recalled which was duly considered by the court and dismissed vide the impugned order dated 20.12.2017 on the ground that the report of the local commission is incomplete as there is no report of the revenue authorities supporting the findings of the local commission nor are there any documents appended with the report on the basis of which the local commission made his report appended. Therefore both orders have been made by consulting the record. During the course of arguments, learned counsel for the Petitioner admitted that the report filed by the

local commission was not a signed document and he was unable to show that the contention of the Respondent that he was not associated in the demarcation process was incorrect.

6. In view of the aforesaid, the instant Revision Petition is dismissed.

SA/M-127/L Petition dismissed.

P L D 2021 Lahore 15
Before Ayesha A. Malik, J
SILK BANK LIMITED through Team Leader Legal---Petitioner
Versus
SUI NORTHERN GAS PIPELINES LIMITED through Authorized Attorney and 9 others---Respondents
Writ Petition No. 27720 of 2019, heard on 13th October, 2020.

(a) Gas (Theft Control and Recovery) Act (XI of 2016)---

----Ss. 4, 2(o), 5 & Preamble---Jurisdiction of Gas Utility Court---Contractual disputes between Sui Northern Gas Pipelines Limited ("SNGPL") and third-parties---Encashment of Bank guarantee/ performance guarantee---Nature of jurisdiction of Gas Utility Court---Scope---Question before High Court was whether under Gas (Theft Control and Recovery) Act, 2016 (SNGPL) could file a suit for recovery of amount due under contract of guarantee and could seek encashment of such Bank / Performance Guarantee---Held, that jurisdiction of the Gas Utility Court related to disputes of consumers, gas producers or offender(s) under Gas (Theft Control and Recovery) Act, 2016---Term "sums due" or "recoverable from any person" used in S.2(o) of the Gas (Theft Control and Recovery) Act, 2016 were to be seen in context of disputes pertaining to offences under said Act, or in terms of sums due or recoverable with respect to purchase or consumption of gas and incidental charges thereto, including with respect to transmission and distribution of gas through pipelines---High Court observed that Preamble of the Gas (Theft Control and Recovery) Act, 2016 and its provisions made clear that same sought to vest jurisdiction in Gas Utility Court to recover amounts due to Gas Utility Company for the consumption of gas and to prevent misuse of supply of gas and any offences related to the supply, transmission and distribution of gas---Gas (Theft Control and Recovery) Act, 2016 did not give jurisdiction to the Gas Utility Court with respect to contractual disputes between SNGPL and any party and in the present case, specifically with regard to encashment of the Bank Guarantee issued to SNGPL---Constitutional petition was allowed, accordingly.
Arshad Javaid Ghuman v. Additional District and Sessions Judge, Lahore and others PLD 2019 Lah. 376 rel.

(b) Interpretation of statutes---

----Construction of provisions of a statute---Principle of "ejusdem generis"---Scope---Per principle of interpretation "ejusdem generis", words should be interpreted in same context with reference to the things provided for before such provision in the same statute, and general words should not be given widest meaning but should be applied in the context of specific things provided for in the statutory definition of the same.
Imran Aziz Khan for Petitioner.
Umer Sharif for Respondent No.1.
Date of hearing: 13th October, 2020.

JUDGMENT

AYESHA A. MALIK, J.---The Petitioner Silk Bank Limited has impugned ex-parte judgment and decree dated 2.3.2017 and attachment orders dated 4.1.2018 and 26.3.2019 passed by Respondent No.2 in execution proceedings for being without jurisdiction.

2. The case of the Petitioner is that Respondent No.1, Sui Northern Gas Pipelines Limited ("SNGPL") entered into an agreement with Data Steel Pipes Industries Private Limited, Karachi ("Data Steel") for the supply of gas pipes. The Petitioner issued Performance Bond Guarantee ("Guarantee") in the amount of Rs.191,589,685/- to SNGPL with reference to the agreement between the SNGPL and Data Steel. A dispute arose between SNGPL and Data Steel for which Data Steel filed a suit for declaration and permanent injunction before the Sindh High Court which is still pending. The Sindh High Court passed an interim order on 19.9.2016 restraining the Respondent SNGPL from encashing the Guarantee, which order was extended from time to time by the Sindh High Court and lastly vide order dated 12.11.2018. On 25.11.2016 Respondent No.1 filed a suit for recovery of Rs.191,589,685/- along with markup before the Gas Utility Court, Lahore and obtained an ex-parte order dated 2.3.2017 which they are now seeking to have executed.

3. Learned counsel for the Petitioner submitted that the Gas Utility Court does not have jurisdiction in the matter as this is not a dispute between a consumer of gas and SNGPL nor is it a case of gas theft. Learned counsel stated that in this regard, this Court has already decided the matter vide judgment dated 18.3.2019 passed in W.P. No.38735 of 2017 (PLD 2019 Lah. 376) titled Arshad Javaid Ghuman v. Additional District and Sessions Judge, Lahore and others that the Gas Utility Court has jurisdiction with reference to the payments due on consumption of gas and its default. Learned counsel stated that the Respondent SNGPL has filed an execution petition for recovery of the decretal amount before the Gas Utility Court at Lahore and has obtained attachment orders dated 4.1.2018 and 26.3.2019 passed by Respondent No.2 which are also without jurisdiction. Learned counsel further submitted that the dispute between Data Steel and SNGPL was also the subject matter of arbitration proceedings wherein finally an Award was issued on 20.10.2018, consequent to which Data Steel filed application before the Sindh High Court seeking a stay against encashment of the Guarantee. Under the circumstances, the Gas Utility Court has wrongfully exercised jurisdiction in the matter and SNGPL has wrongfully invoked the jurisdiction of the Gas Utility Court to encash its Guarantee under a contract between SNGPL and Data Steel.

4. Report and parawise comments have been filed on behalf of Respondent No.1. Learned counsel for Respondent No.1 stated that the SNGPL has invoked the jurisdiction of the Gas Utility Court by disclosing the proceedings before the Sindh High Court; that the Gas Utility Court has jurisdiction in the matter as the preamble of the Gas (Theft Control and Recovery) Act, 2016 ("Act") refers to prosecuting

cases of outstanding amounts payable and sums due. Learned counsel stated that 'sums due' is defined in Section 2(o) of the Act to mean all amounts inclusive of Government taxes not limited to arrears of gas charges and any amount recoverable of any land dispute, rentals, damages, fines, penalties, violation charges and/or on account of any other dispute. He stated that consequent to this definition, the Gas Utility Court has a wider jurisdiction than jurisdiction of disputes pertaining to gas theft or amounts due for the consumption of gas. Further stated that the interpretation by this Court vide judgment dated 18.3.2019 passed in W.P. No.38735/2017 (PLD 2019 Lah. 376) is distinguishable. He stated that the case referred to was a case of recovery of amounts from employees which is distinguishable from the instant case which is related to sums due to the SNGPL for which a suit for recovery of the said amount can be filed before the Gas Utility Court. Hence prays for dismissal of the Petition.

5. Heard and record perused. The basic issue before the Court is whether SNGPL can file a suit for recovery of amounts due under a contract wherein the Guarantee issued by the Petitioner is sought to be encashed. Admittedly this is not a case pertaining to gas theft or recovery of amounts for the consumption of gas rather it is a case relating to a contractual obligation between SNGPL and Data Steel which dispute was the subject matter of an arbitration award dated 20.10.2018. Furthermore it is noted that the Award and the encashment of the Guarantee is the subject matter of a suit filed before the Sindh High Court in which interim orders were issued on 19.9.2016 which order was extended from time to time by the Court and lastly vide order dated 12.11.2018 restraining the Respondent SNGPL from encashing the Guarantee.

6. On the issue of jurisdiction, learned counsel for SNGPL has placed reliance on the definition given to 'sums due' under Section 2(o) of the Act which is reproduced hereunder:

"sums due" means any or all such amount, inclusive of applicable Government taxes, recoverable from a person who purchases or receives gas for self consumption or sale for vehicular use or a person whose premises is connected with the network of the Gas Utility Company, lawfully or unlawfully including but not limited to arrears of gas charges, meter rental, late payment surcharges or any other incidental charges for services including fixed and variable charges, gas theft claims determined in accordance with the Gas Utility Companies laid down procedures and any amount recoverable on account of any land dispute, rentals, damages, fines, penalties, violation charges and or on account of any other dispute;

As per the preamble of the Act, the objective of the Act is to prosecute cases of gas theft and other offences relating to gas and to provide a procedure for recovery of amounts due. Learned counsel for SNGPL has stressed upon the use of the term procedure for recovery of amounts due in the preamble to suggest that this amount means all and any amounts due to SNGPL because as per the definition given in Section 2(o) of the 'sums due', it is not restricted to amounts related to gas theft or for the consumption of gas. This Court has already held in judgment dated 18.3.2019 passed in W.P. No.38735/2017, that the objective of the Act is to

prosecute cases of gas theft and other offences relating to gas so as to recover amounts due for the consumption of gas. In terms of Section 3 of the Act, the Gas Utility Courts are constituted by notification in the official Gazette and they have exclusive jurisdiction with respect to all matters covered under Section 4(2) of the Act which gives the Gas Utility Court exclusive jurisdiction with reference to all matters covered by the Act related to the consumer, gas producer or offender as the case may be. Hence as per the Section, jurisdiction of the Gas Utility Court is related to disputes of consumers, gas producers or offenders. The term consumer is defined in Section 2(b) of the Act, being a person who has received the supply of gas under a gas sales agreement. The term gas producer has not been defined but the term 'gas' is defined to suggest that a gas producer is one who produces the gas defined in Section 2(e) of the Act. However offences are provided for in the Act being the unauthorized use of gas, tampering with gas meters or pipelines or that the dispute of gas causing damage to transmission or transportation lines or for wasting gas. In this regard, it is also noted that Section 5 of the Act provides for the powers of the Gas Utility Court which is specifically related to taking cognizance of any offence punishable under the Act on a complaint made in writing by a person authorized by the Gas Utility Company, which again clarifies that the Gas Utility Court will deal with the offences specified under the Act so as to prevent the misuse of gas and to ensure the payment is made by consumers for the consumption of gas. It is also noted that in terms of Section 6 of the Act, the procedure for complaints and suits for default before the Gas Utility Court is prescribed such that where a person is involved in an offence under the Act or where there are sums due or recoverable from a person or where there is a consumer who disputes a bill or metering against a Gas Utility Court, the consumer or Gas Utility Company can file a complaint or a suit before the Gas Utility Court. In this Section, the reference to 'sums due' or recoverable from any person will be seen in the context of the dispute pertaining to an offence under the Act or sums due or recoverable with respect to the purchase or consumption of gas and incidental charges which may include land dispute, damages, fines and penalties with respect to the transmission and distribution of gas through pipelines. In terms of Section 27 of the Act, charges for supply of gas can be recovered as arrears of land revenue which again provides for the charges for supply of gas or any other sums outstanding against the consumer or any other person under the Act is recoverable as arrears of land revenue. Therefore the preamble of the Act and its provisions are clear that the Act seeks to vest jurisdiction in the Gas Utility Courts to recover amounts due to the Gas Utility Company for the consumption of gas and to prevent misuse of the supply of gas and any offence related to the supply, transmission and distribution of gas.

7. The contention of Respondent SNGPL that amounts due under the contract for the supply of pipelines which has nothing to do with the theft of gas, supply of gas or misuse of gas is amenable to the jurisdiction of the Gas Utility Court is totally without basis. The use of the terminology 'sums due' will be seen in the context of any default by a consumer or a producer of gas or an offender as the case may be. However it does not give jurisdiction to the Gas Utility Court with respect to contractual disputes between SNGPL and any party and in this case specifically

with respect to encashment of the Guarantee issued by the Petitioner in a supply contract with Data Steel. The Gas Utility Court has been established specifically for the purposes of controlling gas theft and recovering amounts due for the consumption of gas. The preamble of the Act provides that it is necessary to prosecute cases of gas theft and other offences relating to gas and to provide for procedure for expeditious recovery of amounts due in relation to gas theft and offences relating to gas. These amounts due as specified in the preamble do not suggest any amount due to SNGPL pursuant to any contract which is not related to the supply of gas by SNGPL. In this regard, the basic principle of interpretation which is applicable is ejusdem generis that the words should be interpreted in the same context with reference to the things provided for in the definition and the general words should not be given the widest meaning but should be applied in the context of the specific things provided in the definition. Hence with the definition of 'sums due' amounts which are extraneous to the purchase or consumption of gas or gas theft or with reference to the offences provided for under the Act cannot be recovered by filing the proceedings before the Gas Utility Court as the intent of the law is clear. Furthermore it is noted that a dispute with reference to encashment of the Guarantee is pending before the Hon'ble Sindh High Court wherein interim order was granted on 19.9.2016 and on 12.11.2018 whereby the Respondents were restrained to encash the Guarantee. That suit is still pending which is the forum where the issue of encashment can be decided.

8. In view of the aforesaid, the instant Petition is allowed and the impugned orders dated 4.1.2018 and 26.3.2019 passed by Respondent No.2 are set aside.

KMZ/S-61/L Petition allowed.

2021 C L C 76
[Lahore]
Before Ayesha A. Malik, J
Syed ASHFAQ ALI SHAH----Petitioner
Versus
MAQTOOL AKHTAR (DECEASED) through Legal Heirs and others----Respondents
W.P. No.9328 of 2013 and C.M. No.4 of 2020, decided on 6th November, 2020.

Civil Procedure Code (V of 1908)---

----S.12(2)---Bar to further suit---Element of fraud---Scope---Respondent filed suit for declaration with permanent injunction against the petitioner wherein he prayed for an order declaring him owner in possession of the suit property---Suit was decreed ex-parte---Respondent, thereafter, sold the property to purchasers---Petitioner moved application for setting aside the ex-parte decree, which was allowed on the conceding statement of respondent---Suit was heard and the same was withdrawn by respondent---Purchasers after attaining knowledge of the withdrawal of suit filed application under S.12(2), C.P.C.---Trial Court while concluding that the respondent could not have made any conceding statement as he had no proprietary rights in the suit property allowed the application under S.12(2), C.P.C. and the suit was deemed to be pending where the respondent was directed to implead relevant parties for the matter to be decided on its merits---Appellate Court concluded that there was a collusive effort by respondent and the petitioner, hence the application was rightly allowed---Validity---High court observed that both the courts below had duly considered the record and the evidence from which the element of the fraud was evident---No case for interference was made out---Constitutional petition was dismissed.
Rana Zia Abdul Rehman and Nawab-ur-Rehman for Petitioner.
Chaudhry Sadaqat Ali for Respondents Nos.7, 8 and 9.
Barrister Haris Azmat, Barrister Maryam Hayat and Muhammad Faizan Azhar for Respondents Nos.10 of 12.
Sheikh Naveed Shaharyar for Respondent No.11.
Date of hearing: 6th November, 2020.

JUDGMENT

AYESHA A. MALIK, J.----Through this Petition, the Petitioner has impugned order dated 27.7.2010 passed by Respondent No.6, Civil Judge, Gujranwala and judgment 8.6.2012 passed by Respondent No.5, Additional District Judge, Gujranwala.

2. The subject matter of dispute between the parties is property measuring 271 Kanals 7 Marlas situated in Qila Didar Singh, Tehsil and District Gujranwala. The facts of the case are that Respondent No.2, Syed Akhtar Ali was the original owner of the disputed property. A dispute arose between Respondent No.2 and the

Petitioner which resulted in the filing of a suit for declaration with permanent injunction by Respondent No.2 against the Petitioner. The suit was decreed ex-parte in favour of Respondent No.2 vide judgment and decree dated 5.3.1981. Consequently Respondent No.2 became owner of the disputed property. Respondent No.2 sold the property to one Ramat Ullah the husband of Respondent No.1 Maqtool Akhtar and to Respondent No.4, Saif Ullah vide registered sale deed dated 29.4.1981 having mutation No.8580 dated 2.5.1988 and mutation No.8811 dated 19.1.1989. The Petitioner moved an application before the civil court for setting aside ex-parte decree dated 5.3.1981. Respondent No.2 appeared in the application proceeding and made a conceding statement before the court that he has no objection if the suit is restored, as the parties have entered into a compromise. On the basis of the said statement, Civil Judge 1st Class, Gujranwala revived the suit of Respondent No.2 vide order dated 13.2.1995. Thereafter Respondent No.2 withdrew his suit on 9.12.1999. Consequently the Petitioner considered himself to be the owner of the property.

3. Respondents Nos.1 and 4 having become owners of the property
were never impleaded nor was heard before passing order dated 9.12.1999, hence they moved an application under Section 12(2) Civil Procedure Code, 1908 ("C.P.C.") on 31.10.2000 for setting aside the orders dated 13.2.1995 and 9.12.1999. Reply was filed to this application by Respondents Nos.1, 2 and 4. The matter was heard, seven issues were framed, evidence was led and after hearing all the parties, Civil Judge 1st Class, Gujranwala vide order dated 27.7.2010 set aside orders dated 13.2.1995 and 9.12.1999 on the ground that the suit could not have been revived given that Respondent No.2 had no proprietary interest in the property since he had sold the property to Respondents Nos.1 and 4 in 1981. Against this order, the Petitioner filed a revision petition before the Additional District Judge, Gujranwala which was dismissed vide the impugned judgment dated 8.6.2012 upholding the order of 27.7.2010 with the finding that there appears to be collusion between the Petitioner and Respondent No.2 who had no proprietary interest in the property having sold it to Respondents Nos.1 and 4, hence the suit was deemed pending and the Respondents were directed to implead the new owners of the property in the suit for a hearing on his application to set aside the ex-parte order.

4. Learned counsel for the Petitioner states that there was no reason to accept the application filed by Respondents Nos.1 and 4 as the matter had been settled between the Petitioner and Respondent No.2 and that Respondents Nos.1 and 4 were party in the said suit. Learned counsel further argued that in fact the sale deed in favour of Respondent No.4 has been cancelled and that the original mutation in favour of the Petitioner has never been challenged. Learned counsel further states that this is a case of mis-reading of the evidence and non-appreciation of the facts of the case.

5. C.Ms. Nos. 3/2016, 1/2017 and 2/2020 were filed under Order 1, Rule 10, C.P.C. for irnpleadment of the Applicants as Respondents which were allowed and the

stated Applicants have been impleaded as Respondents Nos.10, 11 and 12 in the instant Petition.

6. On behalf of Respondent No.11, it is argued by the learned counsel that the Petitioner and Respondent No.2 colluded and misrepresented the facts therefore the application under Section 12(2) C.P.C. was allowed. Learned counsel stated that Respondent No.2 sold the property to Respondents Nos.1 and 4 in 1981 hence he could not have made any conceding statement before the court with respect to the restoration of the suit on 13.2.1995 and on 9.12.1999. Learned counsel further stated that at that time he had no proprietary right in the property, hence this fact should have been brought to the knowledge of the court. He further argued that this statement was made deliberately with the intent to defraud the real owners from the property, as a result whereof the application under Section 12(2), C.P.C. was accepted. Learned counsel has placed reliance on Muhammad Iqbal and others v. Khair Din through LRs and others (2014 SCMR 33).

7. On behalf of Respondents Nos.10 and 12, it is argued by the learned counsel that there are concurrent findings of fact by the Civil Judge, Gujranwala as well as Additional District Judge, Gujranwala on the issue that Respondent No.2 and the Petitioner misrepresented the Facts to the court and played fraud with the court. That the concurrent findings of fact should not be interfered with in constitutional jurisdiction. Learned counsel further argued that the compromise allegedly stated before the court on 13.2.1995 and 9.12.1999 is a misrepresentation of facts by Respondent No.2 and the Petitioner as Respondent No.2 had already sold the property to Respondents Nos.1 and 4. Learned counsel further argued that the Petitioner has no grievance before this Court as the matter is now pending before the trial court and any objection that the Petitioner may have with respect to the revival of the suit of Respondent No.2 has to be raised before the trial court which will look into all the issues regarding the proprietary rights of Respondent No.2 as well as that of the Petitioner. Learned counsel has placed reliance on Malik Muhammad Hussain v. District Returning Officer and others (2008 SCMR 488), Allied Bank Limited through Manager v. Samar Abid and 8 others (2015 CLD 1749) and Muhammad Arif v. Additional Sessions Judge-VIII, Karachi West and 2 others (2020 YLR 1586).

8. Heard and record perused. The basic facts are not disputed in this case being that Respondent No.2 filed a suit for declaration with permanent injunction against the Petitioner wherein he essentially prayed that mutation No.3659 dated 29.3.1972 is illegal and void and that a declaration may be given that he is the owner in possession of the property. As the Petitioner did not appear in the suit it was decided ex-parte on 5.3.1981. Consequently Respondent No.2 became owner of the disputed property. Respondent No.2 then sold the property to Respondents Nos.1 and 4 vide sale deed dated 29.4.1981 and Mutation No.8580 dated 2.5.1988 and mutation No.8811 dated 19.l.1989. However the Petitioner moved an application for setting aside the ex-parte decree of 5.3.1981 which was allowed vide order date 13.2.1995 by the Civil Judge, Gujranwala. The ex-parte decree was set aside on the

basis of a statement by Respondent No.2 that the matter has been compromised between the parties, he has no objection to the same. The case was heard on 9.12.1999 whereby Respondent No.2 withdrew the suit. Consequently Respondent No.2 who was initially declared owner of the property was no longer the owner of the property and instead the Petitioner became the owner of the property. In this regard, it is noted that the suit filed by Respondent No.2 was for cancellation of mutation No.3659 dated 29.3.1972 in favour of the Petitioner. By withdrawing the suit Respondent No.2 informed the court that he was no longer contesting the said mutation in favour of the Petitioner, hence the Petitioner became owner of the disputed property. At this point it is important to note that as per the record, Respondent No.2 was not the owner of the disputed property which he had sold vide sale deed dated 29.4.1981 having mutation No.8580 dated 2.5.1988 and Mutation No.8811 dated 19.1.1989. Hence the question is that whether he could have made a statement before the court to have the ex-parte decree set aside and to withdraw his suit given that he had no proprietary rights in the property.

9. When the fact of the setting aside of the ex-parte decree and withdrawal of the suit came to the knowledge of Respondents Nos.1 and 4, Respondent No.1 filed an application under Section 12(2), C.P.C. on 31.10.2000 in which seven issues were framed out of which the most relevant issues are Issues Nos.1 and 2 that is whether the order dated 13.2.1995 and judgment dated 9.12.1999 have been procured by fraud and misrepresentation. Both the issues were heard and decided together by the Civil Court. The court concluded that Respondent No.2 could not have made any conceding statement before the court on 13.2.1995 or 9.12.1999 as registered sale deed in favour of Respondent No.1 and Respondent No.4 were produced before the court as Ex.A13 and Ex.A14 along with mutation as Ex.A15 and attested copy of suit for declaration titled 'Syed Akhtar Ali Shah v. Syed Ishfaq Ali Shah and others. as Ex.A16 which established the case of Respondents Nos.1 and 4. The court concluded that Respondent No.2 is not competent to claim any interest in the property yet despite the same he made a statement before the court that he has no objection to setting aside the ex-parte decree dated 5.3.1981 whereas at this point Respondent No.2 had no proprietary rights on the basis of which the suit already decreed could have been revived. The court also concluded that the new owners of the property being Respondents Nos.1 and 4 had neither been impleaded at the time when the suit was filed nor was the sale brought to the notice of the court. As the Petitioner was not able to bring any cogent evidence before the court in his defence, the application under Section 12(2) Civil Procedure Code, 1908 was allowed and the order dated 13.2.1995 and 9.12.1999 were set aside vide order dated 27.7.2010 and the suit was deemed to be pending where the respondents were directed to implead the relevant parties allowing the matter to be decided on its merits. Against this order, revision petition was filed by the Petitioner. The revision petition was heard in great detail and the court also concluded that Respondent No.2 was not owner of the property in 1995 and 1999 at which point he could not have made any statement in favour of the Petitioner. The court also concluded that this is a collusive effort by Respondent No.2 and the Petitioner, hence the application under Section 12(2), C.P.C. was rightly allowed.

10. Although learned counsel for the Petitioner has argued the case at great length, there is no denying fact that Respondent No.2 had sold the property to Respondent No.1 and respondent No.4, therefore Respondent No.2 as per the record did not have any proprietary rights at the time when he made a conceding statement before the court on 13.2.1995 and 9.12.1999. Both the Courts below have duly considered the record and the evidence from which the element of fraud is evident. Learned counsel for the Petitioner has not been able to refute the contentions of the Respondents' counsel or rebut what is evident from the record.

11. Under the circumstances, no case for interference is made out the instant Petition is dismissed.SA/A-71/L Petition dismissed.

2021 P T D 155
[Lahore High Court]
Before Ayesha A. Malik and Jawad Hassan, JJ
COMMISSIONER INLAND REVENUE
Versus
Messrs SAMSOL INTERNATIONAL (PVT.) LTD. and others
E.T.R. No.09 of 2013, decided on 26th November, 2019.

Federal Excise Act (VII of 2005)---

----S.34A---Reference to High Court---Exercise of jurisdiction under S.34A of Federal Excise Act, 2005---Findings of fact---Scope---Where order of Appellate Tribunal was based on findings of facts, after detailed discussion, deliberation and interpretation of provisions of law and as such did not carry any mistake apparent on record, then same did not require any interference by High Court while exercising jurisdiction under S.34A of Federal Excise Act, 2005.
Ch. Muhammad Zafar Iqbal for Applicant.
Mehar Alam Sher for Respondent.

ORDER

This Reference Application under Section 34(A) of the Federal Excise Act, 2005 (the "Act") has been filed by the Applicant, being dissatisfied by the order passed by the Appellate Tribunal Inland Revenue, Lahore Bench Lahore ("Appellate Tribunal") in Ex.No.32/LB/2009 dated 06.09.2012. The following questions of law are said to arise out from the impugned order.
QUESTIONS OF LAW
(I) "Whether the learned Appellate Tribunal Inland Revenue erred in law while accepting the Appeal of the Respondent to the extent of penalty and default surcharge under rule 45(5) of Federal Excise Rules, 2005 and Rule 18(3) Sales Tax Rules, 2006? "
(II) "Whether the impugned order to the extent of declaring the imposition of penalty illegal is unlawful and without lawful authority?
(III) Whether the learned Appellate Tribunal exercised its jurisdiction illegally and with material irregularity in passing the impugned order?
(IV) Whether in case of payment of duty/tax through direct debit the date of payment is considered on which payment is received by the Bank?
(V) Whether payment of duty/taxes through direct debit is covered under Sub-Rule (5) of the Federal Excise Rules, 2005 and sub-Rule (5) of Rule 15 of the Sales Tax Rules, 2006?

2. Brief facts are that on failure to deposit due amount of Sales Tax and Federal Excise Duty by the Respondent, Deputy Collector (Adjudication) ordered for payment of default surcharge; that order was appealed before Collector of Customs, Sales Tax and Federal Excise (Appeals), Lahore which was rejected on 07.07.2009.

Being aggrieved, the Respondent filed Appeal before the Appellate Tribunal which was allowed vide impugned order.

3. Learned counsel for the Applicant submitted that the impugned order is illegal and contrary to the law and facts of the case; that the Appellate Tribunal has not passed the above referred order in accordance with law as such the same is liable to be set aside

4. On the other side, learned counsel for the Respondents submitted that the impugned order has been passed strictly in accordance with law and does not require any interference by this Court. He also prayed for dismissal of Reference Application.

5. We have heard the arguments of learned counsel for the parties and perused the record. The Applicant in this Reference Application disputes the order passed by the Appellate Tribunal which allowed the appeal of the Respondent by observing that "National Bank was working as agent of FBR and any payment received by the National Bank under Sub-Rule (5) of Rule 45 is deemed to have been received by FBR". It was further observed that "if bank for any reason deposits and collected amount late in the account of FBR, this was a matter between the agent bank and principle FBR. The registered person could not be penalized under these facts".
The relevant/operative part of learned Appellate Tribunal order is reproduced hereunder:-
"We hold, therefore, that the payment made through e-banking (direct debit) by registered person was within time. Though, apparently, direct debit was not expressly covered under the sub-Rule (5), yet it sufficiently meets the intent and object of rule makers. Principle of `ejusdem generis' can be employed here to construe that payment made through "direct debit" is covered under the sub-rule".

7. We are of the considered opinion that the learned Appellate Tribunal has rightly decided the issues, which otherwise are based on the finding of facts, after detailed discussion, deliberation and interpretation of provisions of law and as such does not carry any mistake apparent on the record, therefore, does not require any interference by this Court.

8. Therefore, Reference application is decided against the Applicant.

9. Office shall send copy of this order under the seal of the Court to the learned Appellate Tribunal as per section 34A(5) of the Act.

KMZ/C-29/L Order accordingly.

P L D 2021 Lahore 86

Before Ayesha A. Malik, J

DISTRICT MANAGER, PAKISTAN INTERNATIONAL AIRLINES CORPORATION, LAHORE---Petitioner

Versus

EXCISE AND TAXATION OFFICER, ZONE NO. 10, LAHORE and 4 others---Respondents

Writ Petition No. 15567 of 2015, heard on 19th October, 2020.

Punjab Urban Immovable Property Tax Act (V of 1958)---

----Ss. 3, 2(e) & 16---Levy of property tax---Leased Land---Lessee in perpetuity, attributes of---Petitioner Pakistan International Airlines ("PIA") impugned demand raised by respondents for payment of property tax in respect of a superstructure raised on land leased by petitioner from Provincial Government---Contention of petitioner, inter alia, was that liability of property tax fell on owner of property, and not lessee---Contention of respondents, inter alia, was petitioner PIA was a lessee in perpetuity and therefore it was liable to pay property tax---Validity---Petitioner would be considered lessee in perpetuity when lease agreement was not for a fixed term or where there did not exist any clause for renewal or termination of lease agreement---In present case, lease agreement was for a fixed term, and said agreement provided that lease agreement could be terminated on account of any breach of agreement or if said property was used for a purpose different than one specified in said agreement, and therefore petitioner could not be termed to be a lessee in perpetuity---High Court observed that under such circumstances, property tax could only be recovered from owner of building, and no tax could be levied under Punjab Urban Immovable Property Tax Act, 1968 on building raised by petitioner on land leased from Provincial Government---Constitutional petition was allowed, accordingly.

Government of Sindh through Secretary and Director General, Excise and Taxation and another v. Muhammad Shafi and others PLD 2015 SC 380 rel.

Pakistan International Airline Corporation and others v. Tanweer-ur-Rehman and others PLD 2010 SC 676; Messrs Lahore Electric Supply Co. Ltd. v. Province of Punjab 2014 CLC 590;Platinum Commercial Bank Ltd. v. Government of Sindh through the Secretary, Secretariat, Karachi and another 2003 MLD 279 and Pakistan Cricket Board v. Executive District Officer (Revenue), Lahore and 2 others Writ Petition No. 10380 of 2006 ref.

Umer Sharif for Petitioner.

Akhtar Javed, Additional, Advocate-General, Punjab along with Tanveer Hussain, Inspector in the office of Respondent No.1.

Date of hearing: 19th October, 2020.

JUDGMENT

AYESHA A. MALIK, J.---Through this Petition, the Petitioner Pakistan International Airline ("PIA") has challenged order dated 19.5.2015 passed by Respondent No.1 wherein they have been told that they are liable to pay property

tax under the Punjab Urban Immovable Property Tax Act, 1958 ("Act") for the superstructure raised on the land leased out to the Petitioner by the Government of Punjab.

2. Facts of the case are that the Petitioner, PIA entered into an Agreement of Lease with the Government of Punjab in 1986 for land located at Lake Road, Old University Ground, Lahore for the purposes of establishing a planetarium ("Lease Agreement"). This lease was initially for five years, then extended and now it has been extended for another 30 years that is 14.11.2026 which fact is not in dispute. The Petitioner was served with notice dated 16.3.2015 under Section 16 of the Act demanding property tax on the superstructure raised on the said land. The Petitioner contested the levy of property tax on the ground that it is not the owner of the property as defined under the Act; that it is exempt from paying tax under the Act as well as in terms of Article 165 of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution"). Learned counsel for the Petitioner stated that the liability of tax under the Act is on the owner of the property and the Petitioner is not the owner of the property as per the definition given in Section 3(e) of the Act. Learned counsel further stated that the Petitioner is being treated as a lessee in perpetuity, however the Petitioner is not a lessee in perpetuity because it has a lease agreement in its favour for a specific period with a termination clause which lease can be cancelled at any time if the government requires the land for public purpose. In this regard, he places reliance on Government of Sindh through Secretary and Director General, Excise and Taxation and another v. Muhammad Shafi and others (PLD 2015 SC 380). Learned counsel also argued that the Petitioner, PIA is performing functions in connection with the affairs of the Federation, hence is entitled to the exemption under Article 165 of the Constitution. Reliance is placed on Pakistan International Airline Corporation and others v. Tanweer-ur-Rehman and others (PLD 2010 SC 676). Learned counsel argued that this Court has already decided a similar matter in Messrs Lahore Electric Supply Co. Ltd. v. Province of Punjab (2014 CLC 590) as well as in terms of the other judgments held that where the occupier of land if an instrumentality of the Federation is exempt from paying tax on the basis of Article 165 of the Constitution. Reliance is also placed on Platinum Commercial Bank Ltd. v. Government of Sindh through the Secretary, Secretariat, Karachi and another (2003 MLD 279).

3. Report and parawise comments have been filed on behalf of the Respondents. Learned Law Officer stated that property tax is levied on the superstructure that has been built on the land for which the Petitioner is liable to pay tax under the Act. He has placed reliance on the judgment of this Court dated 23.4.2015 passed in W.P. No.10380 of 2006 titled Pakistan Cricket Board v. Executive District Officer (Revenue), Lahore and 2 others which is with reference to the Gaddafi Stadium which is under the control of Pakistan Cricket Board wherein they were held liable to pay property tax. Learned Law Officer further stated that the Petitioner is liable to pay tax to the extent of the superstructure as it is an autonomous body, hence it cannot seek exemption under Article 165 of the Constitution. Hence the instant Petition is liable to be dismissed.

4. Heard and record perused. The issue before the Court is whether the Petitioner, PIA is liable to pay property tax for the building constructed on land measuring 24 Kanals 13 Marlas located at Lake Road, Old University Ground, Lahore referred to as the `Planetarium' which was constructed pursuant to the Lease Agreement. As per the Lease Agreement the tenant is liable to pay no rent but shall pay all rates, taxes, charges which are payable by the owner or the occupier of the land. The purpose of the Lease Agreement is so that PIA can build the planetarium. As per the Lease Agreement the Government of Punjab may resume the land if it is required for public purpose or if the land is used for any purpose other than the purpose stipulated in the Lease Agreement. There is no dispute with respect to the lease period which was extended till May 2007 and then again for 30 years uptil 14.11.2026, free of cost. The Respondents have issued show cause notice for payment of property tax on the construction made on the said land essentially stating therein that they have raised a superstructure on the property, hence they fall within the definition of 'owner' under the Act. The Act defines owner in Section 2(e) to include a mortgagee with possession, a lease in perpetuity, a trustee having possession of a trust property and a person to whom an evacuee property has been transferred previously or permanently under the Disabled Persons (Rehabilitation and Compensation Act, 1958). The Respondents argue that the Petitioner is liable to pay the tax because it is a lessee in perpetuity as its lease continues from 1986. However, in terms of the dicta laid down by the august Supreme Court of Pakistan in PLD 2015 SC 380 (supra), the attributes of a lessee in perpetuity is where the lease agreement is not for a fixed term or where there is no clause for renewal or termination of the agreement. The august Supreme Court of Pakistan has also held that it is necessary to go through the contents of the lease agreement to see whether it suggests permanency on the basis of its object and if at all any structure is raised on the same what is the outcome of the said structure in the event that the lease is terminated. In the instant case the Lease Agreement was initially for a period of five years, extendable by the mutual consent of both the parties. Admittedly vide letter dated 10.5.2007 the lease period was extended for 30 years from 14.11.1996 to 14.11.2026 free of cost by the Deputy Secretary (Colonies). The Lease Agreement provides that the land is to be used solely for the purposes of the planetarium and where the Government of Punjab finds that the land is not used for this purpose they can terminate the Lease Agreement. In the event that the Lease Agreement is terminated, the Government of Punjab is not responsible for the structure or any material used for the purposes of the structure, meaning thereby that they are not liable to compensate the tenant for any construction made on the land. As per Clause 4 Lease Agreement can be terminated on account of any breach or non-performance at which time the Government of Punjab may take down the structure and sell whatever material and retain proceeds of the sale. In this case even though the period is from 1986 uptil 2026, it is not the case of the Respondents that the land that has been given to PIA cannot be taken back from them or that the Lease Agreement cannot be terminated or that they are obligated to extend the lease period. Under the circumstances, the Respondents' claim that the Petitioner is lessee in perpetuity is without basis.

5. That being so, the levy of tax under the Act is on the annual value of the building or land or both but tax can only be recovered from the owner of the land. In this case the Petitioner is not the owner of the land as it does not fall within the definition of owner under the Act since it is a tenant of the Government of Punjab, hence tax cannot be levied under the Act on the building raised by the Petitioner on the land leased from Government of Punjab.

6. In view of the aforesaid, the instant Petition is allowed and the impugned order dated 19.5.2015 passed by Respondent No.1, is set aside.

KMZ/D-14/L Petition allowed.

2021 P Cr. L J 205
[Lahore]
Before Mrs. Ayesha A. Malik, J
SADAF AZIZ and others---Petitioners
Versus
FEDERATION OF PAKISTAN and others---Respondents
Writ Petitions Nos. 13537 and 27421 of 2020, decided on 4th January, 2021.

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

----S. 164-A---Universal Declaration of Human Rights, 1984, Art.7---Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, 1984, Art. 16---International Covenant on Economic, Social and Cultural Rights, 1966, Art. 12---Convention Against Elimination of All Forms of Discrimination Against Women, 1979---Victim of rape, examination of---Medical jurisprudence---Virginity test---Applicability---Medical protocol has taken a total shift from its original view and now as per accepted medical protocols, virginity test is no longer considered to be relevant in cases of rape or sexual abuse---Virginity test has no scientific or medical basis---International obligations cast a responsibility on Government of Pakistan to ensure that all necessary steps are taken to prevent discrimination and specifically to prevent carrying out virginity testing---Globally it is accepted that virginity testing does not establish offence of rape or sexual abuse nor past sexual conduct has any relevance in medico-legal examination, which aims to collect evidence on the charge of sexual violence.
24th Edition of Modi's Textbook; A global review; Reproductive Health written by Rose McKeon Olson and Claudia Garcia-Moreno; Strengthening the Medico-Legal Response to Sexual Violence; Eliminating Virginity Testing: An Interagency Statement and Statement on Virginity Testing rel.

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

----Art. 151(4) [as amended by Criminal Law (Amendment) (Offences Relating to Rape) Act (XLIV of 2016)]---Victim of rape---Past character of victim---Requirement---Adopting line of questioning on character of victim has effectively been prohibited under Criminal Law (Amendment) (Offences Relating to Rape) Act, 2016 by deleting Art. 151(4) of Qanun-e-Shahadat, 1984---Past history of victim with reference to her sexual intercourse or her being of easy virtue or habitual to sex is totally unnecessary---Fact regarding past history degrades concerned victim.

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

----S. 164-A---Sexual violence---Virginity test of victim---Object, purpose and scope---Virginity testing is highly invasive, having no scientific or medical requirement, yet carried out in the name of medical protocols in sexual violence cases---Such is humiliating practice which casts suspicion on victim as opposed to

focusing on accused and incident of sexual violence---In effect such test amounts to gender based discrimination as it is neither a medical condition which requires treatment nor does it provide any clinical benefit to victim---Sole purpose of virginity test is to determine whether victim is habituated to sexual intercourse so as to corroborate her statement on the charge of rape and sexual abuse---Investigation into incident of sexual violence, whether victim was previously accustomed to sexual intercourse is hardly determinative question---Issue in sexual violence is whether accused committed rape on victim in time and circumstances complained of---If victim is found to not be a virgin, it cannot and does not suggest that she was not raped or sexually abused---Such test places victim on trial in place of accused and shifts focus on her virginity status---Sexual behavior of victim is totally irrelevant as even the most promiscuous victim does not deserve to be reaped nor should incident of sexual violence be decided on the basis of virginity test.

(d) Constitution of Pakistan---

----Arts. 9, 14 & 25---Fundamental rights of women---Victim of rape---Virginity test---Right to life, liberty, dignity and equal treatment---Applicability---Such rights ensure that life is to be lived with dignified existence protecting one from degradation and ensuring accessibility to a decent physical, social and cultural environment, it also protects a person from structured stigmatizing as a stereotype discrimination adversely impacts dignity of a person---Such rights ensure that right to receive healthcare of a high standard and to the highest attainable standard of physical and mental health---Virginity test by its very nature is invasive and an infringement on privacy of a woman, to her body and is blatant violation of dignity of a woman---Conclusions drawn from such tests about a woman's sexual history and character is a direct attack on her dignity and leads to adverse effects on social and cultural standing of a victim---Such test is also discriminatory as it is carried out primarily to ascertain whether or not the victim is sexually active for which there is no justification as being sexually active is irrelevant to incident of rape or sexual abuse---If at all there is any testing of status of hymen, it can only be for medical purposes with respect to injury or treatment, there is no justification for such information to be used for the purposes of determining whether or not incident of rape or sexual abuse took place.
Ahmad Abdullah and 62 others v. Government of the Punjab and 3 others PLD 2003 Lah. 752; Bashir Ahmad and another v. Maqsood Ahmad and another 2010 PCr.LJ 1824; Liaqat Ali Chughtai v. Federation of Pakistan through Secretary Railways and 6 others PLD 2013 Lah. 413; Hafiz Junaid Mahmood v. Government of Punjab and others PLD 2017 Lah. 1; Government of Sindh through Secretary Health Department and others v. Dr. Nadeem Rizvi and others 2020 SCMR 1 and Mst. Beena v. Raja Muhammad and others PLD 2020 SC 508 rel.

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

----S. 164-A---Qanun-e-Shahadat (10 of 1984) Art. 151(4) [as amended by Criminal Law (Amendment) (Offences Relating to Rape) Act (XLIV of 2016)]---Guidelines

for the Examination of Female Survivors/ Victims of Sexual Abuse, 2020---Constitution of Pakistan, Arts. 9, 14 & 25---Women rights---Victim of rape---Virginity test, vires of---Two finger test---False accusation---Scope---Petitioners assailed jurisdiction of High Court in the interest and benefit of victims of sexual violence---Authorities relied upon Guidelines for the Examination of Female Survivors/Victims of Sexual Abuse, 2020, issued for conducting medical examination by Women Medical Officer---Validity---Tendency to levy false charges of rape and sexual abuse did not justify carrying out virginity testing as the purpose of medico-legal examination was to ascertain whether or not an act of sexual violence had taken place---Even if charge was false, a proper examination on the basis of science and forensic evidence would bring out the truth---Guidelines for Examination of Female Survivors/Victims of Sexual Abuse, 2020, did not categorically prohibit virginity testing, rather they attempted to camouflage the issue so as to continue such practice---High Court directed and declared that the authorities to revise Guidelines for the Examination of Female Survivors/Victims of Sexual Abuse, 2020, so that all required protocols and instructions as per international practice were included; that there was no clarity with reference to Guidelines for the Examination of Female Survivors/Victims of Sexual Abuse, 2020, which replaced 2015 Instructions and SOPs, for the purposes of carrying out medico-legal examination in female victims of rape or sexual abuse; that two finger test and hymen test carried out for purposes of ascertaining virginity of a female victim of rape or sexual abuse was unscientific having no medical basis, therefore, it had no forensic value in cases of sexual violence; that virginity test offended personal dignity of female victim, therefore, was against right to life and right to dignity enshrined in Arts. 9 & 14 of the Constitution; that virginity tests were discriminatory against female victim as they were carried out on the basis of their gender, therefore, offended Art. 25 of the Constitution; that Guidelines for the Examination of Female Survivors/Victims of Sexual Abuse, 2020, SOPs and 2015 Instructions were illegal to the extent of two finger test or hymen test for the purpose of ascertaining virginity of victims, as such tests were against the Constitution; that Federal and Provincial Governments to take necessary steps to ensure that virginity tests were not carried out in medico-legal examination of victims of rape and sexual abuse; that Provincial Government to devise appropriate medico-legal protocols and guidelines along with Standard Operating Procedures in line with international practice that recognized and managed sensitively care of victims of sexual violence and that the authorities to impart regular training and awareness programs so that all stakeholders must understand that virginity test had no clinical or forensic value---Constitutional petition was allowed accordingly.

Barrister Sameer Khosa, Maria Farooq and Salman Ijaz for Petitioners (in Writ Petition No. 13537 of 2020).

Sahar Zareen Bandial, Hammad Saeed and Eamaan Noor Bandial for Petitioners (in Writ Petition No. 27421 of 2020).

Ishtiaq Ahmad Khan, Additional Attorney General for Pakistan and Mrs. Ambreen Moeen, Deputy Attorney General for Pakistan along with Dr. Sajid Bari, Civil Surgeon and Mian Waqar Ahmad, Law Officer from National Commission for Human Rights, Muhammad Ali Khan Mazari, Deputy Director office of Secretary,

Ministry Human Rights, Fahad Azhar, Ms. Shahida Sukhera, Law Officers of Respondent No.7, Ministry of Human Rights, Rana M. Shafique, Legal Advisor Respondent No.5, Punjab Forensic Science Agency and Dr. M. Tahir Jamil, Ministry of National Health Services, Regulations and Coordination for Respondents.

Muhammad Shan Gull, Additional Advocate General, Punjab, Ch. M. Jawad Yaqub, Additional Advocate General Punjab, Akhtar Javed, Additional Advocate General and Sardar Qasim Hassan Khan, Assistant Advocate General with Aslam Javed, Senior Law Officer, Hamid Shahzad, Law Officer, Ali Rashid, Law Officer, Hafiz Yousuf, Law Officer, Dr. Umar Ishaq, Deputy Secretary Specialized Healthcare and Medical Education, Department, Khurram Abbas Wahga, Primary and Secondary Healthcare Department, Ahmad Osama, Section Officer, Home Department, Abbas Ali, Law Officer, Secretary Special Healthcare Department, Kamran Razzaq, PMC (PMDC), Ms. Aasia Shafiq, Law Officer, WDD and Professor Dr. Arif Rasheed Malik, Chairman Department of Forensic Medicine KEMU, Lahore Surgeon Medico Legal Punjab, Lahore for Respondents.

Dates of hearing: 5th March, 30th June, 11th September, 14th October and 10th November, 2020.

JUDGMENT

AYESHA A. MALIK, J.---This petition along with connected W.P. No.27421/2020 challenges the use and conduct of virginity tests specifically being the two finger test and hymen examination in cases of rape or sexual abuse. The Petitioners seek a permanent restraint against the use, conduct or facilitation of virginity tests by the Respondents and seek a direction to ensure that necessary and proper measures are taken with respect to the physical and mental health and safety of the women undergoing the medico-legal examination. The Petitioners further pray that the Respondents should rely on scientific methods of investigation as the virginity test is neither scientific nor medically required to establish the incident of rape or sexual abuse.

The case of the Petitioners

2. The Petitioners before the Court in the instant petition are a group of diverse women, who have been working in the public sphere, in the academia, as a sociologist, journalist, activist, lawyer and psychologist and in W.P. No.27421/2020, the Petitioner is a member of the National Assembly of Pakistan. These petitions have been filed in the interest of and for the benefit of victims of sexual violence who are subjected to virginity testing. The case of the Petitioners is that the Respondents carry out virginity testing as part of the medico-legal examination in cases of rape and sexual abuse. Virginity testing essentially comprises of the two finger test and the hymen test. The justification for both tests is to ascertain whether the victim is sexually active. They argue that the tests are irrelevant for the charge of rape or sexual abuse, particularly after the omission of section 151(4) of the Qanun-e-Shahadat Order, 1984 (QSO) under the Criminal Law (Amendment) (Offences Relating to Rape) Act, 2016 (Amendment Act, 2016).

Learned counsel argued that the circumstances in which the tests are conducted is such that first the consent is obtained from the victim for the purposes of carrying out the examination, however, the victim is neither aware of the reasons for carrying out either of the tests nor is she informed properly, with sufficient sensitivity, as to what the examination entails. Furthermore, generally the victim is not informed by the female medical practitioners that she can refuse to be tested. It is also argued that the virginity tests are neither necessary nor reliable or relevant for the purpose of investigation into the incident of rape or sexual abuse. Learned counsel state that the medico-legal examination reports rely on words such as habituated to sex or not a virgin which are totally irrelevant for the purposes of the incident under investigation and at the same time such derogatory language stigmatizes the victim, causing social and personal trauma. They relied on reported judgments to show how the virginity test is considered by the Courts to conclude about the virtue of the victim. It is their case that the practice of carrying virginity tests is still prevalent notwithstanding the fact that Article 151(4) of the QSO has been deleted and that section 164A of the Criminal Procedure Code, 1898 ("Cr.P.C.") does not require the same. It is also their case that there is insufficient understanding on the relevancy of the virginity test and that there is not enough training with reference to the female medical officers appointed, who carry out the virginity tests and fill in the medico-legal report. Learned counsel stated that Pakistan is a signatory to several international treaties which totally denounce virginity testing, hence Pakistan is obligated to maintain its international commitments pursuant to Article 5 of the Universal Declaration of Human Rights, 1984 (UDHR), Article 7 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) and Article 16 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT). It is also against Article 12 of the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR). They also stated that the Pakistan is also a signatory to and has ratified the Convention Against Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW), which prohibits all forms of discrimination against women and declares the two finger test as discriminatory such that it amounts to a denial of rights to female victims of rape on the basis of her gender. It is argued that virginity tests violate the given standards of the right to human dignity as enshrined in Article 14 of the Constitution of Islamic Republic of Pakistan, 1973 (Constitution). It also violates the right of privacy with respect to a women and her right over her own body and it violates Article 25 of the Constitution as it is specifically applied to female rape or sexual abuse victims making negative inference to her character in order to justify the incident of rape and sexual abuse but is not used where the victim is a male. Learned counsel also rely on a large variety of international literature by the WHO, UN Human Rights Office and UN Women wherein it is reported that virginity testing is associated with a series of adverse physical and psychosocial effects, that it has no evidentiary value, that it violates bodily integrity and the privacy of rape victims and unjustifiably subjects them to further trauma.

The response by the Respondents

3. The Respondents before the Court are the Federation of Pakistan and Province of Punjab. Both have made a statement before the Court through Mr. Ishtiaq Ahmad

Khan, Additional Attorney General for Pakistan and Mr. Muhammad Shan Gull, Additional Advocate General Punjab that in principle the Federation and the Province do not dispute the contentions of the Petitioners to the extent that the two finger test should not be conducted. Mr. Muhammad Shan Gull, Additional Advocate General Punjab informed the Court on 11.09.2020 that the matter in issue is under due consideration before the competent authority and in this regard, new guidelines are under consideration.

4. Report and parawise comments on behalf of Respondent No.7, Ministry of Human Rights, Government of Pakistan and Respondent No.8, National Commission for Human Rights through its Chairman, have been filed. In terms thereof, it is stated that women in sexual abuse and rape cases are examined by authorized women medical officers in terms of section 164A of the Cr.P.C. and that a detail procedure has been prescribed to preserve the rights and dignity of the victim. It is further stated that the said section does not require the two finger test, however it is noted that the practice to carry out the tests notwithstanding the amendments in the law continues. As per the report and parawise comments filed by Respondent No.7, it is categorically stated that two finger test is a violation of the constitutional right to dignity of women who are victims of rape or sexual abuse.

5. Respondent No.5, Punjab Forensic Science Agency ("PFSA") is also before the Court and has filed its report and parawise comments in which they have stated that they do not rely upon virginity tests as they rely on scientific testing methods by collecting forensic evidence in rape or sexual abuse cases. Hence they carry out semen detection and DNA profile development in rape or sexual abuse cases. It is also stated that the PFSA has issued guidelines for rape and sexual abuse cases with respect to the collection and packaging and transportation of biological material for forensic DNA analysis, which is in line with the international practice. Hence to the extent of PFSA it does not require or rely on virginity testing.

6. Report and parawise comments on behalf of Respondents Nos.1 and 2, Secretary Health and Specialized Healthcare and Medical Education Department and as well as Surgeon Medico Legal Punjab have been filed in W.P. No.27421/2020. As per their report and parawise comments, the health department has issued instructions prescribing the manner for examination of female victims of rape or sexual abuse which includes digital examination, speculum examination and specimen collection. It is also stated that an effort has been made to improve upon the manner of examination of female victims as well as of collecting evidence and on ensuring that the consent of the victim is obtained with due sensitivity. Further that the privacy of women victim is maintained; that the victim is examined by a female medical officer and that the medico-legal findings are carefully and clearly documented in the medico-legal report. In this regard, it is stated that digital examination is required to assess the status of the hymen, capacity, size, torn plus information regarding the victims history on sexual intercourse but the women medical officer cannot write words such as habituated to sex in any report. In terms of the report and parawise comments, the medico-legal report proforma requires physical

examination which is by naked eye as well as digital and instrumental examination. In this context information on the rupture of hymen, if present, fresh or old is also required. It is also stated that the two finger test and hymen test is part of the digital examination and bilateral digital traction and is a necessary step as per textual protocol for the medical examination of female victims of rape and sexual abuse. It was however clarified that the two finger test is not conducted unless it is deemed necessary. By way of explanation, it was stated that in cases of minor girls, it is mandatory to inspect the hymen in detail to determine whether it is intact and if not then the nature of the injury.

7. Professor Doctor Arif Rasheed Malik, Chairman Department of Forensic Medicine KEMU, Surgeon Medico Legal Punjab, appeared in person and explained that the examination of the hymen is necessary for the provision of adequate and effective investigation and there are instructions in aid of the process, so as to determine the injuries, determine tears, laceration, bruises, abrasions, swellings and hyperemia where sexual violence is alleged. He clarified that women medical officers are not allowed to write words like habituated to sex and cannot comment on the character of the victim. However, as per his understanding a report has to be given on the status of the hymen as the element of the victims virginity is relevant. In this regard, the Surgeon Medico Legal Punjab, categorically stated that digital examination will be conducted where-ever deemed necessary as it is an integral part of the process. In this regard, it is noted that the Government of Punjab placed before the Court draft guidelines including the proforma for medico-legal examination of female victims of rape or sexual abuse, which are to be implemented in all hospitals within the Province of Punjab. It was stated that these new guidelines have been devised consequent to the issues raised through the instant writ petitions.

8. During the course of arguments, Respondent, Specialized Healthcare and Medical Education Department presented a copy of Notification dated 10.11.2020 stating therein that the Guidelines for the Examination of Female Survivors/Victims of Sexual Abuse (2020 Guidelines) have been issued which contains the proforma of the report to be filled by the women medical officer. In terms of the arguments made by the Respondents, the 2020 Guidelines apparently redress the grievance of the Petitioners as it prohibits the two finger test. The Respondents have specifically relied on Clause 14 of the 2020 Guidelines, which states that two finger test must not be performed. However the Petitioners, having gone through the contents of the 2020 Guidelines raised objections with reference to the same. The Petitioners argued that the 2020 Guidelines have not prohibited virginity testing rather has left the matter open ended such that even though the two finger test has been prohibited, hymen testing has not been prohibited hence virginity testing continues even under the 2020 Guidelines. It was further argued that the 2020 Guidelines emphasizes on information with reference to the status of the hymen, which is essentially to conclude that the character of the victim is questionable as is her honesty and the truthfulness of her statement. Learned counsel for the Petitioners while reading Clauses 14 and 15 of the 2020 Guidelines state that it provides for bilateral digital

traction which essentially is a check on the status of the hymen stretching the hymen at 6 and 12 o'clock positions and further that in terms of the proforma provided for the medico-legal report there is a specific requirement for determining whether the hymen is intact or torn and whether the tear is fresh or old. Therefore, it is argued that the Respondents have retained the ability to conduct virginity testing and have not taken decisive steps towards the eradicating of the same.

9. On the basis of what has been argued, the Petitioners case essentially is that there is no medical or scientific basis to continue with virginity testing that is the two finger test or to test the status of hymen; that it violates the fundamental rights of the female victims such that it denies the female victim the dignity of life that she is guaranteed under the Constitution; that it breaches her right to privacy over her body and her personal life; that it is discriminatory as virginity testing is only done for female victims so as to discredit her. It has also been argued that the process under the Instructions Regarding the Conduct of Medico-legal and Postmortem Examination, 2015 (2015 Instructions") and now the 2020 Guidelines is not victim sensitive and meaningful consent is not obtained before carrying out the medico-legal examination.

Opinion of the Court

Nature of Medico-Legal Examination

10. As part of the investigation of the incident of rape or sexual abuse, the victim is required to undergo a medico-legal examination, once a complaint of rape or sexual abuse is registered with the relevant Police Station through a First Information Report. The victim, accompanied with a parent or a guardian, is presented before a medical officer for the medical examination which leads to the preparation of the report of medico-legal examination of the victim. This medical examination is mandatory in terms of section 164A of the Cr.P.C., which calls for a medical examination of the victim of rape where an offence of committing rape or sexual abuse is under investigation. The section sets out the procedure to be followed for a medico-legal examination in the following terms:

164A. Medical examination of victim of rape, etc.-(I) Where an offence of committing rape, unnatural offence or sexual abuse or attempt to commit rape, unnatural offence or sexual abuse under section 376, section 371 or section 377B respectively of the Pakistan Penal Code, 1860 (Act XLV of 1860) is under investigation, the victim shall be examined by a registered medical practitioner, in the case of female victim by a female registered medical practitioner, immediately after commission of such offence:

Provided that in all cases, where possible, the female victim shall be escorted by a female police officer or a family member from a place of her convenience to the place of medical examination.

(2) The registered medical practitioner to whom such victim is sent under subsection (1) shall, without delay, examine the victim and prepare a report of examination giving the following particulars, namely:--

(a) name and address of the victim and of the person by whom she was escorted;

(b) age of the victim;

(c) description of material taken from body of the victim for DNA profiling;
(d) marks of injury, if any, on body of the victim;
(e) general mental condition of the victim; and
(f) other material particulars in reasonable detail.
(3) The report under subsection (2) shall state precisely the reasons for each conclusion arrived at.
(4) The report under subsection (2) shall specifically record that consent of the victim or of his or her natural or legal guardian to such examination had been obtained.
(5) The exact time of commencement and completion of the examination under subsection (1) shall also be noted in the report.
(6) The registered medical practitioner shall, without delay, forward the report to the investigation officer who shall forward it to the Magistrate along with other requirements as specified under clause (a) of subsection (1) of section 173.
(7) Nothing in this section shall be construed as rendering lawful any examination without consent of the victim or of any person authorized under subsection (4).
As per the Section, the victim has to provide her name, address and age including the name of the person with whom she was escorted. The report requires a description of materials taken from the body of the victim for DNA profiling, marks of injury, if any, on the body of the victim; general mental condition of the victim and all other material particulars with reasons for each conclusion arrived at. Importantly the report has to specifically record the consent of the victim or of her natural or legal guardian to such examination.
Guidelines and Instructions

11. The Respondent Health Department issued Notification dated 28.10.2002 which establishes a three tier structure for conducting medico-legal work. The initial medico-legal examination is carried out by Medical Officers in Rural Health Centers, Tehsil Headquarters Hospital and District Headquarters Hospitals. The second tier consists of the District Standing Medical Board ("District Board") where re-examination is required and the third tier is the Surgeon Medico Legal Punjab. The Surgeon Medico Legal Punjab is the Chairman of the Provincial Standing Medical Board, which is also the final appellate authority against the decisions of the District Boards. The Medico Legal Officers and the District Board fall under the control and supervision of Primary and Secondary Healthcare Department whereas the office of the Surgeon Medico Legal Punjab is an attached department of the Specialized Healthcare and Medical Education Department. They also issued Standard Operating Procedures for Medico Legal Examination of Women Survivors ("SOPs"), which includes the Performa to be used for medico-legal examination reports in all cases of sexual violence. As part of the SOPs there is an Operating Manual on Standard Operating Procedures, which essentially provides guidance to the doctors who perform the medico-legal examination in cases of rape or sexual abuse. The Surgeon Medico Legal Punjab issued the 2015 Instructions, which detail the general instructions for conducting the medico-legal examination. The SOPs have statedly been replaced by the 2020 Guidelines, which were notified on 10.11.2020. Despite the statements of the Federation and the Government of Punjab

that these virginity tests have been stopped, it is necessary to examine the requirements provided under the SOPs and the 2015 Instructions in comparison with the 2020 Guidelines to note whether virginity testing is still required under the 2020 Guidelines.

12. As per the SOPs and 2015 Instructions the examination of a female victim of sexual abuse or rape involves three steps, that is observation through naked eye, digital examination and speculum examination. The 2015 Guidelines referres to digital examination to ascertain the status of the hymen. It also refers to bimanual traction. These terms are not defined anywhere in the SOPs or 2015 Instructions, however as per the reply filed by the Surgeon Medico Legal Punjab digital examination is performed to assess the vaginal canal and to report any bleeding/stains etc. Furthermore that the two finger test is part of the digital examination and bilateral digital traction is done to determine the status of the hymen. Therefore, as per the admitted position, digital examination and bilateral digital traction are terms used for virginity testing. In comparison Clause 14 of the 2020 Guidelines provides for a two step process, essentially being inspection with naked eye and thereafter, bilateral digital traction or speculum examination. Clauses 14 and 15 of the 2020 Guidelines read as follows:-

"14. Local examination should be detailed in lithotomy position including inspection, bilateral digital traction and speculum examination. Inspection should be both with naked eye, magnifying lens and by use of Glaister Keen glass rod as mentioned in prescribed Proforma. TWO FINGER TEST MUST NOT BE PERFORMED.

- Bilateral digital traction of the labia majora makes the hymenal edges visible. This maneuver stretches the hymen at 6 and 12 o'clock positions and any tear at these areas become evident and visible.
- Specular examination of the vaginal canal should be performed only in mature women. An appropriate sized speculum is introduced into the vagina to inspect the conditions of vaginal mucosa, its rouginess and to locate any bleeding, injury or any other condition of the vaginal mucosa and cervix. Preferably, this examination should be performed in operation theatre or in well equipped medico-legal clinic under general anesthesia, if needed.

15. Digital and speculum examination must not be done when hymen is found intact. Per speculum examination is not a must in the case of children/ young girls when there is no history of penetration and no visible injuries. The examination and treatment as needed may have to be performed under general anesthesia in case of minors and when injuries inflicted are severe. If there is vaginal discharge note its texture, color and odour etc."

In terms of the 2020 Guidelines the first step is an inspection with the naked eye and then a bilateral digital traction of the hymen and a speculum examination in mature woman. The term mature woman is not defined but it appears to suggest married women as they are not virgins hence the need for a speculum examination. Furthermore, digital examination meaning the two finger test is specifically prohibited in Clause 14 of the 2020 Guidelines but as per Clause 15 it is not done

where the hymen is intact, meaning that it can be done where the hymen is not intact. As per the attached Proforma for Medico Legal Examination ("the Proforma") observations by naked eye, digital traction and instrument examination require inspection of the hymen to determine if torn, fresh or old. Interestingly it also allows a per-vaginum examination where required and per-vaginum examination is understood to mean the two finger test. The case of the terms digital examination bilateral digital traction and per-vaginum examination is likely to create confusion as to whether the two finger test is required to be carried out and will mean the continued practice of virginity testing as it is set in the process and procedures carried out over the years. Hence the 2020 Guidelines continues with the practice of virginity testing and has only attempted to confuse the issue rather than prohibit it.

13. The Surgeon Medico Legal Punjab, Lahore appeared and explained that digital examination is conducted as it is considered a necessary step in the textual protocol for medical examination of female victims of sexual abuse; that the two finger test is only conducted if deemed necessary and only through authorized women medical officers and that the consent of the victim is always obtained as per the given proforma. Further that the hymen test or two finger test is required to correlate the victims statement with the history of the victim. In this regard, he stated that the findings regarding the rupture of hymen, if fresh or old is done through bilateral digital examination and also through inspection of the naked eye. As per his contention, it is necessary to carry out these tests in order to adequately and effectively ascertain whether the incident of sexual abuse or rape did in fact take place. In his professional opinion the hymen is ruptured in very rare cases while carrying out certain sporting activities or cycling and therefore, the reliance on the status of the hymen in no manner prejudices the rights of female victims.

14. In this context, it is clear from a reading of the 2020 Guidelines that the Respondents still require virginity testing and although the 2020 Guidelines specifically state that the two finger test must not be performed, it is qualified such that it is not performed where the hymen is found intact. Consequently, this means that in terms of the 2020 Guidelines virginity testing through bilateral digital traction and digital examination or even per-vaginum examination may be carried out and the two finger test will not be carried out where the victim is a minor, presumably a virgin. However even in such cases the status of the hymen is examined to confirm her virginity.

The Consequences

15. In support of the arguments made, the Petitioners relied on a series of judgments to show the prejudice caused by virginity testing through the orders of the court. As per the judgments provided, the common conclusion drawn by the courts, based on the medico-legal examination report, is as follows:-

- As per deposition of lady doctor, the victim was proved to be habitual to sexual intercourse;
- Hymen had got healed tears; Vaginal orifice admits two fingers;

- As per the opinion of the lady medical officer, the victim is not a virgin as her vagina admits two fingers easily and the hymen was not found intact;
- The vagina of the examinee admitted two fingers easily and hence an unmarried girl of sixteen years of age appears to be not of a fair virtue;
- According to the Medico-legal Report the hymen was torn fresh and the vagina admitted two fingers tightly;
- Lady doctor had observed that vagina of victim admitted two fingers which was, prima facie, not possible if rape was committed only once with a virgin victim;
- On examination, vagina admitted two fingers with or without pain on genital examination and no discomfort noted;
- In the opinion of the doctor she was used to sexual act.

As per the different medico-legal examination reports examined by the Court, the status of the hymen is provided for and some reports state that two fingers were easily inserted into the vagina along with the opinion of the medical officer as to whether rape or sexual abuse took place. From a bare reading of the 2020 Guidelines and the Proforma and the filled in reports it appears that the process of virginity testing through two fingers or hymen examination are standardized and form the basis of the medical officers opinion or the court's opinion on the virtue and character of the victim. Often enough the opinion of the medical officer is carried into the judgments of the court and language such as habituated to sex, women of easy virtue, habitual to sexual intercourse, indulging in sexual activities are used to describe the victim. The basis being that a woman habituated to sex, is likely to have raised a false charge of rape or sexual abuse.

16. There is no law governing the requirements of virginity testing specifically the two finger test and the hymen test. At the core of the Respondents case, the justification is that these tests are carried out on the basis of established medical protocols in cases of rape and sexual abuse. In this regard, reliance has been placed on Modi, A Textbook of Medical Jurisprudence and Toxicology (Modi's Textbook), which is relied upon for the purposes of medico-legal examination protocols. There is a chapter on Virginity, Pregnancy and Delivery and on Sexual Offences where it is stated that the question of virginity arises in case of rape. In terms of the 24th Edition of Modi's Textbook, the question of virginity is relevant and can be ascertained through an inspection of the status of the hymen, even though he states that an intact hymen is not an absolute sign of virginity. Modi's Textbook also provides the methodology for the examination of the hymen and justifies the same on the strength of establishing whether or not the victim is a virgin. He emphasized on the concept of false charges which is common in rape cases, hence it is necessary to examine the veracity of the victims statement by checking her virginity. However, Modi's Textbook in its 26th Edition shows a change in perspective as it now provides as under:-

It is demeaning to the status of a woman to be forced by orders of Court to carry out test of virginity of woman and must be taken as a grave threat to privacy, a cherished fundamental right. The testimonial compulsions for DNA testing described elsewhere the book with reference to judgments of the Supreme Court shall apply, a fortiorany virginity tests also. Unlike a DNA test which is scientific

and assures 99.99 percent accuracy, virginity test, where there is no pregnancy or child birth, could never be conclusive. While section 53, Cr.P.C. which allows for taking samples of blood or urine the course of criminal investigation, there is no scope for clinical violation of a women body on specious grounds of unraveling truth. Another instance where Courts have refused any medical practice that is invasive of privacy and regarded as despicable, requiring to be discarded is 'the two finger test' to assess past sexual conduct of the woman in cases of sexual abuse. For the same reason, virginity test shall also be discarded. (emphasis added)
Hence the reliance on medical protocol has taken a total shift from its original view and now as per accepted medical protocols, virginity testing is no longer considered to be relevant in cases of rape or sexual abuse as it is has no scientific or medical basis.
Medical and Scientific Views on Virginity Tests

17. The uses and impact of medico-legal evidence, globally is discussed by Janice Du Mont and Deborah White in their review titled The uses and impact of medico-legal evidence in sexual assault cases: A global review commissioned by the World Health Organization. As per the review medico-legal evidence is collected from a victim's body in order to corroborate her account of a sexual assault for a court of law. In any legal action pursued in relation to her case, this evidence is typically used to aid the investigation and prosecution of the accused. In this regard, the objective of the forensic evidence is to prove or exclude a physical connection between individuals and objects or places. More specifically, the medico-legal evidence taken from a sexually assaulted woman may be used in determining the occurrence of recent sexual activity, identifying the assailant, establishing the use of force or resistance and indicating an inability to consent due to the influence of alcohol and drugs or an otherwise diminished mental capacity. As per the review, the relevant features of a medico-legal examination in cases of sexual violence are the written consent from the victim, medical history of the victim, the sexual assault history with relevant details including the date, time and location of the occurrence as well as details of the assailant. The medico-legal findings are relevant with respect to the clothing worn by the victim, the women's hair, urine or blood samples and alcohol. A physical examination is required to identify injuries caused to the victim which are then properly documented. A speculum, colposcope, anoscope and a staining agent like toluidine blue dye may be used to further detect injuries to the ano-genital area. The skin is examined for secretions and body cavities are swabbed for seminal fluid. A victim's emotional state may be observed and recorded. As per the review virginity testing is not relevant to establish rape or sexual abuse.

18. Reviews conducted of medical literature by United Nations Human Rights, World Health Organization and UN Women on Eliminating Virginity Testing, An Interagency Statement have concluded that appearance of the hymen cannot give conclusive evidence of vaginal penetration or sexual history:
The utility of hymen examination as a test for virginity was reviewed. The studies indicated, as has been described in previous reviews, that the inspection of the hymen cannot give conclusive evidence of vaginal penetration or any other sexual

history. Normal hymen examination findings are likely to occur in those with and without a history of vaginal penetration. A hymen exam with abnormal findings is also inconclusive: abnormal hymenal features such a hymenal transection, laceration, enlarged opening, or scars are found in females with and without a history of sexual intercourse. One hymenal feature commonly examined in virginity testing is hymenal opening size. Hymenal opening size also was found to be an unreliable test for vaginal penetration. Hymen opening size varies with the method of examination, the position of the examinee, the cooperation and relaxation of the examinee, and the examinee's age, weight, and height.

19. Similarly, Rose McKeon Olson and Claudia Garcia-Moreno in Reproductive Health wrote in Virginity Testing, A Systematic Review on the two finger test in which it is stated that the medical community does not consider vaginal laxity an indicator of sexual intercourse:
Another form of virginity testing is performed by insertion of two fingers into the vagina to examine its laxity. This form of virginity testing was not included in the review of literature because the medical community has not considered vaginal laxity a clinical indicator of previous sexual intercourse. The vagina is a dynamic muscular canal that varies in size and shape depending on individual, developmental stage, physical position, and various hormonal factors such as sexual arousal and stress.

20. The World Health Organization, the United Nations Office on Drugs and Crime, and Stop Rape Now - UN Action on Sexual Violence in Conflict have developed a toolkit titled "Strengthening the Medico-Legal Response to Sexual Violence" which assists state bodies in developing an effective response to incidents of sexual violence. In this document, these organizations have also stressed that:
The hymen may not appear injured even after penetration has occurred. Hence, the absence of injury does not exclude penetration. The health practitioner cannot make any comment on whether the activity was consensual or otherwise.
Furthermore, they have also stressed that:
Digital examinations of the vagina and anus are rarely warranted. They should not be used to assess the tone of the orifice or to comment on the likelihood or frequency of penetration.

21. In addition the Independent Forensic Expert Group (IFER), a group of 35 independent forensic specialists from 18 countries established by the International Rehabilitation Council for Torture Victims (IRCT) to provide technical advice on issues where allegations of torture or ill treatment are made, issued a statement in 2014 on virginity testing. In the said statement they also cover the medical perspectives on such tests and state:
Published and peer-reviewed medical literature establishes that virginity examinations have no scientific value. The status of the hvmen has no correlation with previous penetration or sexual contact; it does not enable a determination of whether penetration of the hymen or vagina by a penis or any other object has

occurred. Virginity examinations also do not assist in the detection of sexually transmitted infections.
While examination of the hymen may, in very limited contexts, be useful in the diagnosis of sexual assault in prepubescent females, it is not an indicator of sexual intercourse or habituation. An individual with an undamaged hymen may or may not have experienced penetrative sexual contact. There similarly may be no trace of hymenal lesion following sexual assault.
At puberty, the hymen is exposed to oestrogen, which alters its appearance, shape, and elasticity. Studies demonstrate that hymen configurations vary, and the hymen may exhibit changes prior to sexual intercourse. The belief that absence of the hymen confirms that there has been penetration of the vagina is incorrect; equally false is the notion that the presence of a 'normal' or 'intact' hymen means that penetration has not occurred.
Further illustrating the non-utility of this type of examination, in a survey of forensic physicians conducted in Turkey, two-thirds of respondents reported that their findings from at least one virginity examination conducted in the previous twelve months contradicted a recent virginity examination of the same patient. In 73 percent of those cases, the contradictory findings were made by general practitioners or gynecologists.
Health professionals therefore have no medical foundation for conducting virginity examinations; the examinations are irrelevant and harmful to women, and serve as a form of social control of their sexuality. (emphasis added)

22. As per a report published in 2018 by the World Health Organization and United Nations Human Rights titled Eliminating Virginity Testing: An Interagency Statement, virginity testing is unscientific, medically unnecessary and unreliable and it can be painful, humiliating and traumatic for the victim. The Independent Forensic Expert Group Report titled Statement on Virginity Testing has stated that virginity examinations are premised on a correlation between the practice of sexual intercourse and immorality or criminal deviancy. Be nature, as they can only be conducted on those who are unmarried, the examinations are discriminatory. In the justice context, correlating virginity to purity elevates the repugnance of sexual violence against women who are 'virgins'. Yet, it similarly diminishes the perception of the severity of sexual violence against women who have previously engaged in sexual intercourse; and it has been used to suggest that those women are somehow responsible for the acts perpetrated against them. It also states that the status of the hymen has no correlation with previous penetration or sexual contact; it does not enable a determination of whether penetration of the hymen or vagina by a penis or any other object has occurred. Virginity examinations also do not assist in the detection of sexual transmitted infections. While examination of the hymen may, in very limited contexts, be useful in the diagnosis of sexual assault in prepubescent females, it is not an indicator of sexual intercourse of habituation. An individual with an undamaged hymen may or may not have experienced penetrative sexual contact. There similarly may be no trace of hymenal lesion following sexual assault. Finally it states that the concept of virginity also has no relevance to the forensic medical examination, diagnosis, and documentation of sexual assault. In

this context there are volumes in international publications issued by the WHO, United National Human Rights and UN Women, who have also deprecated the practice of virginity testing. These reports and statements make it clear that internationally there is clarity and consensus that virginity tests by way of the two finger test and hymen test cannot indicate definitively that there was any sexual violence. Hence globally these tests are neither considered to be medically or scientifically viable for investigating sexual violence.
Judicial Review

23. The issue of virginity testing has been considered by the Supreme Court of India in its judgment dated 11.04.2013 passed in Criminal Appeal No.1226/2011 titled Lillu alias Rajesh and another v. State of Haryana wherein it has been held that:-
the two finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto, be given rise to presumption of consent.
In another case, Allahabad High Court of India in its judgment dated 28.08.2014 passed in case Capital Cases No.574 of 2013 titled Akhtar v. State of U.P. has held that:-
These finger insertion tests in female orifices without the victim's consent have been held to be degrading, violative of her mental and physical integrity and dignity and right to privacy and are re-traumatizing for the rape victim. Relying on the International Covenant on Economic, Social and Cultural Rights, 1966 and the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 it was further held in Lillu v. State of Haryana, (2013) 14 SCC 643 that no presumption of consent could be drawn ipso facto on the strength of an affirmative report based on the unwarranted two fingers test.
The High Court of Gujarat at Ahmedabad in its judgment dated 17.01.2020 passed in R/Criminal Appeal No.122 of 1996 with R/Criminal Appeal No.25 of 1996 titled State of Gujarat v. Remeshchandra Ramabhai Panchal has held that:-
The test itself is one of the most unscientific methods of examination used in the context of sexual abuse and has no forensic value. Whether a survivor is habituated to sexual intercourse prior to the assault has absolutely no bearing on whether she consented when the rape occurred. Section 155 of the Indian Evidence Act, does not allow a rape victim's credibility to be compromised on the ground that she is "of generally immoral character".
The issue of virginity testing has also been examined by the Bangladesh High Court Division in its judgment dated 12.04.2018 passed in W.P. No.10663/2013 wherein it has been held that:-
The TFT is not scientific, reliable, valid and hereby prohibited in any examination of rape victim. The respondents shall make available the health care protocol (Health Response To Gender Based Violence-Protocol For The Health Care Providers) to forensic experts, physicians who conduct medical examination on rape victims; police officers who conduct investigation of rape case.
With reference to virginity test, the European Court of Human Rights in the case of Aydin v. Turkey No.57/1996/676/866 has held that:-

The various medical examinations ordered by the public prosecutor and the corresponding doctors' reports also failed to meet the needs of an effective investigation into a complaint of rape, focused as they were on the question as to whether or not she was a virgin as opposed to a rape victim. The focus of the examinations should really have been on whether the applicant was a rape victim, which was the very essence of her complaint.
These courts have all held that there is no scientific or medical basis to carry out virginity testing in the form of two finger test or to rely on the status of the hymen whether it is torn or intact as it has no relevance to the investigation into the incident of rape or sexual abuse.

24. The august Supreme Court of Pakistan has considered this issue in the case titled Muhammad Akram v. The State (PLD 1989 SC 742) where in the Supreme Court of Pakistan has held that:
The other argument based on the assumption that the prosecutrix in this case having been used to sexual intercourse should not have been relied upon because of her so-called moral depravity, is also not tenable as it is too wide to be accepted in every case. In the present case it is only an assumption that she might have been used to sexual intercourse and on that basis the benefit of possible consent has been allowed to the appellant in the conviction and sentence for lesser offence. Otherwise; firstly, the medical evidence does not disclose as to whether, the condition of the genitals of the prosecutrix was necessarily due to abusive sexual intercourse or on account of intercourse under compulsion or deceit etc. and/or; whether or not the condition found on examination was not on account of other causes including self-abuse. Therefore, mere opinion of a Doctor, as in this case, would not weaken the testimony of the prosecutrix and would not for that reason necessitate any further corroboratory/supporting evidence for basing the conviction on her statement, if otherwise she appears to be reliable and her testimony inspires confidence.
In Shahzad alias Shaddu and others v. The State (2002 SCMR 1009) the august Supreme Court of Pakistan held that:
We have also examined the question as to whether any advantage can be taken by the petitioners on the allegation that prosecutrix was a girl of an easy virtue. The answer would be in negative as blanket authority cannot be given to ravish the modesty of such-like girls. (emphasis added)
In Shakeel and 5 others v. The State (PLD 2010 SC 47) the august Supreme Court of Pakistan held that:
It reveals from the scrutiny of record that she was medically examined on 18-2-2000 by lady Doctor namely Musarrat Parveen (PW2) and the swabs were found stained with semen as per the report of Serologist (Exh.PW). We have not been persuaded to agree with the prime contention of learned Advocate Supreme Court that since the vagina of Mst. Asia Bibi (PW1/prosecutrix) admitted two fingers easily hence being a lady of an easy virtue her statement should have been discarded for the simple reason that even if it is admitted that she was a girl of an easy virtue, no blanket authority can be given to rape her by anyone who wishes to do so. The only question which needs determination on the basis of medical

evidence would be as to whether she was subjected to Zina-bil-Jabr. (emphasis added)

International Obligations

25. It is also noted that the United Nations Committee on the Elimination of All Forms of Discrimination against Women and the United Nations Committee on the Rights of the Child, the United Nations Special Rapporteur in Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the United Nations Special Rapporteur on Violence Against Women, its Causes and Consequences have all declared virginity testing to be a harmful practice. Pakistan is a signatory to and has ratified the CEDAW which prohibits all forms of discrimination against women and has stated that there is no medical or scientific basis for carrying out virginity testing in sexual abuse or rape cases, where the victim is a female. As per the International Covenant on Economic, Social and Cultural Rights, 1966, (which Pakistan has ratified), two-finger test has been denounced for having adverse physical, psychological and socioeconomic consequences. Further the 1995 Beijing Declaration and Platform for Action of the Fourth World Conference on Women (to which Pakistan is signatory) called upon all states to take all appropriate measures to eliminate harmful, medically unnecessary or coercive medical interventions. Consequently it denounced carrying out virginity testing not only for being discriminatory but also for having harmful consequences.

26. These international obligations cast a responsibility on the Government of Pakistan to ensure that all necessary steps are taken to prevent discrimination and specifically to prevent carrying out virginity testing, as globally it is accepted that virginity testing does not establish the offence of rape or sexual abuse nor does past sexual conduct have any relevance in the medico-legal examination which aims to collect evidence on the charge of sexual violence. In this regard, the Criminal Law (Amendment) (Offences Relating to Rape) Act, 2016 deleted Article 151(4) of the QSO which effectively prohibits adopting a line of questioning on the character of the victim. Hence her past history with reference to sexual intercourse or her being of easy virtue or habituated to sex is totally unnecessary and in fact degrading so far as the victim is concerned. In this regard, it is noted that Section 13 of the Anti-Rape (Investigation and Trial) Ordinance, 2020 ("2020 Ordinance") specifically prohibits the two finger virginity testing for the purposes of medico-legal examination of a victim related to Scheduled Offences. It also specifically provides that any evidence to show that the victim is of immoral character shall be inadmissible.

Fundamental Rights

27. Virginity testing is highly invasive, having no scientific or medical requirement, yet carried out in the name of medical protocols in sexual violence cases. It is a humiliating practice, which is used to cast suspicion on the victim, as opposed to focusing on the accused and the incident of sexual violence. This in effect amounts to gender based discrimination as it is neither a medical condition which requires treatment nor does it provide any clinical benefit to the victim. Its sole purpose is to

determine whether the victim is habituated to sexual intercourse so as corroborate her statement on the charge of rape and sexual abuse. When seen in the context of an investigation into the incident of sexual violence, whether the victim was previously accustomed to sexual intercourse is hardly the determinative question. The issue is whether the accused committed rape on the victim in the time and circumstances complained of. If the victim, is found to not be a virgin, it cannot and does not suggest that she was not raped or sexually abused. What it does is place the victim on trial in place of the accused and shifts the focus on her virginity status. In this regard, the victim's sexual behaviour is totally irrelevant as even the most promiscuous victim does not deserve to be raped, nor should the incident of sexual violence be decided on the basis of a virginity test. When seen in the context of fundamental rights Article 9 of the Constitution provides for the right to life and liberty as per law and Article 14 of the Constitution provides for the fundamental rights of dignity of man. These rights ensure that life is to be lived with a dignified existence protecting one from degradation and ensuring accessibility to a decent physical, social and cultural environment. It also protects a person from structured stigmatizing as stereotype discrimination adversely impacts the dignity of a person. Furthermore, it ensures that right to receive healthcare of a high standard and to the highest attainable standard of physical and mental health. Reliance is placed on Ahmad Abdullah and 62 others v. Government of the Punjab and 3 others (PLD 2003 Lahore 752), Bashir Ahmad and another v. Maqsood Ahmad and another (2010 PCr.LJ 1824), Liaqat Ali Chughtai v. Federation of Pakistan through Secretary Railways and 6 others (PLD 2013 Lahore 413), Hafiz Junaid Mahmood v. Government of Punjab and others (PLD 2017 Lahore 1), Government of Sindh through Secretary Health Department and others v. Dr. Nadeem Rizvi and others (2020 SCMR 1) and Mst. Beena v. Raja Muhammad and others (PLD 2020 SC 508).

28. The virginity test by its very nature is invasive and an infringement on the privacy of a woman to her body. It is a blatant violation of the dignity of a woman. The conclusion drawn from these tests about a woman's sexual history and character is a direct attack on her dignity and leads to adverse effects on the social and cultural standing of a victim. It is also discriminatory as the test is carried out primarily to ascertain whether or not she is sexually active, for which there appears to be no justification as being sexual active is irrelevant to the incident of rape or sexual abuse. If at all, there is any testing of the status of the hymen, it can only be for medical purposes with respect to injury or treatment. However, there is no justification for such information to be used for the purposes of determining whether or not the incident of rape or sexual abuse took place.

29. Sexual violence/rape is the most heinous of crimes. It is an intrusion on the privacy and dignity of a woman and victim should be treated with care and caution. Where evidence is to be collected in the form of a medico-legal examination, it is necessary to acknowledge that the only reason the two finger test and the hymen examination is carried out is to ascertain if the victim was a virgin. A lot has been stated that prior to carrying out these tests, the consent of the victim is obtained,

however it is noted that even the consent obtained through the written form, is neither meaningful nor instructional. As per the 2020 Guidelines and even in the 2015 Instructions the consent form is as follow:-

I _____(patient's name) hereby give consent for all the procedures of medico-legal examination that have been explained to me by the doctor on duty. This will include photography for identification, examination of genitalia, collection of specimens for evidence, medical treatment if required and release of report for police and court purposes. I also declare that on oath that I have not undergone any Medico Legal examination previously from any doctor regarding the present incidence and I have described all the information and facts truly.

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Signatures thumb impression of victim) (Name, Signature and thumb impression of guardian
for victims below 12 years of age)
CNIC No.

Signature of doctor:_____

This consent form does not explain why the two finger test or hymen test is required or what its purpose is. To the contrary, it misleads the victim into thinking that she will be examined to collect evidence of the incident or rape or sexual abuse and not evidence with respect to her sexual history or promiscuity. In this regard, the two finger test and the hymen test conducted for the purposes of obtaining the status of the victims virginity is a violation of her personal integrity. It is a physical invasion of her body and the mere fact that as per the proforma, consent is taken it does not in any manner justify carrying out such a test. It is vital that in such cases, the victim understands the requirements of the medical examination, the manner in which the examination will be carried out and the purpose for which it is being conducted. It is only on the victims understanding of these elements that it can be said that she has given her consent for a physical examination. As has already been stated, rape and sexual abuse is a heinous crime which amounts to a life changing event for the victim which is irreparable. Hence responding to the victim appropriately is just as important as collecting evidence from the person of the victim.

30. Medical forensic examination report should use appropriate language to describe the victim and her state and should totally restrain from commenting as to

whether or not rape or sexual abuse has taken place. The damage caused by such comments and use of words describing the woman as habituated to sex or regularly involved in sexual intercourse can have far reaching effects on the victim socially as well as mentally and personally. Presumptions on her behaviour, her clothes, her activities and her past history are easy to form, yet difficult to erase. Sensitivity is the need of the victim, who has experienced physical and psychological trauma and may have physical injuries as well as psychological injuries. So far as, women medical officer is concerned, section 164A, Cr.P.C. clearly provides for information in cases of rape or sexual abuse. In this regard, the perception over sexual conduct should be avoided and the standardized manner with which the process is carried out should change. Each victim has to be dealt with care and caution and each incident of rape or sexual abuse, as reported in the medico-legal examination has to be in the context of tracing evidence and no more. Although it has been argued on behalf of the Respondents that there is a tendency to levy false charges of rape and sexual abuse, this does not justify carrying out virginity testing as the purpose of the medico-legal examination is to ascertain whether or not an act of sexual violence has taken place. Hence even if the charge is false, a proper examination on the basis of science and forensic evidence will bring out the truth.

31. Furthermore, despite the fact that the Government of Punjab and the Surgeon Medico-Legal Punjab have emphasized on the efforts made with reference to the 2020 Guidelines, I find the same to be totally lacking in protocols and guidance. There is no evidence on how to ensure that proper consent is obtained, what is to be explained, what language is to be used and how to interact with the victim. The 2020 Guidelines or for that matter the 2015 Instructions and SOPs do not require that consent be obtained for every test and procedure undertaken and that the victim be informed that she can refuse any test at any point of the examination. There are no protocols on how to treat the victim, on how to take her history or even question her on sexual intercourse. The guidelines make no distinction between minors, adolescents or otherwise nor does it attend to disabilities or disabled victims. The instructions and guidelines are a reflection of the time and effort put into devising them and shows the seriousness attached to the issue. In this case, the 2020 Guidelines appear to be a hurried attempt to show vigilance and support, however in reality the Respondent, Government of Punjab has shown quite the opposite. The 2020 Guidelines do not categorically prohibit virginity testing, rather they attempt to camouflage the issue so as to continue this practice. Under the circumstances, the 2020 Guidelines should be revised so that all required protocols and instructions as detailed above and as per international practice are included.

32. For all what has been discussed above, in terms of the documents relied upon by the Respondents for the purposes of carrying out medico-legal examination in female victims of rape or sexual abuse, there is no clarity with reference to whether the 2020 Guidelines have replaced the 2015 Instructions and SOPs. This clarity is vital as medico-legal examination must be carried out on the basis of a comprehensive code setting out the protocols and requirements leaving no ambiguity as to whether the two finger test or the hymen test to ascertain virginity is

required. In this regard, it is clarified that the hymen test can be carried out if it is warranted medically or for treatment purposes and in this regard the 2020 Guidelines or the 2015 Instructions and the Proforma should specifically require the medical officer to stipulate the reasons for carrying out the hymen test. It is also noted that notwithstanding the promulgation of 2020 Ordinance which specifically prohibits the two finger test by way of section 13, the Federal Government has taken no steps to enforce the requirements of the 2020 Ordinance or any steps to create awareness and training in order to change the habits of the medico-legal officers in carrying out the virginity test. As the concept of virginity testing is ingrained in the processes of the medico-legal examination without proper training and awareness programs, there can be no success in bringing the tests to an end. In this regard, it is noted that even with respect to obtaining consent from the victim, training is required for the staff and the medico-legal officers involved to understand what meaningful consent is and how to obtain that consent. Also to ensure that the victim understands the procedures for which she is giving her consent and the consequences in terms thereof. Through the course of hearing and despite the voluminous information placed before the Court by the counsel for the Petitioners, Respondent No.11, Surgeon Medico-Legal Punjab has defended the two finger test and hymen test on the basis of medical protocols which as per the information provided before this Court has also undergone change and no longer recognizes it as part of the medical protocols. In this regard, it is vital that Respondent No.11 himself along with his department as well as Specialized Healthcare and Medical Education Department, Lahore are aware of updated medical protocols and forensic science with reference to the cases of sexual violence. Change can only be brought about when the people responsible for the change understand and acknowledge the reasons for changing old practices which no longer find any justification. Merely documenting change and not implementing change does not mean that the Federation or the Provincial Government have acted in accordance with the Constitution, the law and international obligations. Hence a concerted effort must be made so as to ensure that virginity tests are stopped in totality.

33. In view of the aforesaid, these petitions are allowed in the following terms:--

(i) It is declared that two finger test and the hymen test carried out for the purposes of ascertaining the virginity of a female victim of rape or sexual abuse is unscientific having no medical basis, therefore it has no forensic value in cases of sexual violence;

(ii) It is further declared that virginity test offends the personal dignity of the female victim and therefore is against the right to life and right to dignity enshrined in Articles 9 and 14 of the Constitution;

(iii) It is also declared that virginity tests are discriminatory against the female victim as they are carried out on the basis of their gender, therefore offends Article 25 of the Constitution;

(iv) Consequently to the extent that the 2020 Guidelines, SOPs and the 2015 Instructions mandate the two finger test or the hymen test for the purposes of ascertaining the virginity of the victim are declared to be illegal and against the Constitution and the Federation and Provincial Government should take necessary steps to ensure that virginity tests are not carried out in medico-legal examination of the victims of rape and sexual abuse;

(v) The Provincial Government should devise appropriate medico-legal protocols and guidelines, along with standard operating procedures, in line with international practice that recognize and manage sensitively the care of victims of sexual violence. This includes regular training and awareness programs so that all stakeholders understand that virginity tests have no clinical or forensic value.

MH/S-2/L Petition allowed

PLJ 2021 Lahore 194
Present: **MRS. AYESHA A. MALIK, J.**
GHULAM HUSSAIN etc.--Petitioners
versus
IQBAL HUSSAIN through his legal heirs etc.--Respondents
C.R. No. 2244 of 2014, heard on 10.6.2020.

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

----S. 9--Civil Procedure Code, (V of 1908), S. 115--Suit for possession--Decreed--Appeal--Allowed--Case was remanded--Suit was again decreed in post-remand proceeding--Civil appeal--Accepted--Establishment of title--Non-tendring of any title document by respondent--Report of revenue authorities--Non-justification of claim by respondent--Record shows that Petitioners exhibited *rapat roznamcha waqiati* Ex.P1 in which revenue officer made a clear finding that Defendants No. 1 and 2 were in illegal possession of Property--Order of appellate Court did not take into consideration *rapat roznamcha waqiati* Ex.P1--Stated defendant relied upon decree sheet in Civil Suit which does not establish that he is owner of Property or that he has a share in aforementioned Khasra or Khata nor was judgment attached with said decree sheet nor any details were provided--Appellate Court failed to consider this aspect of matter and concluded in favour of Respondent No. 3 on basis of possession of Respondents No. 1 and 2--Hence there was no justification for Court to conclude that defendants were co-sharers in Khasra No. 2425, Khata No. 156 as Respondent No. 3 already had possession of land he was in ownership of--Petitioners have a registered sale deed in their favour which was never disputed--Admittedly they were in possession of 16 Marlas of land on basis of sale deed and description of land given therein--Appellate Court had no document before it on basis of which joint ownership in Khasra No. 2425 and Khata No. 156 was established with respect to Property--Mere possession, without any title in support thereof does not give Respondent No. 3 title nor justifies Respondents No. 7 and 8's possession which was reported as illegal by revenue authority--Furthermore Ex.Pl provides that parties settled their dispute with respect to possession in Khasra No. 2425, Khata No. 156, consequently Respondent No. 3 is unable to justify his claim over 3 Marlas of land in said Khasra, especially since Respondent No. 4 admits that Ameer Muhammad's possession over 5 Kanals of land is not in issue--Revision petition was accepted.
[Pp. 198 & 199] A, B, C & D
Mr. Muhammad Aslam Chaudhary, Advocate for Petitioners.
Mr. Fayyaz Kalim, Advocate on behalf of counsel for Respondent No. 4.
Date of hearing: 10.6.2020.

JUDGMENT
This Civil Revision impugns judgment dated 5.6.2010 passed by the Additional District Judge, Bhakkar in Civil Appeal No. 76/2009.
2. The basic facts are that the Petitioners filed a suit for possession (Civil Suit No. 276/1997) on 23.10.1997 before the Civil Judge 1st Class, Mankera against the

Respondents with respect to property measuring 3 Marlas within the vicinity of Ward No. 2, Town Committee, Mankera ("the Property"). The Suit was contested by Defendants No. 1, 2 and 3 being Respondents No. 7, 8 and 3 before this Court and decreed in favour of the Petitioners *vide* judgment and decree dated 20.6.2005 wherein Respondents No. 7 and 8 were declared to be illegal occupants of the Property and the Petitioners were declared owners of the Property, thereby rejecting Respondent No. 3's claim of title. Consequently Respondents No. 7 and 8 were directed to hand over possession of the Property to the Petitioners. Aggrieved by this judgment and decree, the Respondents filed an appeal before the Additional District Judge, Bhakkar who remanded the case with the direction that the case be decided afresh after framing an additional issue regarding limitation being Issue No. 1 A. The learned trial Court again decreed the suit in favour of the Petitioners *vide* judgment and decree dated 16.4.2008. Against this judgment and decree dated 16.4.2008, the Respondents filed Civil Appeal No. 76/2009 which was accepted and the impugned judgment and decree was set aside *vide* judgment dated 5.6.2010 passed by the appellate Court. The Petitioners filed the instant Civil Revision against the judgment of the appellate Court dated 5.6.2010 on the ground that the Respondents were neither owners nor in possession of the Property; that the *rapat roznamcha waqiati* Ex.P1 clearly stated that Respondents No. 7 and 8 were in illegal possession of the Property; that the Petitioners had a registered sale deed dated 26.2.1991, Ex.P3 which was not disputed by the Respondents. Hence there was no basis to give possession of the land to the Respondents.

3. Learned counsel for the Petitioners argued that the case of the Respondents before the trial Court and the appellate Court was essentially that they are joint owners in Khasra No. 2425, Khata No. 156 which comprises of 42 Kanals 2 Marlas of land; that they purchased and in the said Khasra and since the properties have not been partitioned, the Petitioners cannot lay claim to any specific piece of land within the joint Khata as all co-sharers have rights in the said Khata. Learned counsel argued that there was nothing on the record to establish the title of Defendant No. 3 who is Respondent No. 3 before this Court; that Respondent No. 3 claimed that he was owner in possession of 5 Kanals of land out of which 3 Marlas is disputed. However Respondent No. 3 did not tender any title documents before the trial Court. This fact has been totally ignored in the order of the appellate Court which accepted the contentions of the Respondents that they were co-owners in Khasra No. 2425 and Khata No. 156 without actually considering the issue of their title.

4. On behalf of Respondent No. 4, it is argued that the said Respondent is the legal heir of Ameer Muhammad along with Respondents No. 2 and 3; that Ameer Muhammad is the owner of the Property which the Petitioners claim that they are in ownership of, however since the issue is of joint ownership in the same Khasra and Khata, the suit for possession is not maintainable without partition of the Property and without impleading all co-sharers. In this case, he argued that the Petitioners did

not implead all the co-sharers and as such there was no report available on the file to support the Petitioners' contention that the Property they claim ownership of was the specific land which they are entitled to.

5. This is an old case pending since the year 2017. As per the order sheet, Respondent No. 4 has been contesting this case whereas the other Respondents despite service have never tendered appearance before the Court. On 18.9.2019 notice 'pervi' was issued to the Respondents except Respondents No. 2 to 4 yet despite the same no one has tendered appearance. On 1.6.2020 final opportunity was given and again no one appeared on behalf of Respondents No. 1, 2, 3, 5, 6, 7 and 8, hence they are proceeded against ex-parte. Respondent No. 4 is present before this Court.

6. In this regard, it is noted that as per the Amended Memo. of Parties filed on 8.2.2018 Respondents No. 2, 3 and 4 are the legal heirs of Ameer Muhammad who was Defendant No. 3 in the suit filed by the 3 Petitioners and Respondents No. 7 and 8 are the legal heirs of Defendants No. 1 and 2 in the said suit.

7. As per the record, the Petitioners filed a suit for possession against the Respondents on 23.10.1997. They claimed that they purchased 19 Marlas of land in Khasra No. 2425, Khata No. 126/156, of which they have obtained possession of 16 Marlas of land and that 3 Marlas of land was wrongfully in the possession of Ghulam Qadir and Mazhar being Defendants No. 1 and 2 in the said suit. Defendants No. 1 and 2 filed written statements as did Defendant No. 3 being Respondent No. 3 in the instant Civil Revision in which it was claimed that Defendant No. 3, Ameer Muhammad was owner of 5 Kanals of land of which he had handed over possession of some land to Defendants No. 1 and 2. Hence the Petitioners' claim that they are owners of the Property was contested. Eight Issues were framed in the suit and the suit was decided in favour of the Petitioners on 20.6.2005. As per the judgment dated 20.6.2005 passed by the Civil Judge 1st Class, Mankera, the Petitioners produced four witnesses and placed reliance on rapat roznamcha waqiati Ex.P1, map of the disputed plot Ex.P2 and registered sale deed as Ex.P.3. Whereas Defendants No. 1 and 2 produced two witnesses along with two affidavits Ex.D1 and Ex.D2, Defendant No. 3 relied upon the statement of the Clerk of TC, Mankera as DW1 and he himself appeared as a witness as DW2. He also relied upon a decree dated 13.12.1995 as Mark-A. On the basis of the evidence the Court held that the Petitioners have a registered sale deed in their favour and that the *rapat roznamcha waqiati* clearly provides that Defendants No. 1 and 2 are in illegal occupation of some land. The Court also concluded that there was no document on the basis of which Defendant No. 3 could claim ownership of 5 Kanals of land as nothing was produced in Court. Consequently they failed to make out their case of ownership and possession.

8. The appellate Court *vide* judgment dated 5.6.2010 while setting aside the judgment and decree dated 16.4.2008 disagreed with the opinion of the trial Court on the ground that the Respondents were the owners of land in Khasra No. 2425, Khata No. 156 and that as per the sale deed the defendants were in possession of

two rooms on the Property which originally the vendor Sharif-ud-Din had requested the defendants to vacate. Hence the appellate Court concluded that the Petitioners never got possession of 3 Marlas of land out of the 19 Kanals of land and that the Respondents were the owners of 11 Marlas of land in Khasra No. 2425, Khata No. 156 being co-sharers in the said Khata. Consequently judgment and decree dated 16.4.2008 passed by Civil Judge 1st Class, Mankera was set aside on the ground that co-sharers cannot lay claim to specific land in a joint Khata and that the Petitioners cannot claim the specific property as being their property as there has been no demarcation or partition.

9. The record shows that the Petitioners exhibited *rapat roznamcha waqiati* Ex.P1 in which the revenue officer made a clear finding that Defendants No. 1 and 2 were in illegal possession of the Property. The order of the appellate Court did not take into consideration the *rapat roznamcha waqiati* Ex.P1. In fact the appellate Court has incorrectly held in its order that the Petitioners have not obtained any report of any revenue authority to establish that the Property is part and parcel of the 19 Marlas of land they had purchased. The rapat roznamcha waqiati Ex.P1 is available on the file, in terms of which the revenue officer not only stated that Defendant No. 3 was in possession of his 5 Kanals of land but was prepared in his presence, he can hardly justify claiming ownership or possession over the Petitioners' land under the garb of joint ownership. Hence this finding of the appellate Court is contrary to the record. Furthermore the Respondents No. 7, 8 and Respondent No. 3, Ameer Muhammad relied upon Mark-A to establish title in Khasra No. 2425, Khata No. 156. In the first instance it is noted that as per the record and on the basis of the arguments made before this Court, no title document, in favour of Defendant No. 3, was ever produced in the Court. The stated defendant relied upon the decree sheet in Civil Suit No. 222/1992 dated 13.12.1995 which does not establish that he is the owner of the Property or that he has a share in the aforementioned Khasra or Khata nor was the judgment attached with the said decree sheet nor any details were provided. The appellate Court failed to consider this aspect of the matter and concluded in favour of Respondent No. 3 on the basis of the possession of Respondents No. 1 and 2. Hence there was no justification for the Court to conclude that the defendants were co-sharers in Khasra No. 2425, Khata No. 156 as Respondent No. 3 already had possession of the land he was in ownership of. Finally the Petitioners have a registered sale deed in their favour which was never disputed. Admittedly they were in possession of 16 Marlas of land on the basis of the sale deed and the description of the land given therein. The appellate Court had no document before it on the basis of which joint ownership in Khasra No. 2425 and Khata No. 156 was established with respect to the Property. Mere possession, without any title in support thereof does not give Respondent No. 3 title nor justifies Respondents No. 7 and 8's possession which was reported as illegal by the revenue authority. Furthermore Ex.P1 provides that the parties settled their dispute with respect to possession in Khasra No. 2425, Khata No. 156, consequently Respondent

No. 3 is unable to justify his claim over 3 Marlas of land in the said Khasra, especially since Respondent No. 4 admits that Ameer Muhammad's possession over 5 Kanals of land is not in issue.

10. In view of the aforesaid, the instant Civil Revision is **accepted** and the impugned judgment dated 5.6.2010 passed by the Additional District Judge, Bhakkar in Civil Appeal No. 76/2009 is set aside.
(Y.A.) Revision petition accepted

P L D 2021 Lahore 108
Before Ayesha A. Malik, J
The BANK OF KHYBER through Authorized Attorneys---Petitioner
Versus
MUNICIPAL CORPORATION GUJRAT through Mayor Nasir Mehmood and 2 others---Respondents
Writ Petition No. 129536 of 2018 along with connected petitions, heard on 17th November, 2020.

(a) Punjab Local Government Act (XIII of 2019)---

----S. 156---Punjab Local Government Act (XVIII of 2013), Ss. 115 & 87---Companies Act (XIX of 2017) S.22---Local Government Taxes, Fees, Rates and Tolls---Authority of a local government to levy taxes etc.---Statutory requirement of publication of name by a company by way of conspicuous display outside every place of business of such company---Levy of local government taxes/fee(s) on such display/ signage---Scope---Question before High Court was whether Provincial Local Government could levy fee on petitioner Banking Companies for display of signboards at their places of business, when such display was made in compliance of requirement of S.22 of Companies Act, 2017 read with applicable State Bank of Pakistan Circulars---Held, that petitioner Banks and other corporate entities were required under Federal Law to affix their signboards on their premises, regardless of whether such premises were in their ownership or rented, and thus they should be exempt from any fee to such extent, as Provincial Law could not override provisions of Federal Law---High Court held that any fee that was charged by Provincial Local Government under S.156 of Punjab Local Government Act, 2019 would be cognizant of provisions of Federal Statutes requiring Banks and corporate entities to install signboards outside their premises as per the Companies Act, 2017 and State Bank of Pakistan Circulars---Constitutional petitions were allowed, accordingly.
Bank Alfalah Limited v. Messrs Callmate Telips Telecom Ltd. and 5 others 2016 CLD 1202 ref.
Soneri Bank Limited v. Province of Punjab and others PLJ 2020 Lah. 239 rel.

(b) Cantonments Act (II of 1924)---

----Ss. 200 & 282---Cantonment Board, powers of---Power of Cantonment Board to make bye-laws---Levy of advertisement fee by Cantonment Board in respect of display/signage outside business premises---Scope---Petitioners impugned bye-laws issued by Cantonment Board regarding pasting of billboards and advertisements and levy of advertisement fee on petitioners' display outside their premises, on ground that under Cantonments Act, 1924, no such power was available to Cantonment Board---Validity---Power to make byelaws under S.282 of Cantonments Act, 1924 was subject to provisions of said Act, and such power was dependent upon statutory power given to Cantonment Board---Section 200 of Cantonments Act, 1924 authorized Cantonment Board to levy fee in a limited manner, and Cantonment

Board could not enlarge scope of said section to include fee on advertisements---Cantonment Board therefore had no authority to levy fee in relation to boards installed by petitioners at their offices/premises---Constitutional petition was allowed, accordingly.
Hyderabad Cantonment Board v. Raj Kumar and others 2015 SCMR 1385; Allied Bank Limited v. Province of Punjab and others (I.C.A. No.62 of 2015); Habib Bank Limited Islamabad v. Federation of Pakistan through Secretary Ministry of Defence, Islamabad and others (Civil Appeal No.796 of 2015) and Messrs Haidri Beverages (Pvt.) Ltd. v. City District Government, Rawalpindi through D.C.O. and others (I.C.A. No.50 of 2015) rel.

(c) Companies Act (XIX of 2017)---

----S.22---Statutory requirement of publication of name by a company by way of conspicuous display outside every place of business of a company/corporate entity---Levy of Local Government, Housing Authorities, Parks and Horticulture Authority, National Highway Authority charges/fee(s) on such display/signage---Scope---Banks and corporate entities were entitled to install signboard/signage in compliance with Companies Act, 2017 and State Bank of Pakistan Policy without charge of fee subject to any rules or regulations on size and shape; provided same did not contain any advertisement material.
Advocates for Petitioners
Malik Muhammad Umar Awan,Raza Imtiaz Siddiqui, Jamshed Alam, Qadeer Kalyar, Syed Ali Zafar, Mubashir Aslam Zar, Muhammad Asif Ismail, Mansoor Usman Awan, Ms. Shazeen Abdullah, Mohsin Mumtaz, Ali Sibtain Fazli, Hasham Ahmad Khan, Abad ur Rehman and Esa Jalil, Mustafa Ramday, Khalid Ishaq; Syeda Fatima Tanveer, Ashar Elahi, Adnan Kazmi, Chaudhary Muhammad Arshad, Usman Nawaz, Zafar Iqbal Kalanauri, Waseem Ahmad Malik, Muhammad Asif Butt, Sheikh Anwaar ul Haq, Hafiz Muhammad Kalim Ullah, Faizan Munir Joyia, Ahmad Kamal Khan, Salman Akram Raja, Malik Ahsan, Ms. Atira Akram, Arslan Riaz, Zeeshan Nadeem, Adil Aftab Kashmiri, Bilal Kashmiri, Kashif Hussain, Shahzad Ahmad Cheema, Asif ur Rehman, Abdul Hameed Chohan, Chaudhary Sohail Khurshid, A.W. Butt, Imran Mushtaq, Abid Hussain, Dr. Zia Ullah Ranjha, Chaudhary Muhammad Shakeel, Afrasiab Mohal, Muhammad Adeel Chaudhary Muhammad Azam Zia, Yasir Islam Chaudhary, Imran Aziz Khan, Ch. Abdul Rab, Umer Abdullah, Kashif Ali Chaudhary, Ms. Shazia Ashraf Khan, Faisal Hanif, Faizan ul Haq Dar, Syed Sajid Ali Bukhari, Abdul Latif, Tahir Farooq, Arslan Munir Joiya, Waqar A. Khan, Imran Mustafa, Hafiz Mudassar Hassan Kamran and Mian Asghar Ali.
Advocates for Respondents
Federation of Pakistan
Ms. Ambreen Moeen, Deputy Attorney General for Pakistan along with Azmat Hayat Khan Lodhi, Assistant Attorney General for Pakistan.
Province of Punjab
Waqar Saeed Khan, Assistant Advocate General, Punjab.

Local Government and Community Development Department (Municipal Corporations)
Khalid Jamil, Muhammad Rafique Chaudhry, Sardar Naeem Akbar Khan, Chaudhary Asif Shahzad Sahi, Barrister Chaudhary Saeed H. Nangra, Zafar Iqbal Bhatti and Ms. Samra Malik.
Cantonment Boards
Barrister Muhammad Umer Riaz, Haroon Rashid, Waqas Umer Sial, Barrister Bushra Saqib, Sardar Balakh Sher Khan Khosa, Naveed Akhtar Chaudhary, Rana Nasr Ullah Khan, Muhammad Imran Haider Bhatti, Muhammad Ali Sherazi, Mian Haseeb ul Hassan, Salman Ahmad, Mrs. Samia Khalid, Zarak Zaman Khan, Sheikh Nadeem Arshad, Muhammad Anwar Chaudhary, Chaudhary Muhammad Atiq, Chaudhary Muhammad Umar, Mufi Ahtesham Uddin Haider, Malik Khurram Shahzad, Zulqarnain Hammad and Muhammad Arif Thothaal.
Parks and Horticulture Authority
Waqar A. Sheikh, Ms. Humaira Afzal, Faisal G. Miran, Abdur Rauf Sindhu, Rana Muhammad Afzal Razzaq Khan, Sardar M.S. Tahir, Mian Abdul Qadoos, Rao Aurangzeb Rashid and Muhammad Rafiq Shah.
National Highway Authority
Malik Muhammad Jhenagir Aslam.
Defence Housing Authority
Altaf ur Rehman Khan and Ishfaq Amir Hussain,
Mubeen Uddin Qazi, Advocate for private Respondent No.5 (in W.P. No.222831 of 2018).
Muhammad Khalid Chaudhary, Advocate for private Respondent No.9 (in W.P. No. 203795 of 2018).
Date of hearing: 17th November, 2020.

JUDGMENT

AYESHA A. MALIK, J.---This common judgment decides upon the issues raised in the instant Petition along with connected Petitions, as detailed in Schedule "A" appended with the judgment, as all Petitions question the levy of advertisement fee by the Respondents.

2. The Petitioners before the Court are primarily banking companies who have challenged the levy of advertisement fee as imposed by the various different Respondent authorities. The Petitioners have been asked to pay advertisement fee for the signboards affixed at their branches. In some cases the fee is being charged for neon signs, stickers and other forms of signage, on the windows of the branch, ATM cabins and elsewhere. Also before the Court are different companies such as Bata Pakistan Limited, Punjab Beverages, Agha Khan Hospital, TCS, Singer Pakistan, Coca Cola Beverages and Raiz Bottlers who have also been levied advertisement fee for the affixation of signboard at their office premises, shops and hospitals along with neon signs and other materials, similar to the Banks. One set of Petitioners before this Court are contractors who specialize in the business of outdoor advertisement and install bill boards and sky signs in various different cities of Punjab. They have been charged advertisement fee for outdoor billboards and sky

boards and other forms of advertisement. Most of the Petitioners have also impugned the demand notices issued by the Respondents for payment of advertisement fee. The Respondent authorities before the Court are:
(i) Local Government(s);
(ii) Cantonment Boards;
(iii) Parks and Horticulture Authority ("PHA");
(iv) Defence Housing Authority ("DHA") and
(v) National Highway Authority ("NHA").

3. So far as the Petitioners are concerned, the common argument in all cases is that they are banking companies or corporate entities who display their corporate information through signboards in compliance with section 22 of the Companies Act, 2017 ("Companies Act") which requires the display of the name of the company in a conspicuous position outside the registered office and every office or place of business as well as the branch under the Licensing Policy of the State Bank of Pakistan in terms of the BPRD Circular 15 of 2007 dated 12.10.2007 ("SBP Policy") which requires the same for the Banks. These requirements are federal in nature and are mandatory, meaning thereby that the Petitioners are obligated to place signboards at their place of business, hence cannot be charged a fee for compliance with the federal law. Learned counsel for the Petitioners argued that since the matter of placing signboards or affixing the company name falls within the domain of the federation, therefore provincial authorities cannot compel the Petitioners to remove their boards nor can they levy a fee on the same. Reliance has been placed on Bank Alfalah Limited v. Messrs Callmate Telips Telecom Ltd. and 5 others (2016 CLD 1202) to urge the point that State Bank of Pakistan Guidelines and Circulars are binding. Learned counsel for the Petitioners also argued that the levy of advertisement fee by its very definition is illegal because there is no advertisement involved in so far as display of signboards is concerned and further that there is no quid pro quo, hence the levy of advertisement fee is illegal. In the context of the different authorities before the Court, the case of the Petitioners is that they are not authorized under their respective law to levy advertisement fee. The Petitioners have placed reliance on Soneri Bank Limited v. Province of Punjab and others (PLJ 2020 Lahore 239) ("Soneri Bank Case") where the same matter was raised and decided.

4. The issue before the Court is with respect to the levy of fee/ charges for the affixation of signboards displaying the name of the Petitioner Banks or companies and in some cases with respect to promotional or advertisement material pasted on the windows of the relevant branch or corporate office. So far as the Petitioners who are contractors engaged in the business of contracting for outdoor display, the issue raised by them is whether the relevant Respondent authority can levy advertisement fee for the purposes of billboards, sky boards and other forms of display used by such contractors. The case of each of the Respondent authority is taken up separately with specific reference to their relevant law.
Local Governments

5. Report and parawise comments have been filed by the respective Municipal Corporations. Some of the Petitions are with reference to the Punjab Local Government Act, 2013 ("2013 Act") while others are with reference to the Punjab Local Government Act, 2019 ("Local Government Act"). The Respondents before the Court represent various different Municipal Corporations in whose vicinity the signboard has been affixed. The case of the Respondents is that in terms of the powers under section 115 of the 2013 Act and section 156 of the Local Government Act, they are entitled to levy taxes and fees. They argue that it is part of the authorized functions of the Municipal Corporations to regulate the affixation of signboards and advertisement boards except where it falls within the jurisdiction of the PHA. Reliance is placed on section 87(2)(i) and (g) of the 2013 Act. In this regard the Respondents have also relied upon letter dated 3.7.2020 issued by the Local Government and Community Development Department, Government of Punjab, Lahore wherein it is stated that the Local Government can regulate signboards and street advertisement, however the respective PHAs continue to perform this function in areas which do not fall within their domain. While relying upon the Soneri Bank Case, the letter of 3.7.2020 requires the Director General, PHA to settle the question of advertisement fee in any area where there is an issue with respect to who can levy the fee, PHA or the Local Government. Learned counsel argued that this letter shows that the Respondent Municipal Corporations can levy advertisement fee.

6. In terms of section 156 of the Local Government Act, fee or tax can be levied through a notification published in the official gazette, meaning thereby that the Local Government can levy fees, rates, tolls and rents provided the same has been approved and is notified in the official gazette. Similar was the position under the 2013 Act where section 115 also required that the fee be notified in the official gazette. In the cases before the Court, it is admitted by the Respondent Local Government that no notification has been issued to date by any of the Municipal Corporations. In the absence of a notification as per the requirement of section 156 of the Local Government Act and section 115 of the 2013 Act, the Local Government cannot levy or charge any fee for the purposes of signboards or advertisement fee from the Petitioners. In this regard, it is noted that this issue has already been decided in the Soneri Bank Case that the Local Governments can only charge fee for the affixation of signboards or advertisement fee provided it is duly notified. However there has been no progress in the matter as no notifications have been issued. I am informed by the learned Law Officer that some effort is being made to regulate this issue, however he could not explain as to whether there will be one single notification for all Municipal Corporations or whether separate rates will be issued. Furthermore there is nothing on the record which justifies non-issuance of notifications given the substantive requirement of the law. It is further noted that so far as the Banks and corporate entities are concerned, they are required under federal law to affix their signboard on their premises, be it in their ownership or rented premises, hence they should be exempt from any fee to this extent as the provincial law cannot override the provisions of a federal law. In this regard, the PHA has exempt banks and corporate entities from any fee on signboards provided

they comply with the requirements of size and shape. Therefore any fee that is charged by the Local Government pursuant to section 156 of the Local Government Act will be cognizant of the provisions of the federate statute regarding banks and corporate entities to install their signboards outside their premises as per the Companies Act and the SBP Policy. Hence these Petitions against the Local Government are allowed as the Local Government has not issued any notification for levy of advertisement fee.
Cantonment Boards

7. Report and parawise comments have been filed by the Respondent Cantonment Board. The stated Respondent essentially rely on section 282 of the Cantonments Act, 1924 ("Cantonment Act") which gives the power to make byelaws. Pursuant to this section byelaws have been issued regarding the pasting of billboards and advertisements with respect to size, shape or style of name-boards, sign boards and signposts, hence they argue that fee can be levied. The Petitioners' contention is that there is no power under the Cantonment Act on the basis of which the Respondents seek to levy advertisement fee. They have placed reliance on the judgment dated 20.5.2015 passed by the august Supreme Court of Pakistan titled Hyderabad Cantonment Board v. Raj Kumar and others 2015 SCMR 1385 wherein the matter in issue has been decided, consequent to which it is argued that the Respondent Cantonment Board is not authorized under the Cantonment Act to levy advertisement fee. They have also relied upon the Soneri Bank Case wherein it is specifically held that with reference to section 200 of the Cantonment Act, the Cantonment Board has no authority to levy any fee which is not contemplated by the said provision.

8. Section 282(3) of the Cantonment Act is reproduced here-under:
282. Power to make bye-laws.---Subject to the provisions of this Act and of the rules made thereunder, a [Board] may, in addition to any bye-laws which it is empowered to make by any other provision of this Act, make bye-laws to provide for all or any of the following matters in the cantonment, namely:--
(3) the regulation of the collection and recovery of taxes, tolls and fees under this Act and the refund of taxes;
At the very outset, it is noted that this power is essentially the power to make byelaws which is subject to the provisions of the Act. Hence the power to make rules is dependent on specific power given to the Board under the Cantonment Act. The section which authorizes the Cantonment Board to levy any fee is section 200 of the Cantonment Act which reads as follows:
200. Levy of stallages, rents and fees. A [Board] may
(a) charge for the occupation or use of any stall, shop, standing, shed or pen in a public market, or public slaughter-house, or for the right to expose goods for sale in a public market, or for weighing or measuring goods sold therein, or for the right to slaughter animals in any public slaughter-house, such stallages, rents and fees as it thinks fit; or

(b) with the sanction of the [Competent Authority], farm the stallages, rents and fees leviable as aforesaid or any portion thereof for any period not exceeding one year at a time; or
(c) put up to public auction, or with the sanction of the [Competent Authority], dispose of by private sale, the privilege of occupying or using any stall, shop, standing, shed or pen in a public market or public slaughter-house for such term ad on such conditions as it thinks fit.
Section 200 of the Cantonment Act was interpreted by the august Supreme Court of Pakistan in the judgment dated 20.5.2015 passed by the august Supreme Court of Pakistan in 2015 SCMR 1385 (supra) concluded that the a bare perusal of section 200 of the Cantonment Act is limited for levying of stallages rent and fee for providing stall, shop, standing shed, pen and for other defined commercial activities on the vendors dealing in goods and for the slaughter of animals in public market or public slaughter houses respectively and that too subject to sanction by the competent authority. In the case before the august Supreme Court of Pakistan the issue was of parking fee and the Court concluded that parking fee is not envisioned under the referred provision. Therefore the Cantonment Board has no authority to enlarge the scope of the charging section and include the subject of parking fee for the purposes of levying fee. The same section was interpreted by this Court in the Soneri Bank Case wherein it was held that the Cantonment Board has no authority to levy fee in relation to the boards installed by the petitioners at their offices/branches. The Respondents rely upon the order of this Court dated 14.3.2018 passed by a learned Division Bench of this Court in I.C.A. No.62/2015 titled Allied Bank Limited v. Province of Punjab etc. wherein the Court remanded the matter with the consent of the parties to the Board for due consideration. In the order dated 7.10.2015 passed by the august Supreme Court of Pakistan in Civil Appeal No.796/2015 titled Habib Bank Limited Islamabad v. Federation of Pakistan through Secretary Ministry of Defence, Islamabad etc. the Court referred the matter to the learned Division Bench of Lahore High Court, Rawalpindi Bench for the purposes of deciding the same along with other matters pending there. The cases were decided by the Division Bench in I.C.A. No.62/2015 wherein the Court on the basis of a consent order decided that they would not charge any advertisement fee on the board affixed on a branch and further that if the respondents intend to charge advertisement fee from the banks for reasons that its board contains advertisement material in violation of the specified shape, it can do so after passing an assessment order in writing. This case did not consider the authority of the Cantonment Board to levy advertisement fee and was decided on the basis of the statement made in the Habib Bank Case (supra) before the august Supreme Court of Pakistan. The Respondents also rely on order dated 16.3.2018 passed by this Court in I.C.A. No.50/2015 titled Messrs Haidri Beverages (Pvt.) Ltd. v. City District Government, Rawalpindi through D.C.O. etc. and order dated 10.11.2020 passed by this Court in I.C.A. No.217/2016 titled Lahore Cantonment Board v. Allied Bank Limited etc. along with several other cases decided on the same terms. However, in this regard, it is noted that these orders are of no help to the Respondent Cantonment Board as the matter in issue essentially is with respect to the authority of the Cantonment Board to levy advertisement fee which matter has been decided by the august

Supreme Court of Pakistan. Therefore the Cantonment Board has no authority to levy fee in relation to the boards installed by the Petitioners at their offices/branches and reliance on section 282 of the Cantonment Act is misconceived.

9. Under the circumstances, all the Petitions challenging the levy of advertisement fee by the Cantonment Board are allowed.

Parks and Horticulture Authority

10. There are 33 Petitions against the PHA filed by different banks with reference to signboards, glass flex, neon signs, window advertisement, LED etc. as well as corporate entities such as Punjab Beverages Company Private Limited, Borjan (Private) Limited, Sign-O-Plus Namoos Advertisement Company, Coca Cola Beverages, Faisalabad Outdoor Advertising Association for payment of advertisement fee against display of their signboards as well as for advertisement on billboards, signboards, sky signs and other forms of advertisement. Some Petitioners have challenged the registration for being beyond the scope of the PHA Act.

11. Report and parawise comments have been filed by the Respondent PHA. The Respondents argue that PHA has been created under section 3(2) of the Parks and Horticulture Authority Act, 2012 ("PHA Act") and it regulates the installation of billboards, sky signs and outdoor advertisements under section 4(c) of the PHA Act. Also argued that the Petitioners are bound to seek permission of PHA before installation of billboards, sky signs and to bring already existing boards in conformity with provisions of the PHA Act. Therefore the counsel argued the Petitioners are bound to fulfil the legal formalities and deposit the fee as approved by the Government under section 12(8) of the PHA Act.

12. PHA is established under section 3 of the PHA Act. The preamble of the PHA Act provides for the establishment of Parks and Horticulture Authority in the Punjab for the regulation, development and maintenance of public parks, green belts and green areas in the Punjab; regulation of billboards, sky signs and outdoor advertisements; to promote open and unrestricted views of the Punjab and to provide for the connected matters. Section 4 of the PHA Act provides for the powers and functions of the Authority to regulate the installation of billboards, sky signs, outdoor advertisements on private or public property. Section 12 of the PHA Act deals with installation of billboards, sky signs and outdoor advertisements and section 12(8) allows the PHA to levy charges and fees for installation of billboards, sky signs or outdoor advertisement as per the government approval. The prohibitions are contained in section 21 of the PHA Act whereby section 21(4) provides that the permission of the Authority is mandatory for any installation or exhibit of advertisement material on any property or contain advertisement material or fall under the category of outdoor advertisement. The definition of advertisement is provided in section 2(b) of the PHA Act, which means commercially displayed or installed signage, board, screen, streamer, poster, banner or any other thing placed, painted, pasted or installed on public or private property that is visible from a public

place and is intended to inform the reader of the availability of a service, product or promoters of a business. Section 30 of the PHA Act also provides the power to make rules. In terms of the Parks and Horticulture Authority Outdoor Advertisement Regulations, 2017 ("Regulations"), the Respondents have exempted banks and other companies from displaying their signage in compliance with Companies Act and the SBP Policy, however with respect to other outdoor advertisement, they are liable to pay fee. Accordingly advertisement fee is only levied on any signboards installed by the banks which exceed the permissible measurement prescribed by the Regulations.

13. In view of the aforesaid to the extent of Banks and corporate entities who display their name as per the requirements of the Companies Act and the SBP Policy, in terms of the Regulations no fee should be charged. However if the display contains any advertisement or is contrary to the Regulations or is with reference to the outdoor advertisement, fee can be levied. So far as the contractors are concerned, since they are involved in the business of outdoor advertisement, they are liable to pay fee as per the PHA Act read with the Regulations. Consequently the Petitions of the Banks and corporate entites are disposed of to the extent of signboard which are in compliance with the Companies Act and the SBP Policy. However if they are involved in any advertisement, they are liable to pay as per the PHA Act and Regulations whereas the Petitions of the contractors are dismissed.

National Highway Authority

14. There are three Petitions against the NHA being W.Ps. Nos.201485/18, 256585/18 filed by Banks and W.P. No.22283/18 filed by Lotte Akhtar Beverages (Private) Limited (formerly Riaz Bottlers Private Limited), which is engaged in the business of manufacturing of carbonated beverages under various different brand names that is Pepsi Cola, Rave, Seven Up, Miranda, Mountain Dew, Sting and purified water under the brand name Aquafina. So far as the Banks are concerned, they have impugned the demand raised by the Respondent NHA for payment of advertisement fee against display of their signboards whereas the Petitioner Lotte Akhtar Beverages (Private) Limited has impugned the demand raised for rental charges against the advertisement displayed by the Petitioner.

15. In terms of the report and parawise comments filed and the arguments made, NHA is empowered to levy advertisement fee under the National Highway Authority Act, 1991 ("NHA Act"). Learned counsel for the Respondent NHA has relied upon section 10 of the NHA Act along with National Highways and Strategic Roads Control Rules, 1998 ("1998 Rules") which basically prescribes the procedure on the basis of which the Respondents can levy advertisement fee. Learned counsel stated that NHA has awarded concession for advertisement and promotional displays on Sahiwal to Lahore section for a period of two years with respect to advertisement and promotional displays, hence the Petitioners are bound to pay the same. Section 10(2)(vi) of the NHA Act empowers the authority to enter into contracts and thereby levy license fee on the terms of the contract. Learned counsel

stated that the Petitioners are therefore liable to pay advertisement fee in terms of the NHA Act as well as 1998 Rules.

16. NHA is established under section 3 of the NHA Act. The preamble of the NHA Act provides its mandate to establish a National Highway Authority for planning, development, operation and maintenance of National Highways and strategic roads and to provide for matters connected therewith or incidental thereto. Section 10 of the NHA Act provides for the powers and duties of the Authority, in terms of which the Authority may take such measures and exercise such powers as it considers necessary or expedient for carrying out the purposes of the Act. Section 10(2)(vii) of the NHA Act provides for the levy, collect or cause to be collected tolls on national highways, strategic roads and such other roads as may be entrusted to it and bridges thereon. This means that NHA can levy and collect tolls on the national highways and strategic roads. Section 10(2)(viii) is with reference to license facilities on roads under its control and such terms as it deems fit. NHA has also relied upon the 1998 Rules and Regulations which are pursuant to sections 31 and 32 of the NHA Act. On the basis of the provisions of the NHA Act, it appears that the NHA is authorized to levy and collect toll on the national highways as well as strategic, bridges, roads and such other rates which are entrusted to it. Therefore there is no specific power to levy advertisement fee or charges of any kind with respect to the signage or advertisement or promotional material. Section 10(2)(viii) of the NHA Act gives the Respondent NHA the authority to enter into a license agreement with respect to roads under its control on the terms it deems fit. These license agreements can contain terms for advertisement and promotional material, for which the Respondents have relied upon concession agreements entered in terms thereof. However there is no concession agreement placed on the file with respect to Soneri Bank Limited and Bank of Punjab or Lotte Akhtar Beverages (Private) Limited. In this regard, it is clarified that the Respondents cannot charge advertisement fee for any signage that has been affixed on the business premises of the Banks in terms of their requirement under the Companies Act and the SBP Policy. Although it is argued that it is with reference to ATM cabins and other material, there is nothing on the file which shows any concession agreement or license agreement to charge advertisement fee. So far as Petitioner in W.P. No.22283/2018 is concerned, nothing has been appended with the Petition or the reply to show that there was any license agreement between the parties for the purposes of displaying promotional material.

17. In view of the aforesaid, these Petitions are disposed of as there is no information provided by the Petitioners with reference to what they are being charged for and whether there is any license agreement between the Petitioners and the NHA. The NHA cannot levy advertisement fee except if it has entered into a license agreement with respect to advertisement and promotional material, hence it should consider the same before issuance of any demand.
Defence Housing Authority

18. There are four Petitions against the DHA being W.Ps. Nos.12680/16, 173617/18, 77072/19, 73006/19 filed by the Banks wherein they have impugned notices issued by Respondent DHA for installation of vinyl/sticking papers by the Petitioners.

19. In terms of the report and parawise comments filed and the arguments made, DHA is authorized to levy all sorts of charges in terms of section 7(2)(e) read with section 8 of the Defence Housing Authority Lahore Order, 2002 ("DHA Order") read with DHA Municipal Rules, 2013 ("DHA Rules") which provides under rule 35 that the authority can regulate signboards and advertisements and no person shall display any signage except with the permission of the authority. The Respondents have also relied upon DHA License Regulations, 2013 ("DHA Regulations") and the Signage Byelaws. Learned counsel argued that the levy of advertisement fee is pursuant to the aforementioned provisions and it is carried out in terms of the DHA Rules and DHA Regulations. So far as the signage boards are concerned, the Petitioners are required to be complied with the DHA Rules, DHA Regulations as well as Signage Byelaws.

20. DHA is established under section 3 of the DHA Order. Section 7 of the DHA Order provides for the powers, duties and functions of Executive Board and in terms of section 7(e) the Board can impose, recover, alter, vary or enhance development charges, installments, cost of apartments, housing units of scheme, commercial projects and transfer fees and other charges in respect of any property, plot or project within the area of the Authority. Section 8 provides for the powers of the Executive Board to raise funds in terms of which they can levy charges as per the rules. The rule making power is under section 22 of the DHA Order and the power to make regulations is under section 23. Rule 35 of the DHA Rules provides that signboards and advertisements are allowed based on the permission given by the authority and under the DHA Regulations Signage Byelaws have been made which provides for the requirements with respect to signboards and other promotional and advertisement material. Therefore in terms of the DHA Order read with DHA Rules read with the Signage Byelaws, DHA can impose charges with respect to advertisement and promotional material, billboards, signboards and specifically with respect to companies signboards installed on the front side of the shop or the office. As per the Signage Byelaws, all office signboards are to be installed as per the specifications given in the Byelaws. Under the circumstances, DHA is competent to levy charges for signboards and other advertisement and promotional material as per DHA Rules and Signage Byelaws.

21. The only issue is whether the DHA can levy charges for placing signboards on the office premises of the Petitioners who are Banks and corporate entities in compliance with the Companies Act and the SBP Policy. In this regard, PHA had stated before the Court that to the extent of one signboard, they have exempt payment of advertisement fee provided that the signboard is in compliance with the requirements of the PHA Regulations, no such statement has been made by the DHA. In this regard, the DHA should also consider the same. Since there is no

information before the Court with respect to the quantum of fee charged for signboards or whether there is any promotional material on the signboards, the DHA can look into the matter. In this regard, it is noted that the Petitioners have impugned demand notices which are with respect to pasting vinyl/sticking papers which is on the glass of the branches and is specifically for advertisement purposes. Hence the Petitioners are liable to pay the same as it falls within the domain of the DHA. Hence these Petitions against the DHA are dismissed.

22. In view of the aforesaid for the purposes of clarity it is declared that:
(i) to the extent of the Respondent Local Government, they are authorized under section 156 of the Local Government Act to levy taxes and fees provided they are duly notified in the official gazette;
(ii) the Respondent Cantonment Board does not have power to levy any kind of advertisement fee or charge fees for signboards;
(iii) the Respondent NHA is not authorized to levy advertisement fee;
(iv) the Respondent PHA is authorized to levy charges and for advertisement and signboards;
(v) the DHA is competent to levy charges for advertisement and signboards;
(vi) banks and corporate entities are entitled to install signboard/signage in compliance with the Companies Act and the SBP Policy without charge of fee subject to any rules or regulations on size, shape and provided it does not contain any advertisement material.

Schedule-A

Details of Writ Petitions mentioned in judgment
Dated 17.11.2020 passed in W.P. No. 129536/2018

National Highway Authority cases

Sr. No.	W.P. No.	Parties Name
1.	222831/2018	Riaz Bottlers (Pvt.) Ltd. v. Federation of Pakistan etc.
2.	201485/2018	Bank of Punjab v. Federation of Pakistan etc.
3.	256585/2018	Soneri Bank Limited v. Federation of Pakistan etc.

Defence Housing Authority cases

Sr. No.	W.P. No.	Parties Name
1.	77072/2019	United Bank Limited v. DHA etc.
2.	73006/2019	Meezan Bank Limited v. DHA etc.
3.	12680/2016	Bank Islami Pakistan Ltd. v. Chairman DHA etc.

Parks and Horticulture Authority cases

Sr. No.	W.P. No.	Parties Name
1.	39412/2016	Allied Bank Limited v. Federation of Pakistan etc.
2.	38785/2015	Bank Alfalah Ltd. v. Province of Punjab etc.
3.	34959/2017	Punjab Beverages Company (Pvt.) Ltd. v. Province of Punjab etc.

4.	40697/2019	National Bank of Pakistan v. Province of Punjab etc.
5.	150097/2017	Bank of Khyber v. PHA etc.
6.	3414/2016	Borjan (Pvt.) Ltd. v. PHA etc
7.	22546/2016	Muhammad Awais v. PHA etc.
8.	256584/2018	Soneri Bank Ltd. v. Province of Punjab etc.
9.	38784/2015	Bank Alfalah Limited v. Province of Punjab etc.
10.	32651/2014	Bank Alfalah Ltd. v. Province of Punjab etc.
11.	55532/2019	Bank Alfalah Ltd. v. Province of Punjab etc.
12.	13254/2019	Bank Alfalah Ltd. v. Province of Punjab etc.
13.	13662/2019	Soneri Bank Ltd. v. Province of Punjab etc.
14.	16063/2015	Bank Alfalah Ltd. v. Province of Punjab etc.
15.	40525/2015	Borjan (Pvt.) Ltd. v. PHA etc.
16.	130862/2018	Sign-O-Plus Namoos Advertising Co. v. Government of Punjab etc.
17.	20402/2019	Bank of Khyber v. PHA etc.
18.	19458/2015	Borjan (Pvt.) Ltd. v. Government of Punjab etc.
19.	9911/2013	Dubai Islamic Bank Pakistan Ltd. v. Government of Punjab etc.
20.	18441/2005	MCB Bank Ltd. v. PHA etc.
21.	15359/2011	Faysal Bank Ltd. v. PHA etc.
22.	12679/2016	Bank Islami Pakistan Ltd. v. DG PHA etc.
23.	18298/2015	Dubai Islami Bank Pakistan Ltd. v. Government of Punjab etc.
24.	34444/2014	Bank Alfalah Ltd. v. Province of Punjab etc.
25.	256586/2018	Soneri Bank Ltd. v. Province of Punjab etc.
26.	16411/2016	Muslim Commercial Bank Ltd. v. Province of Punjab etc.
27.	10819/2012	Coca Cola Beverages v. Government of Punjab etc.
28.	31719/2019	Faisalabad Outdoor Advertising Association v. Government of Punjab etc.
29.	12409/2019	Sign-O-Plus Namoos Advertising Agency v. Province of Punjab etc.
30.	28563/2020	NRSP Micro Finance Bank Limited v. Province of Punjab etc.

Cantonment cases

Sr. No.	W.P. No.	Parties Name
1.	12694/2016	Bank Islami Pakistan Ltd. v. DG Military Land and Cantonment etc
2.	202016/2018	Riaz Bottlers (Pvt.) Ltd. v. Federation of Pakistan etc.
3.	20178/2016	Meezan Bank Ltd. v. Cantonment Board etc.

4.	869/2013	Dubai Islami Bank Pakistan Ltd. v. Federation of Pakistan etc.
5.	26471/2014	United Bank Ltd. v. Executive Officer Cantonment Board etc.
6.	26146/2014	Bank Alfalah Ltd. v. Sialkot Cantonment Board etc.
7.	22989/2015	Riaz Bottlers (Pvt.) Ltd. v. Federation of Pakistan etc.
8.	17591/2013	Habib Bank Ltd. v. Federation of Pakistan etc.
9.	10497/2013	Dubai Islami Bank Pakistan Ltd. v. Federation of Pakistan etc.
10.	29022/2014	Bank Alfalah Ltd. v. Sargodha Cantonment Board etc.
11.	24842/2012	Habib Bank Ltd. v. Federation of Pakistan etc.
12.	32606/2013	Riaz Bottlers (Pvt.) Ltd. v. Federation of Pakistan etc.
13.	64811/2019	TCS (Pvt.) Ltd. v. Federation of Pakistan etc.
14.	573/2012	Habib Bank Ltd. v. Lahore Cantonment Board etc.
15.	949/2014	Dubai Islami Pakistan Ltd. v. Federation of Pakistan etc.
16.	24699/2015	Allied Bank Ltd. v. Federation of Pakistan etc.
17.	18087/2015	Bank Alfalah Ltd. v. Cantonment Board etc.
18.	193812/2018	Meezan Bank Ltd. v. Cantonment Board etc.
19.	5290/2019	Soneri Bank Ltd. v. Federation of Pakistan etc.
20.	208301/2018	Meezan Bank Ltd. v. Federation of Pakistan etc.
21.	216801/2018	United Bank Ltd. v. Federation of Pakistan etc.
22.	30140/2015	TCS (Pvt.) Ltd. v. Province of Punjab etc.
23.	170290/2018	Bank of Punjab v. Cantonment Board etc.
24.	5407/2016	Bank Alfalah Ltd. v. Walton Cantonment Board etc.
25.	25549/2014	Bank Alfalah Ltd. v. Lahore Cantonment Board etc.
26.	681/2014	Allied Bank Ltd. v. Federation of Pakistan etc.
27.	32600/2013	Allied Bank Ltd. v. Federation of Pakistan etc.
28.	3039/2015	Bank Alfalah Ltd. v. Walton Cantonment Board etc.
29.	43748/2017	Bank Alfalah Ltd. v. Federation of Pakistan etc.
30.	256582/2018	Soneri Bank Ltd. v. Cantonment Board etc.
31.	2826/2016	Bank Alfalah Ltd. v. Cantonment Board etc.
32.	6030/2014	Allied Bank Ltd. v. Federation of Pakistan etc.
33.	24903/2017	Al Baraka Bank etc. v. Federation of Pakistan etc.
34.	385/2014	Dubai Islamic Bank v. Federation of Pakistan etc.

Local Government cases

Sr. No.	W.P. No.	Parties Name
1.	203795/2018	Singer Pakistan Ltd. v. Province of Punjab etc.
2.	77070/2019	United Bank Ltd. v. Government of Punjab etc.
3.	214141/2018	Rai Asif Raza v. District Council Faisalabad etc.

4.	6703/2015	Dubai Islami Bank Pakistan Ltd v. Government of Punjab etc.
5.	9697/2015	Borjan (Pvt..) Ltd. v. Government of Punjab etc.
6.	8160/2020	TCS (Pvt.) Ltd. v. Government of Punjab etc.
7.	7554/2020	Bata Pakistan Ltd. v. Government of Punjab etc.
8.	17789/2017	Al-Baraka Bank Pakistan Ltd. v. Province of Punjab etc.
9.	27090/2016	Meezan Bank Ltd. v. Government of Punjab etc.
10.	193795/2018	Meezan Bank Ltd. v. Government of Punjab etc.
11.	22093/2019	Bank Alfalah Ltd. v. Province of Punjab etc.
12.	22352/2019	NRSP Micro Finance Bank Ltd. v. District Council Gujrat etc.
13.	61166/2019	NRSP Micro Finance Bank Ltd. v. District Council Okara etc.
14.	708/2019	NRSP Micro Finance Bank Ltd. v. District Council Gujrat etc.
15.	213537/2018	Bank Alfalah Ltd. v. Province of Punjab etc.
16.	211083/2018	Bank of Punjab v. Government of Punjab etc.
17.	59968/2017	Bank Alfalah Ltd. v. Province of Punjab etc.
18.	3621/2017	Khushhali Micro Finance Bank Ltd. v. Government of Punjab etc.
19.	64809/2019	TCS (Pvt.) Ltd. v. Government of Punjab etc.
20.	116994/2017	Bank Alfalah Ltd. v. Province of Punjab etc.
21.	84998/2017	Bank Alfalah Ltd. v. Province of Punjab etc.
22.	63562/2017	Bank Alfalah Ltd. v. Province of Punjab etc.
23.	8951/2017	Meezan Bank Ltd. v. Government of Punjab etc.
24.	204766/2018	Bank Alfalah Ltd. v. Province of Punjab etc.
25.	196612/2018	Meezan Bank Ltd. v. Government of Punjab etc.
26.	9962/2019	Soneri Bank Ltd. v. Province of Punjab etc.
27.	204913/2018	Bank Al-Habib Ltd. v. Government of Punjab etc.
28.	134957/2018	Bank of Khyber v. Municipal Committee etc.
29.	178171/2018	Bank Alfalah Ltd. v. Province of Punjab etc.
30.	12448/2003	MCB Ltd. v. Municipal Administrator etc.
31.	32111/2014	Punjab Beverages Company (Pvt.) Ltd. v. Province of Punjab etc.
32.	5298/2016	Borjan (Pvt.) Ltd. v. Government of Punjab etc.
33.	251966/2018	NRSP Micro Finance Bank Ltd. v. Province of Punjab etc.
34.	254334/2018	NRSP Micro Finance Bank Ltd. v. Province of Punjab etc.
35.	256583/2018	Soneri Bank Ltd. v. Province of Punjab etc.
36.	3367/2017	Meezan Bank Ltd. v. Government of Punjab etc.
37.	22193/2015	Dubai Islami Bank Pakistan Ltd v. Government of Punjab etc.
38.	47073/2019	Bank Alfalah v. Province of Punjab etc.

39. 57258/2019 Bank Alfalah Ltd. v. Province of Punjab etc.
40. 13140/2020 NRSP Micro Finance Bank Ltd. v. Government of Punjab etc.
41. 23655/2020 NRSP Micro Finance Bank Ltd. v. Government of Punjab etc.
42. 47738/2020 Telenor Microfinance Bank Ltd. v. Government of Punjab etc.
43. 47728/2020 Telenor Microfinance Bank Ltd. v. Government of Punjab etc.
44. 172308/2018 Bank of Punjab v. Government of Punjab etc.
45. 172311/2018 Bank of Punjab v. Government of Punjab etc.
46. 134959/2018 Bank of Khyber v. Municipal Committee Okara etc.
47. 201482/2018 Bank of Punjab v. Government of Punjab etc.
48. 25383/2014 Dubai Islami Bank Pakistan Ltd. v. Government of Punjab etc.
49. 12378/2016 Meezan Bank Ltd. v. Government of Punjab etc.
50. 43753/2017 Bank Alfalah Ltd. v. Province of Punjab etc.
51. 193513/2018 Bank Alfalah Ltd. v. Province of Punjab etc.
52. 134961/2018 Bank of Khyber v. Municipal Corporation Sialkot etc.
53. 162379/2018 Bank Alfalah Ltd. v. Province of Punjab etc.
54. 3053/2017 Bank Alfalah Limited v. Province of Punjab etc.
55. 18826/2013 Dubai Islamic Bank Pakistan Ltd. v. Government of Punjab etc.
56. 870/2013 Dubai Islamic Bank Pakistan Ltd. v. Government of Punjab etc.
57. 10505/2013 Dubai Islamic Bank Pakistan Ltd. v. Government of Punjab etc.
58. 116059/2017 Bank Alfalah Ltd. v. Province of Punjab etc.
59. 67327/2017 Agha Khan Hospital and Medical College Foundation v. Government of Punjab etc.
60. 31724/2019 Punjab Beverages Company (Pvt.) Ltd. v. Province of Punjab etc.
61. 28545/2020 NRSP Micro Finance Bank Limited v. Province of Punjab etc.
62. 17222/2020 TCS Private Limited v. Government of Punjab etc.
63. 29133/2016 Allied Bank Limited v. Federation of Pakistan etc.

KMZ/B-1/L Order accordingly.

2021 M L D 453
[Lahore]
Before Shahid Bilal Hassan and Ayesha A. Malik, JJ
PAKISTAN ENGINEERING COUNCIL---Appellant
Versus
FEDERATION OF PAKISTAN and others---Respondents
I.C.A. No.33510 of 2019, decided on 30th November, 2020.

(a) Pakistan Engineering Council Act, 1975 (V of 1976)---

----S.25A---Pakistan Engineering Council Regulations for Engineering Education in Pakistan, Regls. 2(a)(i) & 2(c)(i)---Constitution of Pakistan, Art.25---Fixation of a 2% quota for holders of Diploma of Associate Engineer (DAE) for admission in B.Sc. Engineering---Whether fixation of such quota was not legal and also discriminatory---Regulating authority for the purposes of admission in an engineering program was the Pakistan Engineering Council ('the Council'), which was duly authorized under the law as well as under the Pakistan Engineering Council Regulations for Engineering Education in Pakistan ('the Regulations') to determine the admission criteria---As far as the fixation of a 2% limit/quota was concerned, the Council on the basis of facts and deliberation in a meeting duly considered the issue pertaining to the DAE examination, the equivalence given by the Inter Board Committee of Chairmen ("IBCC") and by the Punjab Board of Technical Education ("PBTE") and decided to streamline the exercise of discretion by the different universities and colleges, so as to ensure that not more than 2% candidates holding DAE were given admission against the reserved seats---Council by way of quantifying the reserved seats had not acted in contravention to the Pakistan Engineering Council Act, 1976 or the Regulations or acted discriminately---Intra-Court Appeals were allowed and impugned judgment of Single Bench of High Court was set-aside.

Section 25A of the Pakistan Engineering Council Act, 1976 ('the 1976 Act') gave the Governing Body of the Pakistan Engineering Council ('the Council') the power to make regulations which included the power to make regulations stipulating the minimum qualifications for admission to engineering institutions and laying down the minimum standard for allowing admission for examinations. Pursuant to section 25A of the 1976 Act, the Council issued the Pakistan Engineering Council Regulations for Engineering Education in Pakistan ('the Regulations'). Article 2 of the said Regulations provided for the minimum qualification for admission to Engineering Bachelor's Degree Programmes offered by Engineering institutions and universities. Article 2(a)(i) of the Regulations provided for the requirement of a Higher Secondary School Certificate, Pre-Engineering Examination with Physics, Chemistry and Mathematics as the basic criteria for admission in the B.Sc Engineering program. This meant that F.Sc was the criteria for admission in B.Sc Engineering. Article 2(c)(i) of the Regulations provided that a candidate who had passed the Diploma of Associate Engineer (DAE) examination, securing at least 60% aggregate marks shall be eligible for applying in admission against reserved seats in relevant discipline of engineering in which he or she had passed the DAE

examination and the relevancy of DAE would be determined by the Accreditation Committee of the Council. In terms of the Regulations for the purposes of DAE examination, the Regulations originally provided that the DAE candidate, who secured at least 60% aggregate marks would be eligible to apply for admission against reserved seats, however the number of seats was not quantified. This Regulation was amended vide SRO 417(I)/2016 dated 14-05-2016 such that the Regulation inserted 2% limit on the DAE candidates against reserved seats. This meant that although originally a DAE candidate was eligible against reserved seats, the Council quantified a 2% limit for all colleges and universities against the reserved seats.

The issue of the 2% quota for the reserved seats was considered in a meeting held by the Council in which it was discussed that engineering universities as a special provision allowed DAE students admission if they had the aggregate marks, however, since the DAE students did not study the subjects of physic, chemistry and mathematics in the rigorous manner as the F.Sc students, the Council decided to regulate the discretion to admit against reserved seats by the universities by way of a 2% limit for reserved seats for all universities.
For the purposes of Regulation 2(c) of the Regulations, DAE candidates were always considered against reserved seats. The argument that since DAE was equivalent to F.Sc, hence students holding the said qualification were entitled to be considered as F.Sc candidates was without basis as the admission of DAE candidates was always limited to reserved seats stipulated by the relevant university. The Single Bench of the High Court) while considering the 2% limit failed to take into consideration Regulation 2(c) of the Regulations which by itself, in its original form had limited the admission of the DAE candidate against reserved seats. Therefore, even with the abolishment of the 2% limit, the holders of DAE qualification were not entitled to admission in B.Sc Engineering program on the basis of DAE being equivalent to F.Sc as their admission was subject to the number of reserved seats in the respective colleges/universities.
Respondents failed to make out a case of discrimination or unreasonable classification as the original Regulations limited their admission against reserved seats and by way of fixing the number of reserved seats to a 2% no discrimination was made out.

Reliance of the Single Bench (of the High Court) on the equivalence given by the Inter Board Committee of Chairmen ("IBCC") and by the Punjab Board of Technical Education ("PBTE") was without basis as the equivalence granted by both these independent institutions was not relevant for the purposes of admission in the engineering program. The regulating authority for the purposes of admission in an engineering program was the Council, which was duly authorized under the law as well as under the Regulations to determine the admission criteria. Council by way of quantifying the reserved seats had not acted in contravention to the 1976 Act or the Regulations or acted discriminately. Intra-Court Appeals were allowed and impugned judgment of Single Bench of High Court was set-aside.

(b) Constitution of Pakistan---

----Art.199---Constitutional jurisdiction of the High Court---Scope---Policy decision made by a professional regulatory body in accordance with law---High Court could not interfere with such a policy decision in its constitutional jurisdiction.
Mian Muhammad Wasim, Umer Ijaz Gilani, Usama Khawar and Ms. Ruqia Ismail with Shah Jahan Khaltak, Deputy Registrar, PEC Head Quarter, Islamabad for Appellant.

Malik Sohail Murshad for Respondent No.3, Punjab Technical Board.
Barrister Haris Azmat and Barrister Maryam Hayat for Respondent No.4 College.
Barrister Hamid Azim Laghari, Muhammad Qasim Tarar and Rafae Naguib Saigal for Respondent No.5 (Student).
Mrs. Ambreen Moeen, Deputy Attorney General.
Akhtar Javed, Additional Advocate-General.
Date of hearing: 30th November, 2020.

JUDGMENT

AYESHA A. MALIK, J.----The Appellant, Pakistan Engineering Council ("PEC") has filed the instant ICA and ICA No.1554/2019 wherein they have impugned judgment dated 13.03.2019 whereas in ICA No.78117/2019 PEC has impugned order dated 22.5.2019 passed in W.P. No.235395/2018 which has relied upon the impugned judgment dated 13.3.2019. The matter in issue in all ICAs is whether the holders of Diploma of Associate Engineer ("DAE") are eligible for admission in B.Sc Engineering being equivalent to F.Sc. Originally ICA No.78117/2019 was fixed for 20.01.2021, however, with the consent of the parties, the case was fixed for today so as to ensure that the common issues raised in these ICAs are addressed through this common judgment.

2. The objection of limitation has been raised by the Respondents in all these ICAs essentially stating that these ICAs have been filed beyond the period of limitation. In this regard, applications for condonation of delay have been filed under Section 5 of the Limitation Act read with Section 151 of the Civil Procedure Code, 1908 in all three ICAs. For the purposes of the instant ICA and ICA No.1554/2019 as per the contents of the applications for condonation of delay, the judgment was reserved on 13.03.2019 by the learned Single Bench. On 20.03.2019 the Appellant applied for the certified copy of the judgment. On 16.04.2019 after one month and three days as per the stamp, the certified copy of the judgment was prepared. However, learned counsel for the Appellant stated that no express intimation of the preparation of the certified copy was issued by the Copy Agency of this Court to the Appellant, who was regularly visiting the copy branch to obtain the certified copy of the impugned judgment. On 07.05.2019 the copy was made available to the Appellant and the appeals were filed after one day of obtaining the certified copy of the judgment. Learned counsel for the Appellant argued that a period of limitation for filing an ICA is 20 days from the date of the decree or judgment, however, in this case

although the case was reserved for judgment on 13.03.2019 the Appellants could not file the ICAs as they were not aware of the outcome of the case. As soon as the certified copy of the judgment was made available, the Appellant filed the instant appeals before this Court. Learned counsel argued that the circumstances were beyond the control of the Appellant and has placed reliance on Province of Punjab and others v. Zafar Ullah and others (PLD 2015 Lahore 220) and Multan Khan v. Ghazni Khan and 13 others (2016 CLC 1600) to urge the point that it was incumbent upon the Copy Agency to issue information to the Appellant that a certified copy of the judgment was prepared. Learned counsel further argued that despite the fact that the Appellant was repeatedly visiting the Copy Agency for obtaining the certified copy of the judgment, it was not made available until 07.05.2019, which goes to show that the certified copy was not available for delivery to the Appellant. On behalf of the Respondents it is argued that the appeals are barred by time; that the period of limitation is 20 days and there is no justifiable reason to condone the delay in these cases.

3. We have heard the arguments on the issue of limitation and find that the Appellant has raised sufficient grounds to condone the delay in these appeals. We also note that the matter in issue as raised by the Appellant is important for the purposes of admission in B.Sc Engineering hence we condone the delay and proceed to decide these ICAs on its merits. So far as, ICA No.78117/2019 is concerned, since the matter in issue in this appeal essentially arises of the impugned judgment dated 22.05.2019 passed in W.P. No.235395/2018, the delay in this appeal is also condoned and we proceed to decide this ICA on its merits as well.

4. Learned counsel for the Appellant argued that the Respondents before this Court being students of Chenab College of Engineering and Technology and the college itself essentially filed writ petitions before the learned Single Bench challenging the fixation of a 2% quota for reserved seats for holders of DAE for admission in B.Sc Engineering. The impugned judgment considered the case of the Respondents and granted their prayer on the ground that the DAE is equivalent to Intermediate Examination of the Board of Intermediate and Secondary Education (F.Sc), as per the equivalence issued by the Inter Board Committee of Chairmen ("IBCC") and by the Punjab Board of Technical Education ("PBTE"). The second ground for allowing the writ petitions of the Respondents is that the 2% quota is discriminatory and offends Article 25 of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution") and does not amount to a reasonable classification. The third reason being that the Regulation 2(c) of the Regulations for Engineering Education in Pakistan ("Regulations") is beyond the mandate provided in Section 25A of the Pakistan Engineering Council Act, 1976 ("the Act"). Learned counsel argued that the impugned judgment failed to take into consideration that the Appellant has acted in accordance with the mandate under Section 25A of the Act and that the amendment to the Regulations with the insertion of a 2% quota for DAE students was in consonance with the earlier Regulations, which had never been challenged. Learned counsel further argued that the imposition of a 2% quota for DAE students was a policy decision so as to facilitate and enable students who are unable to study

in F.Sc program. He argued that it is the form of affirmative action got its quantum which restricted to reserved seats. Learned counsel further argued that for the purposes of admission in B.Sc Engineering, F.Sc is the fundamental requirement as it entails the study of the basic sciences being physic, chemistry and mathematics especially calculus which is essential in any world class engineering program. The DAE program does not focus on the sciences in the manner required by the Appellant for an engineering degree. The Appellant has placed reliance on a comparative analysis of the science subjects studied in F.Sc with that in the DAE program in support of his arguments. Learned counsel argued that this was a policy decision made by the Appellant, which did not call for any interference by the learned Single Bench. Furthermore, that the Appellant has duly considered the matter in terms of its international commitment under the Washington Accord which involves 21 countries whose engineering education is given worldwide recognition. Hence the Appellant has ensured that the subject requirements as per the F.Sc are vital for the purposes of admission in a B.Sc Engineering program. Learned counsel further argued that Regulation 2 (c) of the Regulations historically allowed independent universities to determine their quota for the purposes of admission of DAE in B.Sc engineering, therefore, there was always a quota for admission of DAE candidates. However in order to streamline the discretion exercised by the colleges/universities carrying B.Sc Engineering program the Appellant fixed a 2% limit against the reserved seats so as to ensure that the admissions in the engineering degree program were maintained fairly and a uniform policy was followed throughout the country. Learned counsel argued that the Regulations are in accordance with Section 25A of the Act of 1976 and that no illegality has been committed.

5. On behalf of the Respondents, it is argued that Section 25A of the Act is the power to make Regulations and there is no specific power to create a quota for the purposes of admission in B.Sc Engineering program, hence the insertion of a 2% quota for the DAE candidates is against the mandate of Section 25A of the Act. Learned counsel argued that this quota is discriminatory particularly when IBCC along with PBTE recognize DAE being equivalent to F.Sc, hence there is no justifiable reason to create a 2% quota and oust the Respondents from the admission process. Reliance is placed on The Agricultural and Research Department and others v. Muhammad Tariq Javed and others (2019 CLC 1972), Pak Leather Crafts Limited and others v. Al-Baraka Bank Limited (2019 CLD 659), Mian Muhammad Sabir v. Malik Muhammad Sadiq through Legal Heirs and others (PLD 2008 SC 577), The Inspector General of Police, Punjab through District Police Officer v. Abdus Salam and another (2019 CLC 1156), Hafiz Junaid Mahmood v. Government of Punjab and others (PLD 2017 Lahore 1), Ansa Farrukh v. Vice Chancellor and others (2020 MLD 1484), Shrin Munir and others v. Government of Punjab through Secretary Health, Lahore and another (PLD 1940 SC 295), Miss Asma Javaid and another v. Government of Punjab through Secretary Health Department and 2 others (2015 CLC 907), Government of the Punjab, Secretary Home Department through Deputy Secretary (Police) Interior Department and others v. Qanoot Fatima and others (2018 PLC (CS) 22) and Arif-ur-Rehman v.

Government of N.W.F.P through Secretary Education, N.W.F.P and others (2005 SCMR 340).

6. We have heard the counsel at length. The mandate of the Act is to regulate the engineering profession. Section 3 of the Act provides for the constitution and establishment of the Engineering Council ("PEC") and in terms of Section 8, the functions of the PEC have been provided which includes the function of promoting engineering education and review of courses of studies in consultation with the universities. Section 25A of the Act is the power to make regulations which includes the power to make regulations stipulating the minimum qualifications for admission to engineering institutions and laying down the minimum standard for allowing admission for examinations. Pursuant to Section 25A of the Act the Appellant issued the Regulations for engineering education in Pakistan vide SRO No.1142(I)/85 dated 20.11.1985. Article 2 of the Regulations provides for the minimum qualification for admission to Engineering Bachelor's Degree Programmes offered by Engineering Institutions and Universities. Article 2(a)(i) of the Regulations provides for the requirement of a Higher Secondary School Certificate, Pre-Engineering Examination with Physics, Chemistry and Mathematics as the basic criteria for admission in the B.Sc Engineering program. This means that F.Sc is the criteria for admission in a B.Sc engineering. Article 2(c)(i) of the Regulations provides that a candidate who has passed the DAE examination, securing at least 60% aggregate marks shall be eligible for applying in admission against reserved seats in relevant discipline of engineering in which he or she has passed the DAE examination and the relevancy of DAE will be determined by the Accreditation Committee of PEC. In terms of these Regulations we note that for the purposes of DAE examination, the Regulations originally provided that the DAE candidate, who secured at least 60% aggregate marks would be eligible to apply for admission against reserved seats, however the number of seats was not quantified. This Regulation was amended vide SRO 417(I)/2016 dated 14.05.2016 such that the Regulation inserted 2% limit on the DAE candidates against reserved seats. This means that although originally a DAE candidate was eligible against reserved seats, the Appellant quantified a 2% limit for all colleges and universities against the reserved seats. The issue of the 2% quota for the reserved seats was considered in the meeting held by PEC on 16.05.2017 in which it was discussed that engineering universities as a special provision allowed DAE students admission if they had the aggregate marks, however, since the DAE students does not study the subjects of physic, chemistry and mathematics in the rigorous manner as the F.Sc students, the Appellant decided to regulate the discretion to admit against reserved seats by the universities by way of a 2% limit for reserved seats ,for all universities. Consequently, DAE candidates can apply for admission in B.Sc Engineering program, however they can be admitted against reserved seats only to the extent of a 2% limit. Therefore, we note that for the purposes of Regulation 2(c) of the Regulations, DAE candidates were always considered against reserved seats. The argument of the Respondents that since DAE is equivalent to F.Sc, hence they are entitled to be considered as F.Sc candidates is without basis as the admission of DAE candidates was always limited to reserved seats stipulated by the relevant university. For the purposes of the writ petitions filed by the Respondents, they

specifically challenged the imposition of the 2% limit vide letter dated 25.03.2015 meaning thereby that they did not challenge SRO 417(I)/2016 dated 14.05.2016 on the basis of which the amendment was made to the Regulations. In this regard, we further note that the basic prayer of the Respondents before the learned Single Bench was that the 2% quota be abolished and that they be granted admission in the B.Sc Engineering program. The learned Single Bench while considering the 2% limit failed to take into consideration Regulation 2 (c) of the Regulations which by itself, in its original form has limited the admission of the DAE candidate against reserved seats. Therefore, even with the abolishment of the 2% limit, the Respondents before this Court were not entitled to admission in B.Sc. Engineering program on the basis of DAE being equivalent to F.Sc as their admission was subject to the number of reserved seats in the respective colleges/universities. The impugned judgment has stressed on the issue of discrimination as well that DAE is equivalent to F.Sc as per the equivalence provided by the IBCC and PBTE, however, failed to take into consideration that the Regulations themselves stipulate that the relevancy of the DAE will be determined by the Accreditation Committee of PEC meaning thereby that the issue of equivalence, if at all, had to be considered by the Appellant itself and not by the IBCC or by the PBTE for the purposes of admission in B.Sc Engineering. We are therefore of the opinion that the Respondents failed to make out a case of discrimination or unreasonable classification as the original Regulations limited their admission against reserved seats and by way of fixing the number of reserved seats to a 2% no discrimination was made out.

7. We also find that the Appellant was well within its authority under Section 25A of the Act to set the minimum qualification for admission in engineering programs which includes regulating reserved seats. In this regard, we are of the opinion that the reliance of the learned Single Bench on the IBCC and PBTE equivalence is without basis as the equivalence granted by both these independent institutions is not relevant for the purposes of admission in the engineering program. The regulating authority for the purposes of admission in an engineering program is the Appellant, which is duly authorized under the law as well as under the Regulations to determine the admission criteria. So far as the fixation of a 2% limit is concerned, we find that the Appellant on the basis of facts and deliberation in the meeting held on 16.05.2017 duly considered the issue pertaining to the DAE examination, the equivalence given by the IBCC and PBTE and decided to streamline the exercise of discretion by the different universities and colleges, so as to ensure that not more than 2% candidates holding DAE were given admission against the reserved seats. Therefore we observed that the Appellants by way of quantifying the reserved seats has not acted in contravention to the Act or Regulation or acted discriminately. It is a policy decision made in accordance with the law which cannot be interfered by this Court.

8. For what has been discussed above, these ICAs are accepted and the impugned judgment dated 13.03.2019 passed in W.P. No.1286/2016 and W.P. No.57079/20I9 and order dated 22.5.2019 passed in Writ Petition No.235395PO I on the basis of impugned judgment is set aside.

MWA/P-2/L Appeal allowed.

2021 P L C (C.S.) 411
[Lahore High Court]
Before Ayesha A. Malik and Shahid Bilal Hassan, JJ
Dr. JAMSHED DILAWAR and 2 others
Versus
GOVERNMENT OF THE PUNJAB through Chief Secretary and 4 others
I.C.A. No.15249 of 2020, heard on 1st December, 2020.

Civil service---

----Ad hoc employee--- Regularization--- Appellants were appointed as Medical Officers BS-17 on ad hoc basis and sought their regularization--- Validity--- If all ad hoc employees were to be considered for regularization it would be done in accordance with rules and for the purposes of appointments in BS-17 as per process set out by relevant department and Punjab Public Service Commission--- Appellants had to go through Public Service Commission because although they participated in recruitment process in year 2017 yet they did not come on merit--- Appellants were not selected or appointed against sanctioned seats---Appearance of appellants before Public Service Commission did not absolve them from requirement of undergoing process for selection by the Commission--- Even if the authorities were to consider appellants for regularization, they had to be selected by Public Service Commission for appointment on merit--- Division Bench of High Court declined to interfere in judgment passed by Single Judge of High Court in exercise of Constitutional jurisdiction--- Intra Court Appeal was dismissed in circumstances.
Naveeda Tufail v. Government of Punjab 2003 SCMR 219 rel.
Dr. Zaheer Iqbal and others v. Province of Punjab through Chief Secretary and others 2018 PLC (C.S.) 712; Abu Bakar Farooq and others v. Muhammad Ali Rajpar and others 2019 SCMR 830 and Dr. Adnan Rasool and others v. Government of Punjab through Chief Secretary, Lahore and others W.P. No.16185/2019 ref.
Pervaiz Inayat Malik for Appellants.
Aliya Ijaz, A.A.G. for Respondents.
Date of hearing: 1st December, 2020.

JUDGMENT

AYESHA A. MALIK J.----Through this ICA, the Appellants have impugned order dated 17.02.2020 passed by the learned Single Judge in Writ Petition No. 248849/2018 which was dismissed while turning down their prayer for regularization.

2. The case of the Appellants is that they were appointed as Medical Officers (BS-17) on ad hoc basis pursuant to advertisements published in various different newspapers for the said post. The Appellants participated in the recruitment process, passed the interview but did not qualify in terms of the merit against the number of available seats. The Appellants then applied for regularization on the basis of the

judgment of the august Supreme Court of Pakistan reported as Naveeda Tufail v. Government of Punjab (2003 SCMR 219) (hereinafter referred as Naveeda Tufail Case) which was denied through the impugned order dated 17.02.2020. Hence this Appeal.

3. Learned counsel for the Appellants argued that the impugned order dated 17.02.2020 failed to appreciate the point of discrimination between the Appellants and others who have been regularized and the dicta laid down in the Naveeda Tufail Case. Learned counsel for the Appellants has also relied upon judgment dated 23.01.2018 passed by a Division Bench of this Court in 2018 PLC (C.S.) 712, Dr. Zaheer Iqbal and others v. Province of Punjab through Chief Secretary and others which he argues is similar on facts and states that the Appellants are entitled to the same benefit.

4. On the other hand, learned Law Officer argued that the Appellants are not entitled for regularization as they are ad hoc employees. She placed reliance on the case Abu Bakar Farooq and others v. Muhammad Ali Rajpar and others (2019 SCMR 830) wherein it was held that ad hoc employees are appointed as a stop gap arrangement till permanent recruitment in accordance with the prescribed method of appointment and as such do not earn any benefit of regular appointments as that would frustrate the entire concept of being appointed on ad hoc basis. Learned Law Officer further submits that even with reference to the Naveeda Tufail Case, the facts of this case are distinguishable as there is no recruitment process underway and if and when the process is initiated, at the time, the department can consider the Appellants' case in terms of the dicta in the Naveeda Tufail Case. She has also referred to judgment dated 17.09.2020 passed by this Court in W.P. No.16185/2019 titled Dr. Adnan Rasool and others v. Government of Punjab through Chief Secretary, Lahore and others and states that accordingly no illegality is made out in the impugned order.

5. We have heard the arguments and considered the record. Admittedly, the Appellants were appointed on ad hoc basis as Medical Officers (BS-17). The Appellants also appeared before the Punjab Public Service Commission, Lahore ("PPSC") in the year 2018-19 and admittedly were lower in merit, hence they were not appointed. On the basis of their appearance before the PPSC, the Appellants now seek regularization without recourse to the PPSC on the touchstone of the Naveeda Tufail Case. Learned counsel for the Appellants relies upon judgment dated 23.01.2018 passed by a Division Bench of this Court in 2018 PLC (C.S.) 712 titled Dr. Zaheer Iqbal and others v. Province of Punjab through Chief Secretary and others, however we note that this judgment is distinguishable on the facts as in that case, the recruitment process was underway and this Court directed the Respondents to follow the directions given in Naveeda Tufail Case whereby they had to separately consider the case of the appellants for the purposes of recruitment. So far as the case of the present Appellants is concerned, learned Law Officer has stated that the process of recruitment has not been initiated and at the moment, the department is not moving any requisition for considering the case of the Appellants

for regularization. Initially, 3924 posts were advertised and the Appellants were not recommended by the PPSC being very low in merit. Hence she states that the Respondents are not required to regularize the Appellants who did not make the merit. It is important to note that in terms of the Naveeda Tufail Case, for the purposes of regularization, the cases of ad hoc employees seeking regularization have to be sent separately to the PPSC and cannot be tagged with the direct recruitment. However, in terms of the judgment cited as 2019 SCMR 830 (supra), the august Supreme Court of Pakistan has held that ad hoc appointments are for a particular purpose and ad hoc appointees do not have the protection of any rules or law, hence they cannot be given the benefit of regularization as availed by contract employees. In terms of the decisions made in the Naveeda Tufail Case as well as judgment cited as 2019 SCMR 830 (supra), ad hoc employees can be considered for regularization if the relevant department requisitions for their regularization and if the department is desirous of converting the ad hoc appointments into regular appointments. Therefore, ad hoc appointees cannot seek regularization as of right rather they are dependent on the requirements of the department and on following the process undertaken by the appointing authority. In both cases, it is clear that there is no right to be regularized for ad hoc employees, as their appointment is for a particular purpose and not against a sanctioned post. Furthermore, we note that the Naveeda Tufail Case has not directed that the department is compelled to issue a requisition for ad hoc employees. The facts of that case simply required that the cases of those candidates who had worked with the department on ad hoc basis not be tagged with the direct recruitment candidates, for the process of regularization.

6. Learned counsel for the Appellants has stressed that this Court should direct the Respondents to send its requisition for regularization of the Appellants as they have been working with the Respondents for a considerable period of time and they have already undergone the process of recruitment before the PPSC and qualified the same. We have heard the learned counsel for the Appellants at length, however, we are not in agreement with the contentions raised. It is noted that the Naveeda Tufail Case has not declared that all ad hoc employees have to be considered for regularization so long as they undergo the process of recruitment before the PPSC. Naveeda Tufail Case states that ad hoc employees have no right to hold the posts beyond the period for which they were appointed, hence it is a stop gap arrangement and if they are to be considered for regularization, they must go through the process of selection by the PPSC. In the Naveeda Tufail Case, the august Supreme Court of Pakistan gave a concession to the petitioners before the court by requiring that their cases not be tagged with the direct recruitment category and they be treated separately for the purposes of recruitment/regularization by giving them additional marks and relaxation of age so as to facilitate their regularization. The said judgment does not require that all the ad hoc employees be treated in a similar manner rather the august Supreme Court of Pakistan based on a concession offered by Government of Punjab required that cases of the ad hoc appointees be considered separately. However, in terms of 2019 SCMR 830 (supra), the august Supreme Court of Pakistan has decided that ad hoc employees are appointed on stop gap arrangement and they cannot be given any benefit or relaxation in the rules simply

because they have been working on ad hoc basis for a considerable period of time. On the basis of this judgment, the august Supreme Court of Pakistan has made it clear that if at all, ad hoc employees are to be considered for regularization, it will be done in accordance with the rules and for the purposes of appointments in BS-17 as per the process set out by the relevant department and the PPSC. Therefore, the Appellants' contention that they are not required to go before the PPSC is misguided because although they participated in the recruitment process in the year 2017, they did not come on merit. Hence they were not selected or appointed against the sanctioned seats. The appearance of the Appellants before the PPSC in the year 2019 does not absolve them from the requirement of undergoing the process for selection by the PPSC. If at all the Respondents are going to consider the Appellants for regularization, even based on the principles laid down in the Naveeda Tufail Case, they have to be selected by the PPSC for appointment on merit.

7. Under the circumstances, we find no illegality in the impugned order dated 17.02.2020, hence the instant Appeal is dismissed. The impugned order dated 17.02.2020 passed by the learned Single Judge in Writ Petition No. 248849/2018 is maintained.

MH/J-5/L Intra Court Appeal dismissed.

P L D 2021 Lahore 278

Before Mrs. Ayesha A. Malik, J

SUPERIOR COLLEGE FOR GIRLS through Principal---Petitioner

Versus

GOVERNMENT OF THE PUNJAB through Chief Secretary, Lahore and 2 others---Respondents

Writ Petition No. 54008 of 2020, heard on 17th February, 2021.

Punjab Private Educational Institutions (Promotion and Regulation) Ordinance (IV of 1984)---

----Ss.3, 5 & 6---Constitution of Pakistan, Art. 199---Constitutional petition---Registration of Private Educational Institutions---Functions of the Registering Authority---Role of the Provincial Higher Educational Department in such registration---Regulation and framing of Standard Operating Procedures (SOPs) for the registration process---Scope---Petitioner private educational institution impugned delay in process of registration under Punjab Private Educational Institutions (Promotion and Regulation) Ordinance, 1984; and the interference of the Provincial Higher Educational Department in the process---Validity---Provincial Higher Educational Department, in the entire scheme of the registration process under the Ordinance, had no role to play, and no jurisdiction with respect to registration of an institute, and the same did not fall into the mandate of Provincial Higher Educational Department---High Court observed that present registration process did not have any comprehensive procedure laid out and no specific time-frame with regard to registration had been developed by Provincial Government; and furthermore that there existed no justification for annual registration valid for one year, and reasonable time-frame should be provided within which existing registration expired and fresh registration had to be undertaken---High Court directed Provincial Government to make regulations and SOPs with regard to registration process and directed that petitioner college should be registered immediately---Constitutional petition was allowed, accordingly.

Superior College of Commerce v. Government of the Punjab through Chief Secretary and others and judgment dated 14.2.2020 and Punjab College v. Government of the Punjab through Chief Secretary and others 2020 MLD 1502 rel.

Shan Saeed Ghumman, Adeel Hassan and Azizullah Khan for Petitioner.

Akhtar Javed, Additional Advocate General, Punjab along with Dr. Ashiq Hussain, Director General Public Instructions (Colleges), Punjab, Sakhawat Ali Dogar, Deputy Director (Colleges) and Qaiser Raza, Deputy Director in the office of Respondent No.3.

Date of hearing: 17th February, 2021.

JUDGMENT

MRS. AYESHA A. MALIK, J.---Through this Petition, the Petitioner challenges the actions of Respondent No.3 as well as Respondent No.2 with respect to the

delay caused in the issuance of its registration under the Punjab Private Educational Institutions (Promotion and Regulation) Ordinance, 1984 ("Ordinance").

2. The case of the Petitioner is that it applied under the Ordinance for extension in registration and addition of subjects for the session 2018-19 and 2019-20 on 18.12.2018 with respect to its campus at East Bank Sadiq Canal near Darri Singh Pull, Rahim Yar Khan. In response thereto, an inspection was carried out by Respondent No.3 on 9.7.2019 whereby the Petitioner's College was recommended for registration. Subsequent thereof Dr. Ashiq Hussain, Director General in the office of Respondent No.3 issued Hope Certificate on 23.7.2019 stating therein that the request for registration of the Superior College, Canal View near Darri Singh Pull, Rahim Yar Khan has been received for the session 2019-23 and is under process in its office. On the basis of the Hope Certificate, the Petitioner applied with the University of Sargodha as well as University of Education, Lahore for affiliation of its degree programs. These were granted on 20.9.2019 and 9.6.2019 whereafter the Petitioner reverted back to Respondent No.3 for issuance of its registration certificate. However Respondent No.3 did not issue the registration certificate, instead Respondent No.2 issued letter dated 16.1.2020 claiming therein that the Petitioner's application for registration was time barred, hence it could not be granted any affiliation or registration. Respondent No.2 also directed Respondent No.3 to stop entertaining cases for registration of private colleges. Hence the instant Petition.

3. Learned counsel for the Petitioner argued that Respondent No.2, Higher Education Department has no jurisdiction with respect to registration of private educational institutions under the Ordinance. In this regard, the issue has already been settled by this Court vide judgment dated 14.2.2020 passed in Writ Petition No. 49585/2019 titled Superior College of Commerce v. Government of the Punjab through Chief Secretary and others and judgment dated 14.2.2020 passed 2020 MLD 1502 in titled Punjab College v. Government of the Punjab through Chief Secretary and others. Learned counsel submits that this Court has already declared interference by the Higher Education Department with reference to the registration of educational institutions as totally illegal, yet Respondent No.2 interfered and has restricted Respondent No.3 from processing the application of the Petitioner. Learned counsel stated that on the basis of the application for registration and issuance of Hope Certificate, the Petitioner has obtained affiliation, admitted students, commenced its programs and now the Respondents are failing to complete the registration process by way of issuance of the registration certificate. Learned counsel submits that once an inspection is carried out and Respondent No.3 is satisfied with the facilities, there is no basis for denying registration to the Petitioner.

4. Report and parawise comments have been filed by Respondents Nos.2 and 3. Learned Law Officer argued that the Petitioner has not applied for registration as the Petitioner represents Superior College for Girls whereas the application tendered before Respondent No.3 was for Superior College. Hence he stated that the College

for Girls has not applied before Respondent No.3 for extension of its registration. He further argued that Secretary, Higher Education Department being the Administrative Secretary of the Department issued notification dated 13.7.2018 in which a time schedule was provided for grant of NOC for public and private sector colleges in Punjab. On the basis thereof the Petitioner filed the application late, hence their application has been refused. Learned Law Officer further argued that the judgments relied upon have been appealed against, however he stated that the ICAs are still pending. So far as Respondent No.3 is concerned, today Sakhawat Ali Dogar, Deputy Director (Colleges) has appeared in Court with the original record as per orders of this Court dated 16.2.2021.

5. Heard and record perused. The basic contention of the Respondents is that the College of the Petitioner cannot be registered as it is a college for girls which did not apply for registration. However admittedly there is an application filed by the Superior College, Rahim Yar Khan which is pending and pursuant to which Hope Certificate was issued. In this regard, I have carefully gone through the original record and note that the address of the college is the same, the inspection report carried out by Respondent No.3 is for the same campus and the Hope Certificate is also for the same Campus. Six members of the divisional inspection team visited the college premises on 25.5.2019 and found that the college satisfied all conditions for registration, hence recommended it for registration in the additional subjects of BS (Computer Science, Information Technology, Chemistry, Mathematics and English) for the session 2019-2023. Consequent thereof a Hope Certificate was issued on 23.7.2019 wherein the Director General of Respondent No.3 acknowledged that the registration was pending and that the Petitioner can carry on with the affiliation process as contemplated under sections 3(3) of the Ordinance which allows the institution to continue to function without registration during the registration process. The Petitioner applied for affiliation with the University of Sargodha and the University of Education, Lahore which was duly granted and the Petitioner has been awaiting registration since 20.9.2019. On 16.1.2020 Respondent No.2 Higher Education Department issued a letter stating that 60 private colleges applied for BS four year degree program after the due date as per the Higher Education Department's Notification dated 13.7.2018 which cannot be processed and only cases fulfilling Higher Education Department's criteria can be submitted for necessary action. A list has been attached with this notification which includes the Petitioner college at Serial No.32. The contention of the Higher Education Department is that since Secretary Higher Education Department is the Administrative Secretary of the department, hence he can interfere in the registration process. The record also shows that the Directorate of Public Instruction Respondent No.3 issued a letter on 23.7.2019 seeking issuance of NOC for registration of Private Colleges in BS four year degree program from Respondent No.2. The letter is with reference to the Petitioner's Campus. However, there is no explanation for its issuance.

6. The Ordinance provides under Section 3 that all institutions are to be registered and under Section 5 the government shall, by notification, constitute one or more

District Committees in each district consisting of at least five members to perform its functions related to registration under the Ordinance. The application for registration is to be moved before the registering authority which is an officer or committee as notified under section 6 of the Ordinance. This means that the registering authority is Respondent No.3 which has been notified by the Government to carry out the registration process. As per the preamble of the Ordinance registrations is part of the process for regulating the institutions under the Ordinance. In the entire scheme of the law Respondent No.2 has no role to play. Learned Law Officer does not deny this, however the only explanation for the interference by Respondent No.2 in the registration process is that the Secretary is the head of the department. This argument is misconceived as Respondent No.2 has not been able to show how its Secretary is the administrative head of Respondent No.3. It is also noted that in terms of Section 3, once an application for registration of an institution is submitted, the officer receiving the application shall forward the same to the district committee to make an inquiry and submit its report to the registering authority within sixty days. The registering authority after considering the report of the district committee can carry out further inquiry, if it deems necessary and can impose conditions for grant of registration and issue a registration certificate. Section 6(5) of the Ordinance states that the Government, by notification, can constitute one or more Registering Authorities in a district and if more than one Registering Authority is constituted in a district, the Government shall specify the jurisdiction of each Registering Authority. Hence Respondent No.2 has no jurisdiction with respect to the registration of an institution under the Ordinance and in this regard the Petitioner's contention that the matter in issue has already been adjudicated through W.P. No.49585/2019 (supra) and W.P. No.58931/2019 (supra) is correct. So far as letter dated 16.1.2020 is concerned, it required an NOC issued by Respondent No.2 for private colleges for the purposes of starting a four years degree programs. It also refers to Respondent No.2's guidelines of 13.7.2018 on this subject. The guidelines of 13.7.2018 are for starting a degree program and has no relevance to the registration process.

7. As per the Rules of Business, Respondent No.2 Higher Education Department is a government department which is primarily tasked with policy formations and sectoral planning. It has an administrative role under the laws mentioned at Serial No.37 includes the Ordinance. This means that the Higher Education Department can help devise policy on the matter but since it has no role under the Ordinance and the Rules, it cannot interfere in the working of Respondent No.3. Respondent No.3 is to register private educational institutions to ensure compliance with the Ordinance and the Punjab Private Educational Institutions (Promotion and Regulation) Rules, 1984 ("Rules"), specifically Rules 11 and 12 of the Rules. In terms of these Rules, the district committee is to ensure that the private institution has the prescribed textbooks; is following the prescribed syllabus; has the relevant employees for teaching; that it is suitably located; that the premises is equipped with furniture, equipment and the staff is sufficient as per the enrolment of students and that a foreign national is not employee in the institution without proper NOC. In terms of Rule 12 of the Rules, conditions for registration are stipulated which

essentially requires the record to be maintained; fees to be charged within reasonable limits and that the institution will furnish all relevant information as may be required by the registering authority. There is nothing in the Rules or Ordinance which requires Respondent No.3 to concur with Respondent No.2 on this issue. Registration ensures that the requirements of the Rules and the Ordinance are fulfilled for regulatory compliance. Respondent No.2 as the Higher Education Department is not involved in this process nor does it fall within their mandate. At best Respondent No.2 should ensure that the functions under the Ordinance are complied with and that proper processes are in place.

8. It has also come to light during the course of arguments that the Petitioner along with other private institutions are required to approach Respondent No.3 on a yearly basis for registration. Respondent No.3 issues a registration certificate which is valid for one year. There is nothing in the Rules nor any regulations or any standing operating procedures ("SOPs") for this yearly registration process. It seems a bit odd that Respondent No.3 would register the Petitioner's institution to carry out a four year degree program yet require annual registration. Essentially the registration is of the institution for the purposes of compliance with the Ordinance. Once an institution is registered, Respondent No.3 can provide a time period for extension in the registration, however there should be rules/ regulations/SOPs for this purpose. Also there are no regulations for the inspections, no SOPs for compliance and nothing to show how inspection is carried out. When confronted with the Rules, Respondent No.3 was unable to explain the manner in which private institutions are inspected and required to rectify the objections. The Rules do not provide for the manner in which objections raised can be cured or removed. As the objective of the law is to register the private institution, Respondent No.3 is obligated to set out a process for registration, provide the required rules and regulations along with SOPs and specify the requirements and time line on the basis of which registration will be carried out. There should be a specified timeframe within which the registration process is completed and there appears to be no justification requiring an annual registration. When confronted with the above, Sakhawat Ali Dogar, Deputy Director (Colleges) was unable to give any reasonable explanation nor could he justify the processes undertaken. It appears that they are done without any comprehensive procedure set out. Learned Law Officer has relied upon a check list which is specifically for a Graduate four years program and not for any other programs.

9. Therefore in this regard, Respondent No.3 is directed to make regulations and SOPs with reference to the registration process. They are also required to set out a timeline for the purposes of registration. As stated above, there appears to be no justification for annual registration which matter should be considered and a reasonable timeframe should be given within which the existing registration expires and fresh registration has to be undertaken. It is also important to note here that the understanding of the officials of Respondent No.3 with respect to the objective of registering private institutions is negligible. Although the senior officers were present before the Court, no one could explain what procedure or process was

undertaken nor could anyone assist the Court on the timeline that followed and the reasons for the delay. Director General when questioned stated that the college could be registered by May 2021. Even this statement is totally negligent as there is no reason to delay the matter until May 2021. If at all Respondent No.3 considers it necessary to carry out another inspection for any private institution it should not take so many months and particularly in this case where the matter has been delayed for more than one and half year totally due to Respondent No.3.

10. In view of the aforesaid, the instant Petition is accepted and Respondent No.3 is directed to immediately register the college of the Petitioner.

KMZ/S-15/L Petition allowed.

P L D 2021 Lahore 314
Before Mrs. Ayesha A. Malik, J
JOHNSON AND JOHNSON PAKISTAN (PRIVATE) LIMITED through authorized signatory---Petitioner
Versus
FEDERATION OF PAKISTAN through Secretary, Cabinet Division, Islamabad and 5 others---Respondents
Writ Petition No. 20263 of 2020, decided on 22nd October, 2020.

(a) Drugs Act (XXXI of 1976)---

----S. 3(g)(ii), (vi)---"Drugs" and "medical devices"---Scope---Definition of 'drug' is not limited to medicine or substances which are ingested, applied or administered but includes devices---Federal Government is allowed under S.3(g)(vi) of Drugs Act, 1976 to notify any substance or device as "drug".

(b) Drugs Act (XXXI of 1976)---

----S.3(g)(ii), (vi)---Medical devices---Scope---Medical devices include health care equipment as well as devices used in cosmetic surgery and processes as well as in-vitro diagnosis medical devices (IVD)---As per definition given by the World Health Organization, it is the purpose of medical devices which is relevant and which renders medical devices to regulations similar to drugs and medicines---Such is fundamental to health and safety of user of medical devices---'Drugs and medicines' cannot be restrictively construed particularly when records shows that drugs include medical devices.

(c) Drug Regulatory Authority of Pakistan Act (XXI of 2012)---

----Ss.7 & 32---Drugs Act (XXXI of 1976), S.3 (g) (ii), (vi)---Medical Devices Rules, 2017, Rr.24, 25 & 29---Constitution of Pakistan, Art. 199---Constitutional petition---Drugs and medical devices---Drug Regulatory Authority of Pakistan (DRAP)---Role and jurisdiction---Medical Devices Board---Petitioners were importers, exporters and manufacturers of medical devices---Plea raised by petitioner was that medical devices did not fall within the ambit of 'drugs and medicines'---Petitioner further contended that under Drug Regulatory Authority of Pakistan Act, 2012, medical devices were included under 'therapeutic goods' therefore, Medical Devices Board constituted by DRAP was a result of excess delegation of power---Validity---Purpose of the Authority was to regulate manufacture, import, export, storage, distribution and sale of therapeutic goods---Therapeutic goods have a health related purpose and are to be regulated for safety efficiency and efficacy---Medical devices are specifically and purposefully included in range of therapeutic goods for the purposes of regulation---It is for DRAP to decide whether a medical device fell within their regulatory domain, as underlying principle is the purpose for which the device is used---Medical devices play a significant role in health care delivery and also carry some element of risk

associated with the purpose and usage---Medical devices are regulated by DRAP to ensure safety, effectiveness and quality and are assessed on the basis of their classification---Medical devices are classified in for categories based on intended use with class A as the lowest in risk and class D as the highest in risk---Mere fact that a product was registered with a regulatory authority of foreign jurisdiction did not mean that medical device should not be scrutinized at the time of manufacture, import or export by DRAP to ensure compliance with its regulatory requirements---For the purposes of medical devices manufactured, imported or exported into Pakistan or from Pakistan it must be ensured that standards set out by DRAP were complied with---High Court declined to interfere in the matter---Constitutional petition was dismissed, in circumstances.

Constitution Petition No. 127 of 2012 PLD 2013 SC 829; Johnson and Johnson Pak (Pvt.) Ltd. v. Pakistan and others 2008 PTD 345; Dr. Shahnaz Wajid v. Federation of Pakistan through Secretary Establishment Division, Government of Pakistan, Islamabad 2011 SCMR 1737; Nadeem Ahmad Advocate v. Federation of Pakistan 2013 SCMR 1062; Khawaja Ahmad Hassaan v. Government of Punjab and others 2005 SCMR 186; Pakistan through Secretary Finance, Islamabad and 5 others v. Aryan Petro Chemical Industries (Pvt.) Ltd. Peshawar and others 2003 SCMR 370; Chimanlal Jagjivandis Sheth v. State of Maharashtra AIR 1963 SC 665 (V 50 C 102) and Dawakhana Hakim Ajmal Khan (Pvt.) Limited v. Federation of Pakistan and others PLD 2020 Lah. 899 ref.

Messrs Azfar Laboratories Private Limited through Directors and others v. Federation of Pakistan through Secretary Ministry of National Health Services and 4 others PLD 2018 Sindh 448 rel.

Advocates for Petitioners

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Hassan Rana, Muhammad Ahad Naeem, Ghulam Murtaza Chaudhry, Rana Basharat Ali Maraka, Rana Irfan Ahmad, Zubair Ahmad Kundi, Syed Kashif Hassan, Touseef Zada Khan, Allah Ditta Sial, Shamim ur Rehman Malik, Zaheer Ahmad Chaudhry, Malik Mehtab Nabi, Tariq Mahmood Mughal, Zaheer Mirza, Mian Muhammad Ahmad Chhachhar, Syed Umair Abbas, Zaheer Ahmad Chaudhary, Rana Muhammad Shahid Mehmood, M. Nasrullah Ghaffar Chishti, Arslan Riaz, Ms. Samran Mushtaq Chaudhry, Chaudhary Zulfiqar Ali, Muhammad Azam Zafar Khan, Rana Intezar, Khalid Mahmood Baig, Muhammad Mustafa Khalid, Muhammad Afzaal, Hasan Ahsan Mian, Syed Ali Tahir Naqvi, Raza Imtiaz Siddiqui, Jamshed Alam, Qadeer Ahmad Kalyar, Muhammad Azam Zafar Khan, Muhammad Rizwan Rasheed, Muhammad Zafar Khan, Mian Shahid Ali Shakir, Shahid Mehmood Minhas and Barrister Humayun Faiz Rasool.

For the Respondents

Federation of Pakistan

Ch. Ishtiaq Ahmad Khan, Additional Attorney General for Pakistan, Ms. Ambreen Moeen, Deputy Attorney General for Pakistan and Tahir Mehmood Ahmad Khokhar, Deputy Attorney General for Pakistan.

Province of Punjab

Akhtar Javed, Additional Advocate General, Punjab.

DRAP

Syed M. Ghazenfur Ali, Mian Faisal Naseer, with Dr. Ghazanfar Ali Khan, Secretary/Director Medical Devices Board, Shahrukh Ali, Assistant Director Legal Affairs DRAP.

Collectorate of Customs and Federal Board of Revenue

Sarfraz Ahmad Cheema; Mrs. Kausar Parveen, Malik Abdullah Raza, Shahzad Ahmad Cheema, Farrukh Ilyas Cheema, Izhar ul Haq, Sultan Mahmood, Ch. Muhammad Zafar Iqbal, Ms. Riaz Begum, Muhammad Waseem A. Malik, Faraz Ansar Hashmi, Mohsin Ali, Osama Zafar, Zafar Iqbal Bhatti, Chaudhary Muhammad Imtiaz Elahi, Waqar A. Sheikh, Rana M. Mehtab and Falak Sher Khan.

Dates of hearing: 13th 15th July, 22nd September, 7th and 22nd October, 2020.

JUDGMENT

MRS. AYESHA A. MALIK, J.---The instant Petition along with connected Petitions as detailed in Schedule "A" have challenged the legality and authority of the Drug Regulatory Authority of Pakistan ("DRAP") to regulate medical devices. The Petitioners also challenge the Medical Devices Rules, 2017 ("2017 Rules") for being excessive delegation essentially on the ground that the Medical Devices Board constituted thereunder is without the required authority under the DRAP Act. Consequently the Petitioners seek a declaration that the Respondent DRAP be permanently restrained from interfering in the manufacture, import and sale of medical devices.

2. There are three categories of Petitioners before the Court, namely importers, exporters and manufacturers of medical devices. The medical devices range from devices related to Covid-19, such as masks, oximeters, shields and gloves, to

devices related to cosmetic surgery, in-vitro diagnostic devices, ultrasound, sutures, stents, legatures, disposable syringes, stapler guns to life saving medical devices. The exporters of medical devices essentially specialize in surgical instruments. Some of the Petitioners import medical devices for their own use whilst others act as importers/distributors for onward supply.

The case of the Petitioners

3. The basic contentions of the Petitioners is that Parliament does not have legislative competence on the subject of medical devices as medical devices do not fall within the ambit of 'drugs and medicine'. It is argued that since medical devices do not fall within the ambit of 'drugs and medicine', the resolution passed by the Punjab Provincial Assembly under Article 144 of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution") on 15.2.2012 with reference to 'drug and medicine' is not applicable to 'medical devices'. Hence Parliament is not competent to make law with reference to medical devices. It is also argued that 'drugs and medicine' are substances, which are ingested or applied whereas medical devices are instruments, apparatus or machines and related articles used for diagnosis or non-medical procedures, hence are neither drugs nor medicine and were never intended to be treated as 'drugs and medicine'. Counsel for the Petitioner argued that historically medical devices were not included in the definition of 'drug' under the Drugs Act, 1976 ("Drugs Act") whereas under the Drug Regulatory Authority of Pakistan Act, 2012 ("DRAP Act") it has been included under 'therapeutic goods' which in itself suggests that medical devices are not drugs and medicine. It is also argued that for all intents and purposes 'drugs and medicine' are distinct from medical devices and they cannot be treated as drugs and medicine as their functions and usage is different. Consequently the resolution dated 15.2.2012 passed by the Punjab Provincial Assembly does not authorize Parliament to legislate on medical devices. With reference to the 2017 Rules, it is argued that they are beyond the mandate and power provided under the DRAP Act as there is no concept of a Medical Devices Board under the DRAP Act, hence the Medical Devices Board established under the 2017 Rules is illegal, based on excessive delegation of power. It is also argued that the medical devices imported by the Petitioners are all high quality, certified by prestigious international bodies, hence requiring further certification and permission from DRAP for the purposes of import and clearance is totally against the mandate of the law; that the Respondents have failed to establish standards against which the Petitioners' import and export or production and sale can be regulated; that the timelines followed by DRAP are long and are not in the best commercial interest of the Petitioners. It is further argued that the 2017 Rules are arbitrary and impracticable. The exporters of medical devices claim that the export of surgical instruments cannot be regulated by DRAP. It is their case that they manufacture high quality surgical instruments through various artisans and technicians working at a small scale from their homes or small workshops and specialize in one of the many steps involved in the process of manufacturing surgical instruments. Hence regulating the export of surgical instruments is impracticable and does not fall under DRAP's mandate.

4. The Petitioners who import in-vitro diagnostic devices and cosmetic devices argue that these devices do not interact with the subject used upon and are only used for diagnostic and monitoring purposes or for cosmetic purposes, hence they cannot be classified as a drug or medicine, as they do not treat any disease. Similar is the argument for those importing devices used during the pandemic Covid-19 as they also agitate that they should not be required to obtain an NOC for import and release of their consignments as this is not DRAPs mandate. Learned counsel for the Petitioners have placed reliance on Constitution Petition No.127 of 2012 (PLD 2013 SC 829), Johnson and Johnson Pak (Pvt.) Ltd. v. Pakistan and others (2008 PTD 345), Dr. Shahnaz Wajid v. Federation of Pakistan through Secretary Establishment Division, Government of Pakistan, Islamabad (2011 SCMR 1737), Nadeem Ahmad Advocate v. Federation of Pakistan (2013 SCMR 1062), Khawaja Ahmad Hassaan v. Government of Punjab and others (2005 SCMR 186) and Pakistan through Secretary Finance, Islamabad and 5 others v. Aryan Petro Chemical Industries (Pvt.) Ltd. Peshawar and others (2003 SCMR 370) in support of their arguments.

The case of the Respondents

5. On behalf of the Respondent DRAP, learned counsel argued that medical devices have historically always been treated as 'drugs' under the Drugs Act as it is specifically included in the definition of 'drug' in section 3(g)(ii)(vi) and (viii). He stated that even otherwise the nature of the definition of 'drug' under the Drugs Act covers medical devices as these devices are used in the treatment, monitoring, prevention or diagnosis of diseases which include substances or devices which the Federal Government may by notification declare as a drug for the purposes of the Drugs Act. He argued that under the DRAP Act medical devices are included in the definition of therapeutic goods in section 2(xxxvi) and defined in Section 2 (xii) of the DRAP Act. As Medical devices are used for treatment, diagnosis, facilitation and prevention of disease they must be regulated to ensure safety, effectiveness and efficacy. At the heart of the regulatory objective is the health and well being of the person for whose benefit the medical device is to be used. He stated that the 2017 Rules are in accordance with law as a summary for the approval of the 2017 Rules was moved before the Federal Cabinet which approved the same on 15.1.2018. The 2017 Rules were published on 17.1.2018 consequent to which DRAP is authorized to regulate importers and exporters of medical devices to ensure the registration of their products and also to ensure that the medical devices are compliant of the required standards. He stated that this is as per international practice where medical devices are subject to strict review and scrutiny at the time of import or export not only to ensure that they have been manufactured in accordance with the applicable laws but also to ensure the safety, efficacy and effectiveness. He also argued that this matter was considered by the august Supreme Court of Pakistan in 2017 in a Suo Motu Case with reference to the substandard cardiac stents and it was on the clear directions of the august Supreme Court of Pakistan that the 2017 Rules were promulgated. He stated that the Medical Devices Board has been constituted in accordance with the law and the direction of the august Supreme Court and that

most of the Petitioners before the Court are duly registered with DRAP and have applied for registration with the Medical Devices Board.

6. Learned counsel for DRAP further stated that the resolution by the Punjab Provincial Assembly on 15.2.2012 which is with reference to 'drugs and medicine', for all intents and purposes it includes medical devices because at the time medical devices were regulated under the Drugs Act. He explained that prior to the Eighteenth Amendment to the Constitution, matters related to drugs and medicine were listed under Entry No.20 of the Concurrent Legislative List in the Fourth Schedule to the Constitution and were administered under the Drugs Act. The definition of 'drug' under the Drugs Act was not exhaustive and included the medical devices specifically and those included by way of the notifications issued by the Federal Government from time to time. He further argued that medical devices are considered to be part and parcel of the definition of drugs throughout the world and are subject to regulatory compliance. Therefore he argued that DRAP is duly authorized to regulate medical devices under the Drugs Act and the DRAP Act.

7. Report and parawise comments have also been filed on behalf of the Respondent Federation. Learned Additional Attorney General for Pakistan argued that the statute cannot be declared unconstitutional unless its invalidity is beyond reasonable doubt; that all matters relating to drugs and medicine have been allocated to the National Health Service, Regulation and Coordination, Division, Islamabad and that Parliament is empowered to regulate the subject matter of medical devices. Report and parwise comments have also been filed on behalf of Federal Board of Revenue and Collectorate of Customs. Learned counsel argued that the matter does not fall within the domain of the stated Respondents.

8. On the basis of the arguments made before the Court, the issues before the Court are firstly; whether Parliament is competent to legislate on medical devices and whether medical devices fall within the ambit of the resolution passed by the Punjab Provincial Assembly on 15.2.2012 and Secondly; whether the Medical Devices Board as constituted under the 2017 Rules has been constituted in accordance with law and finally whether the processes before the Medical Devices Board is laborious and time consuming so as to prejudice the businesses of the Petitioners.

On Legislative Competence

9. The basic case of the Petitioners is that medical devices do not fall within the ambit of 'drugs and medicine', hence Parliament cannot legislate on the same. Learned counsel for the Petitioners argued that the resolution passed by the Punjab Provincial Assembly dated 15.2.2012 is specifically with reference to 'drugs and medicine' and does not mention medical devices. Hence they argued that Parliament cannot legislate on medical devices as the Provincial Legislature is competent to legislate on the subject of medical devices. They have relied on various definitions of drugs and medicine to establish the point that medical devices are not drugs and

medicines as they are not substances, nor injected and in some cases not used for medical purposes.

10. On behalf of Respondent DRAP, it is argued that historically medical devices have been regulated under the Drugs Act; that the Drugs Act specifically mentions medical devices within the definition of 'drug' under Section 3(g) (ii) (vi) and (viii). Learned counsel further argued that the courts have interpreted the definition of drugs to mean and include medical devices. Reliance is placed on Chimanlal Jagjivandis Sheth v. State of Maharashtra (AIR 1963 SC 665 (V 50 C 102)) in which the court has held that the definition of 'drugs' is comprehensive enough to include drugs and medicines as well as medical devices that is substances which are not strictly used as medicine but undertake similar functions for treatment and diagnosis. Learned counsel further argued that the Federal Government can notify any substance to be treated as a drug, hence SRO 957(I)/2009 dated 5.11.2009, SRO 916(I)/2010 dated 30.9.2010, SRO 917(I)/ 2010 dated 1.10.2020, SRO 918(I)/2010, SRO 919(I)/2010, SRO 824(I)/2018 dated 28.6.2018 have been issued which includes medical devices in the definition of drug under the Drugs Act.

11. So far as the DRAP Act is concerned, medical devices have been specifically included in the definition of 'therapeutic goods' and are defined under Section 2(xxxvi) of the DRAP Act read with Schedule-I of the DRAP Act so as to include all instruments, medical equipments, implants, disposables and software which are used in the diagnosis, monitoring and treatment of disease or any other item which the Federal Government may declare by way of notification to be a medical device. Therefore he argued that for all intents and purposes medical devices have always been construed as a drug and have always been regulated so as to ensure its safety, effectiveness and efficacy. Consequently at the time when the Punjab Provincial Assembly passed the resolution dated 15.2.2012, the definition of 'drugs and medicine' included medical devices.

12. The scope of the resolution passed by the Punjab Provincial Assembly has already been discussed by this Court vide judgment dated 5.8.2020 passed in W.P. No.3973/2017 titled Dawakhana Hakim Ajmal Khan (Pvt.) Limited v. Federation of Pakistan and others PLD 2020 Lah. 899 ("Dawakhana Case"), so as to include a large variety of products which as per the petitioners before the Court in that case did not fall within the meaning of 'drugs and medicine' which reads as under:-
For the purposes of legislative competence there is no legal basis to urge the point that certain products were not intended to be regulated by and under the DRAP Act. Whether or not a product falls under DRAP's regulatory jurisdiction, will be seen in the context of DRAP's regulatory objective and the processes laid out to evaluate the products. It is not the Resolution passed by the Provincial Assembly of Punjab which will determine this issue rather the criterias set out by DRAP to determine whether a product falls under its regulatory jurisdiction. This has to be done in the context of the DRAP Act, the Rules and the regulatory objective of DRAP. Furthermore, classification of products requires a formal determination by DRAP and cannot be broadly categorized as per the dictionary meaning of food or drug or

cosmetic for that matter. Similarly alternative medicine encompasses a wide array of traditional remedies, products and therapies which have to be seen in the context of the statutory definition under the DRAP Act. Hence there is no merit in the argument that the Provincial Assembly of Punjab never intended to grant legislative authority for these products, as this issue can only be answered in the context of the DRAP Act and the Rules. In this regard, it is also important to note that the Province of Punjab has not challenged or questioned the competence of Parliament to regulate drugs and medicine under the DRAP Act nor have they stated in their report and parawise comments filed before this Court, there is a dispute. To the contrary the Province of Punjab has taken the position that the DRAP Act is in addition to and not in derogation of the Drug Act and that the objective of the amendments to the Drug Act was to enable the Provincial Government to deal more efficiently with spurious, adulterated and substandard drugs. Therefore based on the aforesaid, Parliament is competent to enact the Drug Act and the amendments to the Drug Act have not revoked or cancelled the Resolution dated 15.02.2012 given by the Provincial Assembly of the Punjab to Parliament to regulate the subject of drugs and medicine.

In this regard, it is important to note that the entire case of the instant Petitioners with reference to medical devices is also based on the strict interpretation of the words 'drugs and medicine' used in the resolution passed by the Punjab Provincial Assembly. The said resolution allows Parliament to make laws to regulate the subject of 'drugs and medicine' in the following terms:

The Provincial Assembly of the Punjab resolves that the Majlis-e-Shoora (Parliament) may, by law, regulate matters relating to drugs and medicines in term of Article 144 of the Constitution of Islamic Republic of Pakistan.

Hence the issue before the Court is whether medical devices are 'drugs and medicine'.

13. The DRAP Act under Section 32 provides that the Act is in addition to and not in derogation of the provisions made in the Drugs Act and any other law enforced. The Drugs Act defines 'drug' in section 3(g) in the following terms:-

Drug Act, 1976 section 3(g) (i) to (viii)

(g) "drugs" includes,--

(i) any substance or mixture of substances that is manufactured, sold, stored, offered for sale or represented for internal or external use in the treatment, mitigation, prevention or diagnosis of disease, an abnormal physical state, or the symptoms thereof in human beings or animals, or the restoration, correction, or modification of organic functions in human beings or animals, not being substance exclusively used or prepared for use in accordance with the ayurvedic, unani, homeopathic or biochemical system of treatment except those substances and in accordance with such conditions as may be prescribed;

(ii) abortive and contraceptive, substances, agents and devices, surgical ligatures, sutures, bandages, absorbent cotton, disinfectants, bacteriophages, adhesive plasters, gelatin capsules and antiseptic solutions;

(iii) such substances intended to be used for the destruction or repulsion of such vermin, insects, rodents and other organisms as cause, carry or transmit disease in

human beings or animals or for disinfection in residential areas or in premises in which food is manufactured, prepared or kept or stored;
(iv) such pesticides as may cause health hazard to the public;
(v) any substance mentioned as monograph or as preparation in the Pakistan Pharmacopoeia or the Pakistan National Formulary or the International Pharmacopoeia or the British Pharmacopoeia or the British Pharmaceutical Codex or the United States Pharmacopoeia or the national Formulary of the United States, whether alone or in combination with any substance exclusively used in the unani, ayurvedic, homeopathic or biochemical system of treatment, and intended to be used for any of the purposes mentioned in sub-clauses (i), (ii) and (iii); and
(vi) immediate packing containers for sterile preparations which are in direct contact with the drug, blood bags, disposable giving set for infusion or blood, disposable syringes or any other substance or device which the Federal Government may, by notification in the Official Gazette, declare to be a "drug" for the purposes of this Act;
(vii) Infant formulas, follow up milks, milk substitutes, baby foods, baby gruels, baby teas and juices, bottles and treats and any other product used as infant formula as such;
(viii) Cosmetics including hair Sprays, perfumes, facial and talcum powders, hair treatment shampoos, hair conditioning aids and devices and all formulas and lotions connected therewith for conditioning and cleaning of hair, hair colours, facial make-up foundations, vanishing and cold creams, creamy make-up sticks, bath lotions and oils, blushers and blush-ons, texture improvement devices, moisturizers of all kinds, mascaras, vaselines, sunnas, wrinkle-care creams, hair oils/herbal preparations for texture and facial glow and improvement, shower creams, skin lotions and oils, sun-burn lotions and oils, shaving cream and lathers, after-shave lotions and any other preparation or material connected therewith; (emphasis added)
Devices find mention specifically in Section 3(g) (ii) and (vi) of the Drugs Act. Section 3(g)(ii) specifically lists out certain devices including surgical ligatures, sutures, bandages, absorbent cotton, disinfectants, bacteriophages, adhesive plasters, gelatin capsules and antiseptic solutions which have been included in the definition of drug. It also provides that substances, agents and devices are included in the definition of drug, meaning thereby that the definition of 'drug' was not limited to medicine or substances which are ingested, applied or administered but include devices. Furthermore section 3(g)(vi) of the Drugs Act allows the Federal Government to notify any substance or device as a drug. Consequently the Federal Government notified certain substance to be a drug vide SRO 957(I)/2009 dated 5.11.2009 declaring canula, catheter and stent, being medical devices, to be drugs under the Drugs Act and vide SRO 916(I)/2010 dated 30.9.2010 amended the Drugs (Licensing Registering and Advertising) Rules, 1976 to include medical devices. It prescribed the requirements for manufacturing of medical devices. SRO 917(I)/2010 amended the Drugs (Specification) Rules, 1978 to include medical devices and required medical devices to meet the requirements set out in British Pharmacopoeia and where specifications are not given in the British Pharmacopoeia, to follow specifications given by International Standards Organization, World Health Organization ("WHO"), United States Pharmacopoeia

and International Pharmacopoeia. SRO 918(I)2010 amended the Drugs (Labelling and Packing) Rules, 1986 to include medical devices and regulated labelling and packing of medical devices. SRO 919(I)/2010 amended the Drugs (Import and Export) Rules, 1976 to include medical devices for regulating its import and export. Hence the contention of the Petitioners that medical devices have never been regulated under the Drugs Act is without basis. Medical devices were regulated under the Drugs Act, and were included in the definition of 'drug' either specifically or through the authority given to the Federal Government under the Drugs Act. Not only does the definition include devices but the Drugs Act allows the Federal Government to declare substances or devices to be drugs. This means that the legislature was conscious of the fact that the list provided in the definition of 'drug' under the Drugs Act is not exhaustive, hence it authorized the Government to keep adding substances and devices for the purposes of the definition of 'drug' as it was deemed necessary.

14. There is no specific definition of the term medical devices. They are used in diverse settings, at home, by paramedical staff, in clinics, in hospitals by doctors or dentists. They can be used for diagnoses, for monitoring for assistance and for life support purposes. As per the WHO there are an estimated two million different kinds of medical devices on the world market in more than 22000 generic groups. Consequently the term medical devices cover a wide range of products that are used in processes or procedures where the health and safety of the user is relevant. Globally 'medical devices' are regulated due to their use in the diagnosis, prevention, mitigation and treatment of disease. They include health care equipment as well as devices used in cosmetic surgery and processes as well as in-vitro diagnosis medical devices. The WHO defines medical devices and IVD in the WHO Global Model Regulatory Framework for Medical Devices including in vitro diagnostic medical devices as:
any instrument, apparatus, implement, machine, appliance, implant, reagent for in vitro use, software, material or other similar or related article, intended by the manufacturer to be used, alone or in combination, for human beings, for one or more of the specific medical purpose(s) of:
diagnosis, prevention, monitoring, treatment or alleviation of disease;
diagnosis, monitoring, treatment, alleviation of or compensation for an injury;
investigation, replacement, modification or support of the anatomy or of a physiological process;
supporting or sustaining life;
control of conception;
disinfection of medical devices;
providing information by means of in vitro examination of specimens derived from the human body,
and which does not achieve its primary intended action by pharmacological, immunological or metabolic means, in or on the human body, but which may be assisted in its intended function by such means.
IVD means a medical device, whether used alone or in combination, intended by the manufacturer for the in vitro examination of specimens derived from the human

body solely or principally to provide information for diagnostic, monitoring or compatibility purposes (1). For a glossary of other relevant terms, see Appendix 1.
There may also be products on the market that are similar to medical devices in function and risk that do not fit within these definitions. For reasons of protecting public health they are regulated as if they were medical devices. Examples include: impregnated bed nets to protect against malaria-bearing mosquitoes; personal protective devices to avoid cross-infection; lead aprons to protect against radiation; some medical gases; and implantable or other invasive products for a cosmetic rather than a, medical purpose.

15. As per the definition given by the WHO it is the purpose of the medical device which is relevant and which renders medical devices to regulations similar to drugs and medicine. This is fundamental to the health and safety of the user of the medical devices. Hence 'drugs and medicine' cannot be restrictively construed particularly when the record shows that drugs included medical devices. Therefore the term 'drugs and medicine' unsed in the resolution passed by the Punjab Provincial Assembly cannot be given limited application as the term drug has always included medical devices and it is for DRAP to decide whether a medical device is to be regulated. This Court has already held in the Dawakhana case that;
A bare reading of both definitions show that the intent of the legislature has always been to cover a broad category of products. For the purposes of the dispute at hand the products of the Petitioners are classified under the definition of Alternative Medicine, Therapeutic Goods, Health and OTC Products and Medicated Cosmetics which definitions do not offend any fundamental right or interest of the Petitioners. The intent of the legislature is to provide a broad based definition so as to ensure that if a product falls within the regulatory objective of DRAP it must be compliant with its regulatory requirements. DRAP is also authorized to ensure implementation of internationally recognized standards, especially implementation of guidelines issued by World Health Organization. To execute its powers and functions, the composition of DRAP is made of specialist directors in every field and if required the Federal Government can always increase the number of divisions or directors as required. The Drug Act also provided for regulating the import and export of drugs, the manufacture of drugs and the sale of drugs. Hence the Drug Act also contemplated the registration, licensing and regulation of the manufacture of drugs as well as the import and export of drugs. The DRAP Act being in addition to the Drug Act maintains these functions in addition to those stipulated in the DRAP Act. Accordingly the legislative intent is clearly to build upon the regulatory framework under the Drug Act to include Therapeutic Goods, Alternative Medicine, Health and OTC Products and Medicated Cosmetics. The objective of the regulatory framework is to ensure that the consumer or user of the product is protected from harm, and that the consumer knows what they are buying or consuming.

16. So far as the DRAP Act is concerned, it includes medical devices in the definition of therapeutic goods bringing it within DRAP's regulatory domain. Section 2(xviii) of the DRAP Act provides that medical devices means the devices stipulated in Schedule-I and Schedule-I provides that medical devices are (a)

instruments, medical equipment, implants, disposables and software, used mainly for the purpose of (diagnosis, monitoring and treatment, of disease); or (b) any other item which the Federal Government may, by notification in the official Gazette, declare as medical device. The DRAP Act as per its preamble states its purpose as being to regulate the manufacture, import, export, storage and distribution and sale of therapeutic goods. The reason being that therapeutic goods which have a health related purpose have to be regulated for safety, efficiency and efficacy. Hence medical devices have been specifically and purposefully included in the range of therapeutic goods for the purposes of regulation. In this regard, it is for DRAP to decide whether a medical device falls within their regulatory domain as the underlying principle will be the purpose for which the device is used. This is because medical devices play a significant role in health care delivery and also carry some element of risk associated with the purpose and usage. Medical devices are regulated by DRAP to ensure safety, effectiveness and quality and are assessed on the basis of their classification. Medical devices are classified in four categories based on intended use with class A being lowest in risk and class D being highest in risk. Even in "Messrs Azfar Laboratories Private Limited through Directors and others v. Federation of Pakistan through Secretary Ministry of National Health Services and 4 others" (PLD 2018 Sindh 448) ("Azfar Laboratories Case") while discussing the resolution passed by the Punjab Provincial Assembly the Court concluded that it appears to be stated in the broadest of terms. The Court also concluded that the silence and lack of action by the Provincial Assembly is significant, as it suggest that the Provincial Government has no objection to the regulatory ambit of DRAP as per the DRAP Act. Hence for all intents and purpose medical devices fall within the authority granted by the Punjab Provincial Assembly to Parliament vide resolution dated 15.02.2012 as the sole object of the resolution was to authorize Parliament to regulate the subject of medicine which includes medical devices.

17. The next question is whether the Medical Devices Board has been established lawfully under the DRAP Act read with the 2017 Rules or whether it is a case of excessive delegation. Learned counsel argued that the DRAP Act in Section 7(u) has not constituted a registration board or a licensing board as defined in section 2(xvii) and (xxxii) of the DRAP Act. It is further argued that only board established under the DRAP Act is the policy board in terms of section 9 of the DRAP Act and there is no provision under the DRAP Act which establishes a Medical Devices Board. Learned counsel further argued that the Medical Devices Board has not been catered for even in the definitions or in any provisions of the DRAP Act, hence its establishment under the 2017 Rules is illegal and amounts to excessive delegation.

18. On behalf of the Respondents it is argued that the Registration Board is constituted under the Drugs Act which provides for a registration board as well as licensing board in terms of sections 5 and 7 of the Drugs Act. Learned counsel further argued that Section 7(u) of the DRAP Act includes the power to establish a board for the purposes of the licensing, registration, pricing and appellate function. He stated that on the directions of the august Supreme Court of Pakistan in Human

Rights Case No.623-P/2017 (in the matter of imbedding substandard cardiac stents) ("HRC") regarding sale of substandard stents, several directions were given to DRAP which included the direction to establish a separate board for medical devices to improve its regulatory regime over medical devices. Consequent thereof in the 241st meeting of the Registration Board held on 23.12.2013, the matter was taken up by the Registration Board and it was decided that a separate board be established for medical devices. Finally in the 268th meeting of the Registration Board, a decision for the establishment of Medical Devices Board was approved, such that the experts with reference to medical devices on the Registration Board were shifted to the Medical Devices Board. Learned counsel further argued that essentially the registration board established and constituted under the Drugs Act was bifurcated so as to become a separate registration board for medical devices. Learned counsel argued that the Registration Board and the Licensing Board under the Drugs Act was originally registering and licensing drugs which included medical devices but with the constitution of the Medical Devices Board the task of registering and licensing medical devices was shifted to the Medical Devices Board. He further argued that majority of the Petitioners before this Court have been registering their medical devices originally with the Registration Board and now with the Medical Devices Board, hence they cannot aprobate and reprobate at the same time. In this regard he has relied on the registration certificates of various different medical devices by the Petitioners including the instant Petitioner before the Court, Johnson and Johnson Pakistan (Private) Limited. He has placed a list of all importers and local manufacturers registered with the Medical Devices Board on record.

19. As per the record, a summary for the Federal Cabinet was prepared on 15.12.2017 for approval of the Medical Devices Rules, 2017. The Medical Device Rules, 2017 were submitted for approval of the Cabinet on 15.12.2017. On 26.12.2017 the Cabinet considered the summary dated 15.12.2017 submitted by National Health Services, Regulations and Coordination Division for approval of Medical Devices Rules, 2017 and approved the same. In terms of letter dated 15.1.2018 issued by the Ministry of National Health Services, Regulations and Coordination, Islamabad, Chief Executive Officer, DRAP was requested to notify the approved Medical Devices Rules, 2017 and to submit a copy of the notified rules for onward submission to Cabinet Division. On 17.1.2018 SRO 32(I)/2018 was issued by the Ministry of National Health Services, Regulations and Coordination Drug Regulatory Authority of Pakistan, Islamabad whereby the Medical Devices Rules, 2017 were notified in the official gazette. Thereafter through SRO 143(I)/2018 dated 7.2.2018, in terms of Rule 59 of the Medical Devices Rules, 2017, Medical Device Board was constituted comprising of ten members. Furthermore the record shows that as per order dated 2.3.2017 in the HRC Case the august Supreme Court of Pakistan directed that a committee be constituted comprising of all stakeholders to resolve the issue of registration of medical devices and to make the process efficient. The Association of Medical Devices, some importers and some local manufacturers of medical devices were all before the august Supreme Court of Pakistan on that date. Subsequently

consultative meetings were held on 6.3.2017 and 10.3.2017 with representation of all stakeholders. In fact notification dated 21.3.2017 issued by Ministry of National Health Services, Regulations and Coordination, Islamabad shows that several of the Petitioners were part of the Committee established to revise the Medical Devices Rules, 2015 for improving the working of DRAP towards medical devices. The meetings resulted in the 2017 Rules which is now under challenge.

20. Section 5 of the Drugs Act calls for the grant of licenses to manufacture drugs on the terms and conditions provided by the Central Licensing Board. Section 7 povides for the registration of drugs in accordance with the conditions prescribed by a Registration Board comprising of such persons as may be prescribed. Consequent thereof a Registration Board was established which was performing the functions of registration of drugs including medical devices. Under the Drugs (Licensing, Registering and Advertising) Rules, 1976. The requirements of registration of drugs by the Registration Board are provided in Chapter III Rules 24 and 25 read with Rule 29 which prescribes the procedure for registration. As the DRAP Act provides under Section 32 that the Act is in addition to and not in derogation of the provisions made in the Drugs Act and any other law enforced, the establishment of the Registration Board as per Section 7 of the Drugs Act is in accordance with law. The DRAP Act established DRAP under Section 3 of the DRAP Act and the composition of DRAP is in Section 4 which has created different directors which includes the Director Medical Devices and Medicated Cosmetics. He is incharge of the Division of Medical Devices and is responsible for all functions related to regulation and enlistment. In terms of Section 7 of the DRAP Act, DRAP has the power and function to issue guidelines and monitor the enforcement of licensing registration and regulations for therapeutic goods and under Section 7(u) DRAP is to perform the functions of licensing, registration, pricing and appellate functions. Consequently the DRAP Act does not need to constitute a registration board that has already been constituted under the Drugs Act. DRAP has the authority to issue guidelines and also to undertake the functions of licensing and registration. On the basis of the statutory powers, DRAP can take decision related to the functions of registration and licensing. In the 46th session of the National Assembly held on 14.9.2017 the Minister for National Health Services, Regulations and Coordination apprised the Assembly that medical devices were regulated as 'drugs' under the Drugs Act and that the august Supreme Court of Pakistan has directed in a case related to the sale of substandard stents that DRAP formulate a more efficient process with respect to medical devices. Subsequently, a report was tendered by the Secretary to the Prime Minister in which it was recommended that there should be a Medical Devices Board which will specialize in the function of registration and licensing of medical devices so as to ensure efficiency in the process and also to simplify procedures for the benefit of its users. Consequently the matter was taken up at the 241st meeting of the Registration Board of DRAP wherein it was decided that a Medical Devices Board shall be set up which will deal specifically with registration and licensing of medical devices. Hence as per the record, the Medical Devises Board is a subset of the Registration Board duly constituted under the Drugs Act and in line with its functions and authority.

21. Under the DRAP Act, Section 7 provides for the powers and functions of the authority which specifically requires that the authority issue guidelines and monitor the enforcement of licensing, registration, advertisement, drug specifications, pricing among other functions. Sub-section (u) provides specifically for the functions of licensing, registration, pricing and appellate function thereof and Section 8 gives the authority the power to delegate its functions to any of those officers as it may deem appropriate. The 2017 Rules defines Medical Devices Board to be the body responsible for the enlistment and registration of medical devices, licensing of establishment and issuance of permits for export and import of medical devices and for matters related thereto. All these functions are provided for under the DRAP Act and were previously administered by the Registration Board under the Drugs Act. The Registration Board and the Licensing Board are contemplated under the Drugs Act and were constituted accordingly. The Medical Devices Board as a subset of the Registration Board specializes in the enlistment, licensing of medical devices and is duly constituted. Hence there is no illegality in sub-dividing the functions of the registration board so as to create a separate board for the purposes of registering and licensing medical devices. The Medical Devices Board is in fact the registration and licensing board contemplated under the Drugs Act but has been given a separate name so as to distinguish it from drugs and other therapeutic products registered under the DRAP Act.

22. As per the record provided by the DRAP, the minutes of meeting of the Medical Devices Board show that the Petitioners have applied for registration and licensing before the Registration Board and the Medical Devices Board since its inception. In fact the Respondent DRAP has relied upon W.P. No.3134/2017 filed by Ferozsons Laboratories Limited in which the petitioner admitted and accepted the registration process before the Medical Devices Board wherein it was specifically stated that the Medical Devices Board is responsible for registration and licensing of medical devices and in fact it was their case that the 2017 Rules will regulate all medical devices and that all medical devices registered under the Drugs Act should be deemed to be registered under the Medical Devices Rules, 2017. In this regard, it is noted that the petitioner Ferozsons Laboratories Limited is also before the Court in W.P. No.16171/2020 now challenging the establishment of the Medical Devices Board in total negation of their earlier contention in W.P. No.3134/2017. Hence there appears to be no justifiable ground for challenging the constitution of the Medical Devices Board.

23. The Petitioners have argued that the process and procedure adopted by DRAP with reference to medical devices are laborious and not conducive to good practices, hence have an adverse impact on the commercial interests of the Petitioners. The Petitioners have agitated on the enforcement of timeline by DRAP on the fees structure followed by DRAP, on the application methodology for enlistment or for licensing and for NOCs as being tedious and encumbring and un-practical, hence the 2017 Rules are liable to be struck down. Learned counsel for DRAP along with Dr. Ghazanfar Ali Khan, Secretary/Director Medical Devices Board has explained that the consultative process is underway in which several of the issues highlighted

by the Petitioners are before a committee seeking to revise the rules. It is stated that previously before the establishment of the Medical Devices Board a consultative process was adopted to revise the 2015 Rules which resulted in the 2017 Rules. In the same way a consultative process is again underway and most of the issues highlighted by the Petitioners can be placed before DRAP, however it does not necessitate striking down the rules. Learned counsel has placed reliance on the facilitative processes adopted by DRAP for the purposes of medical devices, such as Standard Operating Procedures ("SOPs") for enlistment purposes, for renewal purposes, for obtaining NOCs for clearance of imported products and for inspection of good distribution practices for medical devices.

24. Regulating medical devices is an evolving field which may face various different complications on account of the variety of issues that are related to the development of medical devices, their usage and performance. The primary regulatory objective of DRAP is to ascertain the performance and usage of the medical devices and thereafter to ensure safety and effectiveness in the performance of medical devices. This is essentially done through the process of risk assessment which involves analysis and evaluation of the risks involved with respect to the medical device, which is why the devices are categorized and classified as per the risk involved in their usage. It is noted that even under the Drugs Act, the import, export and manufacturing of medical devices including packing, advertisement, sale and distribution was regulated so as to ensure that the medical device is as per the required standards to ensure safety, efficacy and effectiveness. In this regard, it is noted that one of the arguments put forward was that where medical devices are registered with regulatory authorities of foreign jurisdiction they should not be re-evaluated by DRAP for the purposes of enlistment, licensing or clearance. However, this argument is totally misplaced as the mere fact that a product is registered with a regulatory authority of foreign jurisdiction does not mean that the medical device should not be scrutinized at the time of manufacture, import or export by DRAP to ensure compliance with its regulatory requirements. For the purposes of medical devices manufactured, imported or exported into Pakistan or from Pakistan it must be ensured that the standards set out by DRAP are complied with. As the issues raised are with respect to processes and delay, the Petitioners can raise it with DRAP to duly consider the same and make changes in the rules or SOPs where required and if required. So far as the regulatory regime of medical devices is concerned, as provided for under the Drugs Act, DRAP Act and the 2017 Rules, the public is the ultimate beneficiary of the medical devices whether used at home or in a clinic or hospital, whether for cosmetics or in-vitro diagnostic purposes, there is an obligation on the Respondents to ensure the safety and effectiveness of the medical devices.

25. Under the circumstances, no case for interference is made out. All these Petitions are dismissed.

Schedule

Details of Writ Petitions mentioned in judgment Dated 30.11.2020 passed in W.P. No.32048/2014

Sr. No.	W.P. No.	Parties Name
1	32048/14	Gharibwal Cement Limited etc. v. Pakistan through Secretary Revenue Division Islamabad etc.
2	32061/14	Maple Leaf Cement Factory Limited v. Federation of Pakistan etc.
3	32964/14	Kohinoor Sugar Mills Limited v. Federation of Pakistan etc.
4	33560/14	D.G. Khan Cement Limited v. Federation of Pakistan etc.
5	33561/14	LAFCO Private Limited v. Federation of Pakistan etc.
6	33772/14	NTMIR Industrial Chemical Limited v. Federation of Pakistan etc.
7	34109/14	MAF Hypermarkets Pakistan Limited v. Federation of Pakistan etc.
8	40488/15	Gharibwal Cement Limited etc. v. Federation of Pakistan etc.
9	39002/15	Maple Leaf Cement Factory Limited v. Federation of Pakistan etc.
10	149/15	Pakistan Cricket Board v. Federation of Pakistan etc.
11	37950/16	Gharibwal Cement Limited etc. v. Federation of Pakistan etc.
12	35786/17	Ali Akbar Textile Private Limited v. Federation of Pakistan etc.
13	259390/18	Fatima Fertilizer Company Limited v. Federation of Pakistan etc.

Sd/-
(Ayesha A. Malik)
Judge

Schedule-A

Details of Writ Petitions mentioned in judgment Dated 22.10.2020 passed in W.P. No.20263/2020

Sr. No.	W.P. No.	Parties Name
1	20263/20	Johnson and Johnson Pakistan Private Limited v. Federation of Pakistan etc.
2	51533/20	Muhammad Haroon v. Federation of Pakistan etc.
3	53182/20	A.M. Distributors v. Federation of Pakistan etc.
4	29598/20	Shafiq ur Rehman etc. v. Federation of Pakistan etc.
5	29928/20	Ameer Sons v. Federation of Pakistan etc.
6	29313/20	Wahab Tariq Butt v. Federation of Pakistan etc.
7	29910/20	Haji S. Ameer Din and Sons v. Federation of Pakistan etc.
8	2740/19	Waseem Ijaz v. Federation of Pakistan etc.
9	7114/19	Tariq Rashid Qureshi v. Federation of Pakistan etc.
10	2781/20	UDL Distribution Private Limited etc. v. Federation of Pakistan etc.

11	2802/20	Muller and Phipps Pakistan Private Limited etc. v. Federation of Pakistan etc.
12	32332/20	Jamil Ahmad v. Federation of Pakistan etc.
13	32298/20	Zahid Traders v. Federation of Pakistan etc.
14	32308/20	Muhammad Anwar v. Federation of Pakistan etc.
15	32462/20	Hijaz Hospital v. Federation of Pakistan etc.
16	32747/20	Muhammad Abdullah v. Federation of Pakistan etc.
17	32838/20	Mujtaba Traders v. Federation of Pakistan etc.
18	32398/20	IL Apparel Private Limited v. Federation of Pakistan etc.
19	32590/20	Sheikh of Sialkot v. Federation of Pakistan etc.
20	32681/20	Lab Diagnostic System Private Limited etc. v. Federation of Pakistan etc.
21	32040/20	One Ten World etc. v. Federation of Pakistan etc.
22	32102/20	Genemeq Health Private Limited etc. v. Federation of Pakistan etc.
23	32461/20	Ali Noor Industries v. Federation of Pakistan etc.
24	32380/20	Punjab Medical Store v. Federation of Pakistan etc.
25	31571/20	Endo Aid Biomedica v. Federation of Pakistan etc.
26	31152/20	Unison Traders v. Federation of Pakistan etc.
27	31068/20	Daniyal Arif etc. v. Federation of Pakistan etc.
28	31715/20	Zain Traders v. Federation of Pakistan etc.
29	31051/20	Muhammad Shabbir v. Federation of Pakistan etc.
30	31161/20	ACCU Sight etc. v. Federation of Pakistan etc.
31	31713/20	Madiha Raza v. Federation of Pakistan etc.
32	31260/20	AK International v. Federation of Pakistan etc.
33	31262/20	Muhammad Waseem v. Federation of Pakistan etc.
34	31362/20	Solutions Engineering Private Limited etc. v. Federation of Pakistan etc.
35	31253/20	Muhammad Hisham v. Federation of Pakistan etc.
36	33484/20	Horizon Star v. Federation of Pakistan etc.
37	33487/20	Quintex Medical etc. v. Federation of Pakistan etc.
38	33828/20	Shahbaz Ahmad v. Federation of Pakistan etc.
39	33827/20	Hospitech Healthcare Private Limited v. Federation of Pakistan etc.
40	33824/20	Muhammad Sohail Sikandar v. Federation of Pakistan etc.
41	33120/20	Ghani Chemical Industries Limited v. Federation of Pakistan etc.
42	33003/20	Syed Hasan Jafar Zaidi v. Federation of Pakistan etc.
43	29237/20	Mansoor Ahmed Mehwish v. Federation of Pakistan etc.

44	29073/20	Yantai Mingdian Machinery Private Limited etc. v. Federation of Pakistan etc.
45	39115/20	Meditract etc. v. Federation of Pakistan etc.
46	39574/20	Qaiser Cap House v. Federation of Pakistan etc.
47	39909/20	Ikram Ilahi Baig etc. v. Federation of Pakistan etc.
48	40545/20	Bio Life etc. v. Federation of Pakistan etc.
49	40024/20	Al-Hayat v. Federation of Pakistan etc.
50	226829/18	Wajahat Khan v. Federation of Pakistan etc.
51	252484/18	Medtronic Pakistan Private Limited v. Federation of Pakistan etc.
52	225938/18	Credible Surgical Private Limited etc. v. Federation of Pakistan etc.
53	246839/18	Humera Sohail v. Federation of Pakistan etc.
54	246840/18	ACP Systems v. Federation of Pakistan etc.
55	249836/18	B. Braun Pakistan Private Limited v. Federation of Pakistan etc.
56	37521/20	Muzaffar Abbas Mirza etc. v. Federation of Pakistan etc.
57	37829/20	Shaukat Ali etc. v. Federation of Pakistan etc.
58	37114/20	Assuza Incorporation etc. v. Federation of Pakistan etc.
59	37239/20	Network Marketing Services v. Federation of Pakistan etc.
60	37722/20	Maha Tradings v. Federation of Pakistan etc.
61	37834/20	Delta Chemical and Machinery Corporation v. Federation of Pakistan etc.
62	38974/20	Ibrahim Enterprises v. Federation of Pakistan etc.
63	38647/20	Shahzad Traders etc. v. Federation of Pakistan etc.
64	38242/20	Endo Aid Biomedica v. Federation of Pakistan etc.
65	38885/20	Qasim Riaz v. Federation of Pakistan etc.
66	38821/20	Concept Pharma v. Federation of Pakistan etc.
67	38084/20	Multiple Trading House v. Federation of Pakistan etc.
68	35000/20	Geentech International v. Federation of Pakistan etc.
69	35130/20	1Son Medical Corporation etc. v. Federation of Pakistan etc.
70	35553/20	MMYZ International v. Federation of Pakistan etc.
71	36447/20	S Ijaz ud Din etc. v. Federation of Pakistan etc.
72	36697/20	Links Communication System v. Federation of Pakistan etc.
73	36124/20	LEO Science v. Federation of Pakistan etc.
74	36890/20	Universal Exports through Faisal Azhar v. Federation of Pakistan etc.
75	34351/20	Transworld through Anwar Ali v. Federation of Pakistan etc.
76	34999/20	AJ Trading Corporation v. Federation of Pakistan etc.
77	34885/20	Med Express through Fuad ul Haq Dodhy v. Federation of

		Pakistan etc.
78	34197/20	Bestever Sourcing through Muhammad Sohail Malik v. Federation of Pakistan etc.
79	34363/20	Abdul Munim Khan v. Federation of Pakistan etc.
80	34841/20	Clinical Life Inc.through Muhammad Nauman v. Federation of Pakistan etc.
81	34657/20	Allied International Mover v. Federation of Pakistan etc.
82	34732/20	M. Ramzan Sewing Machine and Silk Company v. Federation of Pakistan etc.
83	34126/20	Shamco Traders Private Limited etc. v. Federation of Pakistan etc.
84	34446/20	Biocare System etc. v. Federation of Pakistan etc.
85	26523/20	Human Healthcare etc. v. Federation of Pakistan etc.
86	26106/20	Asad Ullah Khan Lodhi etc. v. Federation of Pakistan etc.
87	26583/20	MA Tools Equipment House Private Limited v. Federation of Pakistan etc.
88	21970/19	Waheed Aslam v. Federation of Pakistan etc.
89	29401/20	Hanan Sohail v. Federation of Pakistan etc.
90	29066/20	Alam Medics v. Federation of Pakistan etc.
91	29466/20	Sameer Enterprises v. Federation of Pakistan etc.
92	29871/20	ZM Traders v. Federation of Pakistan etc.
93	29512/20	Royal Medical Company v. Federation of Pakistan etc.
94	29977/20	Forcare etc. v. Federation of Pakistan etc.
95	29041/20	Latif Instruments Private Limited etc. v. Federation of Pakistan etc.
96	29628/20	Capital Trading Corporation v. Federation of Pakistan etc.
97	24836/20	AS Enterprises etc. v. Federation of Pakistan etc.
98	28297/20	KASBN International v. Federation of Pakistan etc.
99	28897/20	Stupra International etc. v. Federation of Pakistan etc.
100	28916/20	Medequips SMC Private Limited v. Federation of Pakistan etc.
101	28157/20	Worldwide Scientific etc. v. Federation of Pakistan etc.
102	28579/20	Tameer International etc. v. Federation of Pakistan etc.
103	28356/20	Bio Care Medical System v. Federation of Pakistan etc.
104	28386/20	Ali Gohar and Company etc. v. Federation of Pakistan etc.
105	28891/20	Sanabel Venture Private Limited through its Chief Executive v. Federation of Pakistan etc.
106	28781/20	Nasira Enterprises v. Federation of Pakistan etc.
107	28961/20	Crystal Healthcare v. Federation of Pakistan etc.

108	42713/20	Lab Care Services v. Federation of Pakistan etc.
109	42458/20	E. Siddique Sons and Company v. Federation of Pakistan etc.
110	42758/20	A.A. Enterprises v. Federation of Pakistan etc.
111	42387/20	A&E Medical etc. v. Federation of Pakistan etc.
112	42466/20	Sharif Trading Company v. Federation of Pakistan etc.
113	42933/20	Essa Nasir v. Federation of Pakistan etc.
114	43636/20	Respro Medical etc. v. Federation of Pakistan etc.
115	44462/20	Biodent Care Services v. Federation of Pakistan etc.
116	46326/20	Ideal Business Products v. Federation of Pakistan etc.
117	45886/20	Medi Serve v. Federation of Pakistan etc.
118	42809/20	Hamza International v. Federation of Pakistan etc.
119	44195/20	Biorays Enterprises etc. v. Federation of Pakistan etc.
120	45798/20	Al-Ratio Traders etc. v. Federation of Pakistan etc.
121	50574/20	Holy Green International v. Federation of Pakistan etc.
122	4795/19	Shahid Ikram v. Federation of Pakistan etc.
123	47895/19	Shoukat Ali v. Federation of Pakistan etc.
124	50812/19	Sultan Sons v. Federation of Pakistan etc.
125	27754/20	Synthetic Products Enterprises v. Federation of Pakistan etc.
126	27379/20	Muhammad Imran etc. v. Federation of Pakistan etc.
127	27857/20	Hi-Med Surgical v. Federation of Pakistan etc.
128	48190/20	Zahid Iqbal v. Federation of Pakistan etc.
129	12185/19	Muhammad Rizwan etc. v. Federation of Pakistan etc.
130	16726/20	Syed Omar Ahmad v. Federation of Pakistan etc.
131	16171/20	Feroze Sons Laboratories Limited v. Federation of Pakistan etc.
132	61819/19	Muhammad Hanif etc. v. Federation of Pakistan etc.
133	77360/20	Ahmad Medix Private Limited v. Federation of Pakistan etc.
134	21181/20	Cor-Med Company v. Collector of Customs etc.
135	25660/20	Radiant Medical Private Limited v. Federation of Pakistan etc.
136	48355/20	Rizwan Zahoor v. Federation of Pakistan etc.
137	49257/20	Muhammad Yousaf etc. v. Federation of Pakistan etc.
138	48417/20	Highnoon Laboratories Limited etc. v. Federation of Pakistan etc.
139	47353/20	Umer Hayat etc. v. Federation of Pakistan etc.
140	30394/20	Beten Pharmaceuticals Private Limited v. Federation of Pakistan etc.
141	30775/20	Megalink Trading Company etc. v. Federation of Pakistan etc.
142	30977/20	Goraya Instrumed v. Federation of Pakistan etc.

143	30875/20	Multiple Trading House v. Federation of Pakistan etc.
144	30356/20	Syner Tech etc. v. Federation of Pakistan etc.
145	30843/20	SPERO Enterprises v. Federation of Pakistan etc.
146	30026/20	Pak Trading House v. Federation of Pakistan etc.
147	30143/20	Impact International v. Federation of Pakistan etc.
148	30195/20	Hi-Mod Technologies v. Federation of Pakistan etc.
149	30330/20	Nice Chair Company Private Limited etc. v. Federation of Pakistan etc.
150	30648/20	METRO Commercial Enterprises v. Federation of Pakistan etc.
151	30587/20	Gold Medical Instrument v. Federation of Pakistan etc.
152	30669/20	Three Dimensional Lifestyle Limited v. Federation of Pakistan etc.
153	30318/20	Khawaja Javed Iqbal etc. v. Federation of Pakistan etc.
154	30054/20	Interlink Corporation v. Federation of Pakistan etc.
155	30564/20	Shaukat Khanum Memorial Trust etc. v. Federation of Pakistan etc.
156	30092/20	Aatif ur Rehman Akhtar v. Federation of Pakistan etc.
157	30929/20	Vital Care v. Federation of Pakistan etc.
158	30032/20	Mega Tech Enterprises etc. v. Federation of Pakistan etc.
159	30262/20	Kamal Traders v. Federation of Pakistan etc.
160	30578/20	Olympia Diagnostics etc. v. Federation of Pakistan etc.
161	37940/20	Merlin International etc. v. Federation of Pakistan etc.
162	50030/20	Medi Health Services etc. v. Federation of Pakistan etc.
163	51163/20	LPC Mills Private Limited v. Federation of Pakistan etc.
164	49969/20	Medi Urge Private Limited etc. v. Federation of Pakistan etc.

MH/J-1/L Petition dismissed.

PLJ 2021 Lahore (Note) 57
Present: **MRS. Ayesha A. MALIK, J.**
SAJID HUSSAIN SHAH--Petitioner
versus
PAKISTAN CRICKET BOARD through Chairman etc.--Respondents
W.P. No. 29875 of 2014, heard on 5.6.2015.

Constitution of Pakistan, 1973--

----Art. 199--Scrutiny of clubs--Declaration as "inactive"--Appeals--Allowed--Appeals before independent adjudicator--Rejected--Standing to contest election--*Locus standi*--Aggrieved person--Cricket club of petitioner did not challenge active status of Respondents No. 3 to 5--Manipulation of election process--Challenge to--I have gone through order of Independent Adjudicator and I am in agreement with order that Petitioner does hot have *locus standi* as he is not an aggrieved person so far as order of Independent Adjudicator is concerned--If a candidate is allowed to challenge "Active" status of clubs, it would mean that every candidate could manipulate election process and try to control electoral college which would ultimately affect election--This is not mandate of Constitution of PCB which basically requires that clubs are scrutinized and verified for purposes of being declared "Active"--Once process has been completed and a club has gone through process of scrutiny then appeal before Election Commission and Independent Adjudicator, question of "Active" or "Non-Active" status of cricket club cannot be raised by a candidate simply because he is desirous of winning election--It is also noted from record that cricket club of Petitioner did not challenge "Active" status of Respondents No. 3 to 5--It is only Petitioner in his personal capacity who has filed appeals--Petitioner is not an aggrieved person and merely apprehending outcome of RDCA election does not qualify as being an aggrieved person--Petition dismissed.
[Para 6] A, B & C

Barrister Haaris Ramzan, Advocate for Petitioner.
Mr. Zaki Rehman, Advocate for Respondent-PCB.
Mr. Abdul Razzaq Rajab, Advocate for Respondents No. 3 to 5.
Date of Hearing: 5.6.2015.

JUDGMENT
This petition impugns the decision of the Independent Adjudicator dated 13.6.2014 with reference to the case of Respondents No. 3 to 5.

2. The case of the Petitioner is that the Respondents No. 3 to 5 Clubs were scrutinized as per the prescribed procedure of the Pakistan Cricket Board (**"PCB"**) in October 2013 and were declared "Inactive" clubs pursuant to Notification dated 7.10.2013. The stated Respondents being aggrieved by Notification of 7.10.2013 filed appeals before the Election Commission which appeals were allowed. The Petitioner being aggrieved by the clubs having been declared "Active" filed appeals before the Independent Adjudicator because as president of Malik Gymkhana

Cricket Club, Rawalpindi he is a candidate for the forthcoming election of the Rawalpindi District Cncket Association (**"RDCA"**) and he is prejudiced by Respondent No. 3-5 rival clubs right to vote in the RDCA elections. Learned counsel for the Petitioner states that the orders of the Election Commission are contrary to the record as they themselves state that the required number of sixteen players were not present at the time of scrutiny yet allowed the appeals, hence declaring the clubs to be "Active". Learned counsel states that the only way to verify a club is through the scrutiny process and if the required number of players are not present, the club cannot be declared as "Active".

3. Learned counsel for Respondent PCB submits that the scrutiny process was undertaken as per law and essentially the dispute is one between the Petitioner and Respondents No. 3 to 5. He emphasized the fact that on account of such like disputes, the election process is being delayed.

4. Learned counsel for Respondents No. 3 to 5 raised an objection on the *locus standi* of the Petitioner. He stated that the Petitioner is not an aggrieved person and as such has no *locus standi* to file the instant petition. Further argued that the Petitioner is a candidate in the upcoming election and that being a candidate in the election does not give him cause to question the decision of the Election Commission or the Independent Adjudicator. Learned counsel submits that the Cricket Club of the Petitioner did not challenge the decision of the Election Commission or that of the Independent Adjudicator but the Petitioner in his personal capacity as a candidate in the election has challenged the same, which is not maintainable. Learned counsel submits that the Petitioner is not an aggrieved person because he simply desires to participate in the election and that does not give him cause to challenge the "Active" status of the Respondent clubs.

5. Heard and record perused.

6. The basic issue is with respect to the standing of the Petitioner who has challenged the "Active" status of Respondents No. 3 to 5. The Petitioner states that he is aggrieved by the decision of the Independent Adjudicator which declared Respondents No. 3 to 5 to be "Active" clubs, as the orders on the face of it show that the entire cricket team of the club was not present at the time of scrutiny, hence they cannot be "Active". States that since it is the requirement of the scrutiny process, the Petitioner is aggrieved that the clubs have been declared "Active" without following due process. The question of *locus standi* and whether or not the Petitioner is an aggrieved person came up before the Independent Adjudicator who decided this issue against the Petitioner. In the orders of the Independent Adjudicator, it is stated that the Petitioner cannot be considered as "any other person" under Para 40(2) of the Constitution of PCB which allows any association or active club or Regional Cricket Association, member or any other person to challenge the decision of the scrutiny committee or of the Election Commissioner or

any other decision of the Board. The Independent Adjudicator found that "any other person" means:

> A person/body not associated with the above mentioned Associations, Active Club or RGA. It is also to be seen who can be considered to be an aggrieved person. "An aggrieved person" must be one who has suffered a legal grievance, a man against whom a decision has been pronounced, which has wrongly deprived him of something or wrongly refused him of something or wrongly affect his title to something.

Learned counsel for the Petitioner states that his basic grievance is that since he is a candidate in the forthcoming election, Respondents No. 3 to 5 will vote in the forthcoming election which will prejudice his right to possibly win the election meaning that he does not want them to vote in the elections. I have gone through the order of the Independent Adjudicator and am in agreement with the order that the Petitioner does not have *locus standi* as he is not an aggrieved person so far as the order of the Independent Adjudicator is concerned. The Petitioner is contesting in the forthcoming election and for the purposes of contesting the election, the Petitioner cannot attempt to oust "Active" clubs from the electoral by agitating against the decision of the scrutiny committee, the Election Commissioner or the Independent Adjudicator. If a candidate is allowed to challenge the "Active" status of clubs, it would mean that every candidate could manipulate the election process and try to control the electoral college which would ultimately affect the election. This is not the mandate of the Constitution of PCB which basically requires that clubs are scrutinized and verified for the purposes of being declared "Active". Once the process has been completed and a club has gone through the process of scrutiny then appeal before the Election Commission and the Independent Adjudicator, the question of "Active" or "Non-Active" status of the cricket club cannot be raised by a candidate simply because he is desirous of winning the election. It is also noted from the record that the cricket club of the Petitioner did not challenge the "Active" status of Respondents No. 3 to 5. It is only the Petitioner in his personal capacity who has filed the appeals. Therefore I am in agreement with the decision of the Independent Adjudicator that the Petitioner is not an aggrieved person and merely apprehending the outcome of the RDCA election does not qualify as being an aggrieved person.

7. Under the circumstances, no case for interference is made out. **Petition is dismissed**.

(Y.A.) Appeal dismissed

2021 P T D 689
[Lahore High Court]
Before Ayesha A. Malik, J
CRESCENT TEXTILE MILLS LIMITED
Versus
FEDERATION OF PAKISTAN and others

Writ Petitions Nos. 52548, 57455, 56719, 56952, 58606, 52579, 52589, 53961, 54012, 54101, 54213, 54237, 54284, 54315, 54323, 54330, 54338, 54363, 54491, 54506, 54510, 54511, 54544, 54553, 54558, 54697, 54910, 54932, 55172, 55749, 55593, 55588, 55490, 55259, 55255, 58117, 55998, 57230, 55978, 52620, 54487, 58705, 55243, 52560, 54936, 55251, 55518, 56066, 56071, 52608, 55519, 54527, 54535, 54539, 54550, 54556, 54559, 54522, 52600, 52604, 57767, 59968, 59130, 60358, 60726, 61429, 62392, 62443, 64846, 67323, 66262 of 2020 and Crl. Org. 67055-W of 2020, decided on 21st December, 2020.

Income Tax Ordinance (XLIX of 2001)---

----S.209(8A)---Jurisdiction of Income Tax Authorities---Change of taxing jurisdiction---Scope---Petitioners impugned orders whereby their taxing jurisdiction was changed from Regional Tax Office (RTO) to the Large Taxpayers Office (LTO) at another city, on the ground that orders were made without jurisdiction and were therefore illegal---Validity---Under S.209(8A) of Income Tax Ordinance, 2001, power for such change of jurisdiction was categorically provided to Department, therefore such change of jurisdiction was well within powers of the Department---Constitutional petitions were dismissed, in circumstances.

Babar Hussain Shah and another v. Mujeeb Ahmed Khan and another 2012 SCMR 1235; New Jubilee Insurance Company Ltd., Karachi v. National Bank of Pakistan, Karachi PLD 1999 SC 1126; Government of Pakistan v. Messrs Village Development Organization 2005 SCMR 492; Hazara (Hill Tract) Improvement Trust through its Chairman and others v. Mst. Qaisra Elahi and others 2005 SCMR 678; Moulana Atta ur Rehman v. Al-Hajj Sardar Umar Farooq and others PLD 2008 SC 663; Muhammad Khan v. Shamsuddin and others 1969 SCMR 212; Mrs. Anisa Rehman v. P.I.A.C. and another 1994 SCMR 2232; Messrs Dewan Salman Fiber Ltd. and another v. Government of N.W.F.P through Secretary, Revenue Department, Peshawar and others PLD 2004 SC 441; Chairman, Regional Transport Authority, Rawalpindi v. Pakistan Mutual Insurance Company Limited Rawalpindi PLD 1991 SC 14 and Shabbir Ahmed v. Kiran Khursheed and 8 others 2012 CLC 1236 ref.

Khubaib Ahmad, Shehbaz Butt, Muhammad Mohsin Virk, Sumair Saeed Ahmed, Rabeel Safdar Tatla, Hammad lftikhar Malik, H.M Majid Siddiqui, Muhammad Nauman Yahya, Waseem Ahmad Malik, Asmar Tariq Mayo, Rana Ashfaq Ahmad, Dr. Muhammad Saleem Malik, Muhammad Bashir Malik, Rana Usman Habib Khan, Ahsan Siyal, Adeel Shafique, Mian Abdul Ghaffar, Rai Amir Ijaz, Muhammad Ajmal Khan, M. Farooq Sheikh, Azeem Hafeez, Usman Khalil, Hashim Aslam Butt and Zahid Imran Gondal for Petitioners.

Ambreen Moeen, Deputy Attorney General for Official Respondents.

Mrs. Kausar Parveen, Shahzad Ahmad Cheema, Asif Imran Awan, Mustasim Malik Toor, Anas Sheikh, Malik Sohail Mushad, Muhammad Abid, Chief (Inland Revenue Formations) FBR, Mrs. Nabila Farah Baig, Chief Commissioner, LTO and Multan, Malik Sarwar, ACIR, Islamabad Builder Zone for Respondents.

JUDGMENT

AYESHA A. MALIK, J.----Through this petition along with connected writ petitions as detailed in Schedule-A, the Petitioners have challenged orders whereby their taxing jurisdiction has been changed, primarily from Regional Tax Office ("RTO") Faisalabad to Large Taxpayer Office ("LTO") Multan, from LTO Multan to LTO Islamabad or LTO Lahore and in some cases the RTOs have been changed.

2. The case of the Petitioners is that they are registered as manufacture-cum-exporters with RTO Faisalabad and their jurisdiction has been changed from RTO Faisalabad to LTO Multan vide order dated 12.10.2020. It is their case that this order is in excess of jurisdiction; that there is no provision under the Income Tax Ordinance, 2001 ("Ordinance") or Sales Tax Act, 1990 which allows for change in jurisdiction. More importantly, the transfer of jurisdiction has been done contrary to the principles of natural justice and without following due process. The Petitioners have argued that within the overall scheme of tax collection, as structured under the law there is no provision for change of jurisdiction and that the Respondents are obligated to facilitate the taxpayers. It is argued that by way of change of jurisdiction especially a change from the place of business not only causes inconvenience but also financial hardship on taxpayers as they are required to provide all documentations at the changed LTOs or RTOs, which becomes difficult and expensive. It is also argued that the change in jurisdiction means that the jurisdiction is exercised by the Respondents from a city where neither the registered offices are located nor any branch or factory is located, hence on this account, the order of change of jurisdiction is illegal and against the mandate of law. In this regard, the Petitioners have placed reliance on Babar Hussain Shah and another v. Mujeeb Ahmed Khan and another (2012 SCMR 1235), New Jubilee Insurance Company Ltd., Karachi v. National Bank of Pakistan, Karachi (PLD 1999 SC 1126), Government of Pakistan v. M/s. Village Development Organization (2005 SCMR 492), Hazara (Hill Tract) Improvement Trust through its Chairman and others v. Mst. Qaisra Elahi and others (2005 SCMR 678), Moulana Atta ur Rehman v. Al-Hajj Sardar Umar Farooq and others (PLD 2008 SC 663), Muhammad Khan v. Shamsuddin and others (1969 SCMR 212), Chief Commissioner, Karachi and another v. Mrs. Dina Sohrab Katrak (PLD (sic)195 SC (Pak) 45), Mrs. Anisa Rehman v. P.I.A.C. and another (1994 SCMR 2232), Messrs Dewan Salman Fiber Ltd. and another v. Government of N.W.F.P through Secretary, Revenue Department, Peshawar and others (PLD 2004 SC 441), Chairman, Regional Transport Authority, Rawalpindi v. Pakistan Mutual Insurance Company Limited Rawalpindi (PLD 1991 SC 14) and Shabbir Ahmed v. Kiran Khursheed and 8 others (2012 CLC 1236).

3. On behalf of the Respondents, report and parawise comments have been filed by the Respondents. It is argued that there were originally three Large Taxpayers Units ("LTUs") (recently re-designated as the Large Taxpayers Offices) at Islamabad, Karachi and Lahore and now LTO Multan has been set up. Muhammad Abid, Chief Inland Revenue Formation appeared in person and explained that all cases where the turnover is of more than rupees one billion and have a revenue contribution of Rs. 20.00 Million or more have been assigned to LTOs. The object of setting up LTOs is to make the tax system more efficient, revenue responsive, large taxpayer friendly and uniformly in tax cases across geographical location. He explained that all four LTOs are fully functional and in some cases they are industry specific. In this regard, he explained that for sugar mills the designated LTOs is Lahore so as to facilitate their audit and otherwise. This includes W.P. No.54487/2020 being a sugar mill. So far as the real estate developers, their Association contacted the Respondents and requested that their LTO be shifted to Multan. In this regard, he stated that this includes the developers in W.Ps. Nos.61429 and 62392 of 2020. He further explained that the formation of LTOs is the result of the Tax Administration Reform Project ("TARP"), which was executed in 2000 and continued for some time uptil 2010 and LTO Multan was part of the original plan, though delayed. He stated that it is misconceived that transfer of jurisdiction involves hardship, both financial and otherwise as all working is online and in few cases they will be required to present documents in person. The Respondents have relied Section 209(8A) of the Ordinance read with powers contained under the Federal Board of Revenue Act, 2007 ("Act") to establish their authority on change in jurisdiction.

4. The basic contention of the Petitioners is that their taxing jurisdiction cannot be changed and specifically they have all challenged notification whereby they have been transferred to LTO Multan, LTO Lahore or a new RTO. In terms of Section 209 (8A) of the Ordinance, the power for change of jurisdiction is categorically provided for such that the power to confer jurisdiction includes the power to transfer jurisdiction from one income tax authority to another. Hence the basic contention of the Petitioners that this change in jurisdiction is illegal and beyond the scope of power given to the Respondents is totally misconceived as the law specifically gives the power to confer jurisdiction, which includes the power to transfer jurisdiction from one tax authority to another. In this regard, it is noted that the Federal Board of Revenue ("FBR") under Section 4 of the Act has the power to make regulations, policies, programs, strategies in order to carry out the purposes of this Act which includes to implement tax administration reforms and adopt modern effective tax administration methods, improve processes and to make all necessary rules and orders, circulars and instructions for the enforcement of any of the provisions of fiscal law and the provision of this Act. Hence the change in jurisdiction or transfer of jurisdiction is well within the scope of the powers of the Respondents. In this regard, by virtue of the report submitted before this Court, it is stated that there are total 350 cases transferred to different LTOs in Multan and Lahore as well as the change in jurisdiction of different RTOs. Only 122 persons have challenged their transfer whereas the rest have accepted the transfer of jurisdiction orders. In this regard, it is also noted that a criteria has been provided for LTOs, catchment areas

have been defined and the Petitioners all meet the criteria, as there is no dispute on the criteria and the Petitioners' applicability to the same. In this regard, the Petitioners are not required to be issued any notice nor are they required to be consulted on the issue. The taxpayers are obligated to be processed at the relevant LTO or RTO on the basis of the criteria set out and the defined catchment area. Furthermore no right of the Petitioner is infringed as at best they have pleaded hardship and inconvenience, which does not violate any fundamental right.

5. Under the circumstances, there is no merit in these petitions and the same are dismissed.

KMZ/C-3/L Petitions dismissed.

2021 P T D 844
[Lahore High Court]
Before Ayesha A. Malik, J
CSH PHARMACEUTICALS (PVT.) LTD. through duly Authorized Company Secretary
Versus
COLLECTORATE OF CUSTOMS through Collector Customs and 3 others
Writ Petition No.13728 of 2011, decided on 8th July, 2015.*

Customs Act (IV of 1969)---

----S.19---SRO No.575(I)/2006, dated 05-06-2006---General power to exempt from customs duties---Scope---Petitioner sought benefit of SRO No.575(I)/2006, dated 05-06-2006---Petitioner being a pharmaceutical company had manufactured certain drugs for which customized Air Handling Units (AHUs) were required to control temperature, humidity and pressure level---As per the understanding of petitioner the AHUs required by it were not locally manufactured---Petitioner had imported the AHUs at which it sought the benefit of the SRO No.575(I)/2006, dated 05-06-2006, which was denied---Contention of authorities was that the local manufacturers had the capacity to manufacture the required AHUs---Validity---Authorities had admitted that no physical verification was made to ascertain the statements of local manufacturers, who had claimed that they had the capacity to make the AHU required by the petitioner---AHU required by the petitioner was a customized product with certain specific components---Authorities were required to certify that a particular product was locally manufactured and in doing so it had to understand the requirements of the petitioner---Constitutional petition was accepted, authorities were directed to provide certificate to the petitioner that the product was not locally manufactured and the customs authorities were directed to grant the benefit of the SRO No.575(I)/2006, dated 05-06-2006 to the petitioner in terms thereof.
Waleed Khalid for Petitioner.
Mian Tariq Ahmad, DAG.
Ehsan Ullah Cheema and Irteza Ali Naqvi for Respondent Customs.
M. Inam Chohan for Respondent.
EDB with Tariq Ejaz Chaudhry, CEO EDB and Khuda Bakhsh Ali Technical Manager Respondents Nos.3 and 4.
Date of hearing: 8th July, 2015.

JUDGMENT

AYESHA A. MALIK, J.----This single judgment decides upon the issues raised in W.P.Nos.13728 and 12697 of 2011 and Cr1. Org.No.660-W of 2013 as common questions of law and fact arise in these petitions.

2. The Petitioner is a pharmaceutical company and has prayed that it be granted the benefit of SRO 575(I)/2006 ("SRO") dated 05.06.2006 and that letters issued by

Engineering Development Board, Respondent No.3 dated 17.02.2011, 25.02.2011 and 09.06.2011 be declared illegal and unlawful having no legal effect against the Petitioner.

3. The case of the Petitioner is that it is engaged in the business of manufacturing, selling and distribution of pharmaceuticals drugs and other ancillary products. The Petitioner manufactured Co-Amoxiclav for which customized Air Handling Units ("AHUs") are required to control-temperature, humidity and pressure level. As per the understanding of the Petitioner the AHUs required by it are not locally manufactured. The Petitioner made various attempts to find a local manufacturer and supplier, who could provide the AHUs of the requisite specifications, however, to no avail. The Petitioner therefore, imported AHUs in October, 2010 at which point the Petitioner sought the benefit of the SRO. This was denied on the ground that the product was manufactured locally, hence the Petitioner could not avail its benefit.

4. Learned counsel for the Petitioner argued that the product is not manufactured locally and this fact was ascertained by the Petitioner prior to the import on the basis of letters dated 25.04.2009 and 13.10.2009 issued by Respondent No.2 wherein Respondent No.2 admitted that the AHUs of the specification required by the Petitioner are not manufactured locally. Learned counsel further argued that the Respondents have denied the Petitioner the concession under the SRO essentially on the ground that local companies have the capacity to manufacture the AHUs of the specification required by the Petitioner. However, he stated that no physical verification of this capacity was ever made by Respondent No.2, therefore, he argued that Respondent No.2 does not have actual knowledge of this fact and on the basis of the statements of some local manufacturers they are now insisting that the AHUs received by the Petitioner are manufactured locally. Learned counsel further argued that in this regard a meeting was held in the presence of Respondent No.2 with local manufacturers, who confirm that they do not manufacture the required AHU locally. He has placed reliance on letters dated 05.03.2011 and 21.02.2011 issued by Habibullah Industries (Pvt.) Ltd. and AGECO (Pvt.) Ltd. respectively. Learned counsel argued that a request was made to Respondent No.2 vide letter dated 13.05.2011 that those suppliers, who claimed that they have the capacity to make the AHUs should be physically verified by a technical team of Respondent No.2 as the Petitioner was of the opinion that the AHU it required was not locally manufactured. Learned counsel argued that on 17.05.2011 at a meeting, Respondent No.2 concluded that the AHU is a customized product and local manufacturers are technically capable of manufacturing the AHUs which are required by the Petitioner. Learned counsel argued that this statement was made without any physical verification and without conducting any independent inquiry into the matter. Again another meeting was held on 09.06.2011 wherein some local manufacturers again confirmed that they were making AHUs with Plug Fan and VFD required by a Petitioner and other pharmaceutical firms were being imported by it as a component. Learned counsel argued that the Petitioner is entitled to the

benefit of stated SRO as the product is not locally manufactured and Respondent No.2 claims that it is manufactured locally is not based on any tangible evidence.

5. Report and parawise comments have been filed by the Respondents. It is the case of CEO EDB and Technical Manager of Respondents Nos.3 and 4 that the AHU required by the Petitioner is a customized product, which can be manufactured in Pakistan. They stated that earlier in the year 2009 it was on a one time basis that Respondent No.2 stated that the AHUs were not locally manufactured. However, subsequently, local manufacturers have surfaced, who have the capacity to make the AHU required by the Petitioner. They specifically referred to a letter of Cool Point (Pvt.) Ltd. dated 04.01.2011 and relied upon minutes of the meeting dated 08.06.2011 to urge the point that Cool Point (Pvt.) Ltd. has categorically stated that it can manufacture the product and in this regard, it is willing to give a performance guarantee. He further stated that it was incumbent upon the Petitioner to check with Respondent No.2 first as to whether the product is being locally manufactured. Instead, the Petitioner without reference to Respondent No.2 imported the machinery and is wrongly seeking the benefit of the SRO. CEO EDB stated that AHUs are listed at serial No.504 of Customs General Order No.11/2007 ("CGO") as they are locally manufactured and the names of two manufacturers are specifically provided therein. He stated that this CGO is not an exhaustive list and there are other manufacturers of this product. He explained that several meetings were held wherein the local manufacturers categorically stated that they have the capacity to manufacture the AHU required by the Petitioner. It was their opinion that they are required to ascertain the capability and the actual manufacturing of the product was not necessary. In this case, there was no need for physical verification because the capability of the local manufacturers was based on the information provided in the various meeting held by them. Hence they were of the opinion that the AHU required by the Petitioner could be locally manufactured.

6. Learned counsel representing the Custom Department adopted the arguments advanced by CEO EDB as well as Technical Manager of Respondents Nos.3-4 and argued that the Petitioner is not entitled to the benefit of stated SRO.

7. Heard and record perused.

8. The basic contention of the learned counsel for the Petitioner is that the Petitioner is entitled to the benefit of the SRO as the AHU product with its technical specification is not locally manufactured. On this issue, the Petitioner and the Respondent No.2 are in disagreement as Respondent No.2 is of the opinion that local manufactures have the capacity to manufacture the AHU required by the Petitioner. Both CEO EDB and Technical Manager of Respondents Nos.3 and 4 appeared before the Court to explain the record and function of EDB. During the course of their explanation, it was admitted that no physical verification was made to ascertain the statements of local manufacturers, who claimed that they had the capacity to make the AHU required by the Petitioner. It is an admitted position that the AHU required by the Petitioner is a customized product with certain specific

components. The SRO provides that if the goods are not locally manufactured as notified in the CGO issued by Federal Board of Revenue ("FBR") certified by the Engineering Development Board then the benefit of SRO is available to those goods which are imported. CGO No.11/2007 provides the list of local manufacturers of the AHU at serial No.504 with its specifications and lists the names of two companies, who are locally manufacturing the AHU. Admittedly, the AHUs imported by the Petitioner have specifications different from the ones provided in the CGO. So far as, the names of local manufacturers are concerned, they have issued letters dated 05.03.2011 and 21.02.2011 to the Petitioner confirming their inability to manufacture the AHU required by the Petitioner. The Respondents are relying upon the letter dated 03.03.2011 issued by Cool Point (Pvt.) Ltd stating therein that they can manufacture the AHU required by the Petitioner. They have also relied upon a letter dated 03.03.2011 issued by Petal Engineering (Pvt.) Ltd for this purpose. A meeting was held on 17.05.2011 where the Petitioner along with some manufacturers discussed the issue and it was concluded that the AHU is a customized product and local manufacturers are technically capable to manufacture the AHU required by the Petitioner. Another meeting was held on 09.06.2011 where the capability of the local industry was again confirmed and it was decided by Respondent No.2 that it is the local capacity which has to be seen and not what has been supplied so far. They decided that the technical specifications of any equipment have no nexus with the project requirement or the quality of a product. They also decided that capability of local manufacturers meant that the Petitioner could not avail the benefit of the SRO. Having gone through the specific letters and documents relied upon by the parties I am of the opinion that Respondent No.2 has misconceived its role for the purposes of ascertaining whether or not the AHU required by the Petitioner is locally manufactured. Respondent No.2 has simply relied upon the statement of local manufacturers and totally disregarded the technical requirements of the Petitioner for the purposes of its business. The FBR offered an incentive by virtue of the SRO on the basis of which it gave a concession with respect to import of goods which were not locally manufactured. Clearly this is to encourage the local manufacturers. The SRO requires for the product to be locally manufactured and in this regard, Respondent No.2 must physically verify the manufacture of the product. Merely relying upon statements of manufacturers does not justify the position taken by EDB. Furthermore, the record shows that uptil 2009 the EDB itself acknowledged that the AHU was not locally manufactured. Although they claimed that this was a one time situation, which subsequently changed, they have not been able to show how they have reached this conclusion and whether they verified the statements of the local manufacturers.

9. Another aspect of this Court is that the EDB is misconceived in its understanding that the technical specifications of the equipment or the quality of the product are not relevant for the purposes of the SRO. The EDB is required to certify that a particular product is locally manufactured and in doing so it must understand the requirements of the Petitioner. The Petitioner is entitled to carry on its business in the best possible way and if a customized machine essential to its business has not been locally manufactured, Respondent No.2 was obligated to certify accordingly.

Merely relying on the statements of local manufacturers without physical verification of the technical and qualitative aspect was in disregard of their basic function which is to certify that the product is locally manufactured.

10. Under the circumstances, this petition is accepted. The EDB is directed to provide certificate to the Petitioner immediately that the product is not locally manufactured and the Respondents are directed to grant the benefit of stated SRO to the Petitioner in terms thereof.

SA/C-5/L Petition accepted.

P L D 2021 Lahore 483

Before Mrs. Ayesha A. Malik, J

SURAJ COTTON MILLS LIMITED through Adil Bashir and 8 others---Petitioners

Versus

FEDERATION OF PAKISTAN through Secretary and 2 others---Respondents

Writ Petition No. 35089 of 2020 (and other connected Petitions), heard on 19th February, 2021.

Oil and Gas Regulatory Authority Ordinance (XVII of 2002)---

----S. 8---Natural Gas Tariff Rules, 2002, R. 18---Pricing for retail consumers of natural gas---Advice of Federal Government for minimum price and sale price of natural gas---Mandatory nature of obligations cast under upon Oil and Gas Regulatory Authority (OGRA) and Federal Government under S.8 of Oil and Gas Regulatory Authority Ordinance, 2002---Scope---Petitioners impugned demand for arrears of charges for use of gas created by respondent OGRA on ground that such demand was based on tariff, which was notified in contravention of S.8 of Oil and Gas Regulatory Authority Ordinance, 2002 read with R. 18 of Natural Gas Tariff Rules, 2002; as Federal Government not render its mandatory advice on prescribed tariff, and thus demand for arrears based on impugned notification issued by OGRA was illegal---Validity---Oil and Gas Regulatory Authority per S.8 of Oil and Gas Regulatory Authority Ordinance, 2002 issues "prescribed price" whereas Federal Government notifies sale price and in event of failure of Federal Government to advise OGRA within stipulated time, OGRA was obligated to notify prescribed price, if higher, as sale price---Section 8 of Oil and Gas Regulatory Authority Ordinance, 2002 cast an obligation on Federal Government to issue its advice within 40 days on sale price and it also cast an obligation on OGRA to make a determination and issue a notification, when Federal Government does did not issue its advice in 40 days, and such statutory provisions were mandatory in order to ensure that process of notifying tariff and ensuring that licensee of natural gas received its revenue requirements was maintained---Upon failure of Federal Government to render advice, it was mandatory upon OGRA to notify prescribed price, if higher, as sale price in terms of S.8(4) of Oil and Gas Regulatory Authority Ordinance, 2002, and no such notification was issued in the present case---Petitioners however could not get benefit for such shortcomings and had no right to decide what tariff should be and if they were aggrieved during process of determination of tariff, a statutory remedy was available to them under Oil and Gas Regulatory Authority Ordinance, 2002---High Court observed that since determination of prescribed price and notification of sale price was an ongoing matter, setting aside sale price in impugned notification would give petitioners a benefit they were otherwise not entitled to---Constitutional petitions were dismissed, in circumstances.

Khalil-ur-Rehman and Anis-ur-Rehman for Petitioners (in W.Ps. Nos.35089/20, 36727/20, 128267/18, 40568/20, 37819/20, 43313/20, 35367/20 and 11921/21).

Malik Bashir Ahmad Khalid for Petitioners (in W.Ps. Nos.35355/20, 35357/20 and 35652/20).
Ms. Ambreen Moeen, DAG along with Usman Arif Rai, Deputy Director (Legal) in the office of Respondent No.1.
Mrs. Samia Khalid, Zarak Zaman Khan and Usman Sheikh for Respondent **OGRA.**
Anwaar Hussain for Respondent SNGPL (in W.Ps. Nos.35089/20, 36727/20, 128267/18, 37819/20, 43313/20, 35367/20, 11921/21, 35355/20, 35357/20 and 35652/20) along with Atif Rizwan, Law Officer and Muhammad Zia, Officer Regulatory Affairs in the office of Respondent No.3.
Imran Khan Klair for Respondent SNGPL (in W.P. No.40568/20).
Date of ghearing: 19th February, 2021.

JUDGMENT

MRS. AYESHA A. MALIK, J.---This common judgment decides upon the issues raised in the instant Petition along with connected Petitions, as detailed in Schedule "A" appended with the judgment, as all the Petitions raise common questions of law and facts. Through these Petitions, the Petitioners challenge the decision dated 6.7.2020 in Review proceedings passed by Oil and Gas Regulatory Authority ("OGRA") and Notification dated 31.8.2015 issued by OGRA being without jurisdiction and in violation of the Oil and Gas Regulatory Authority Ordinance, 2002 ("Ordinance") and Natural Gas Tariff Rules, 2002 ("Rules").

2. For the purposes of payment of arrears of gas tariff, the period in dispute is from 31.8.2015 to 30.12.2016 and the sector is general industry. The Petitioners are industrial concerns who have challenged the liability created for arrears of gas tariff on the basis of Notification dated 31.8.2015 for being against the mandate of the OGRA Ordinance and the Rules. The issue is whether the Petitioners are liable to pay arrears of gas tariff for the disputed period as determined by OGRA vide its decision dated 3.7.2014 at the rate of Rs.464.94 MMBTU or as per the impugned Notification at the rate of Rs.600 MMBTU.

3. The undisputed facts of the case are that the Respondent SNGPL filed its application for determination of its revenue requirements for the financial year 2014-15 before OGRA on 13.12.2013. A decision was rendered under Section 8(1) of the Ordinance on 3.7.2014 wherein the provisional tariff prescribed by OGRA for the financial year 2014-15 with effect from 1.7.2014 was Rs.464.94 MMBTU for general industry. OGRA sent this provisional price to the Federal Government in terms of Section 8(3) of the Ordinance for its advice. The Federal Government was required to render its advice within 40 days, however it failed to render its advice within the given time. Instead the advice was sent after a delay of 14 months whereafter the impugned Notification dated 31.8.2015 was issued and the sale price was notified at the rate of Rs.600 MMBTU.

4. The Petitioners' contention as narrated by the learned counsel is that Section 8(3) of the Ordinance clearly defines what is to happen in the event that the Federal

Government fails to advise the Authority within the prescribed 40 days' time. In such eventuality, it is the Authority which has to notify the sale price, as determined by it as per Section 8(1) and (2) in the official gazette. Therefore the case of the Petitioners' is that if the Federal Government fails to advise OGRA under Section 8 (3) of the Ordinance then OGRA notifies the price under Section 8(4) which is the relevant price due from the consumer for the disputed period. In these cases, the Petitioners' stance that they are liable to pay at the rate prescribed in the decision dated 3.7.2014 being Rs.464.94 MMBTU. Learned counsel further argued that the Petitioners have been made liable to pay arrears on account of the differential of Rs.464.94 MMBTU and Rs.600 MMBTU. Furthermore the Petitioners base their contentions on the judgment of the Hon'ble Sindh High Court dated 6.5.2016 passed in Suit No.1978/2015 titled Pakistan Beverage (Pvt.) Ltd. v. Federation of Pakistan and others wherein the impugned Notification was set aside.

5. Report and parawise comments have been filed by Respondent OGRA. In terms thereof, learned counsel argued that the sale price has been fixed in accordance with the requirements of the Ordinance as well as the Rules; that OGRA under the applicable legal framework determines the revenue requirements of gas under Section 8(1) and (2) of the Ordinance. The Federal Government under Section 8(3) issues its advice for the sale price for each category of retail consumer of natural gas. The advice of the Federal Government is binding on OGRA and the answering Respondents on the basis of the advice rendered, issued the impugned Notification on 31.8.2015. This price was made effective from 1.9.2015, meaning thereby that the Petitioners were liable to pay the tariff for gas at the rate of Rs.600 MMBTU from 1.9.2015. It is argued that the Petitioners from the date of determination dated 3.7.2014 till the issuance of the Notification of 31.8.2015 paid tariff at the rate of Rs.488.23 MMBTU as per Notification dated 1.1.2013. However on account of the advice of the Federal Government with effect from 1.9.2015 till the issuance of the next Notification for the next financial year being 2015-16 which came in December 2016, they are required to pay tariff at the rate of Rs.600 MMBTU. Learned counsel argued that the Authority has acted in accordance with law as per the advice of the Federal Government. She further argued that the sale price of 31.8.2015 is consistent with OGRA's determination dated 3.7.2014 as the price fixed on 3.7.2014 was the provisional price which had to be finalized on actual cost. This was done on 27.11.2015 when the final price fixed at the rate of Rs.528.19 MMBTU being higher than the price paid by the Petitioners. Hence even though there was a delay, the cost was kept in mind and consequent thereof Notification dated 31.8.2015 was issued. She also argued that against this Notification, the Petitioners had remedy of appeal under Section 12 of the Ordinance and review under Section 13 of the Ordinance. However, instead the Petitioners filed writ petitions which were then converted into reviews vide the orders of this Court before OGRA which ultimately decided the matter vide the impugned decision. This practice continued in several cases which were treated as reviews and decided by OGRA. Consequently OGRA in the review petitions decided that the Notification dated 31.8.2015 will be effective from 1.9.2015, hence the outstanding

amount statedly recoverable from the Petitioners is Rs.1.2 billion, which has to be paid. Hence she prays for dismissal of the petitions.

6. Report and parawise comments have also been filed on behalf of Respondent SNGPL. Learned counsel argued that there is no penal provision under the Ordinance in the event that the Federal Government does not issue a notification within the required 40 days; that non-advice from the Federal Government as required under Section 8(3) read with Rule 18(2) of the Rules does not render the impugned Notification dated 31.8.2015 as illegal. Learned counsel argued that as per Section 8(4) of the Ordinance in the event of failure of the Federal Government to render its advice within the stipulated 40 days, OGRA is empowered to notify the price. However it did not issue any notification until 31.8.2015. Learned counsel further argued that the provisions of the Ordinance in Section 8 are directory; that OGRA has no control over the actions of the Federal Government and that at the given time the tariff was fixed as per the requirement for the financial year 2014-15. Furthermore the tariff of Rs.600 MMBTU has never been challenged for the subsequent years, hence the instant challenge is hit by laches. He also stated that the Petitioners did not challenge the notified sale price as per law and instated filed petitions before this Court and obtained stay orders so as to stop making payments which they were obligated to pay. Hence these petitions are liable to be dismissed being devoid of any merit.

7. Heard. The basic dispute is with reference to Section 8 of the Ordinance and Rule 18 of the Rules which are reproduced as under:
Section 8 of the Ordinance

8. Pricing for retail consumers for natural gas.---(1) The Authority shall determine an estimate of the total revenue requirement of each licensee for natural engaged in transmission, distribution and the sale of natural gas to a retail consumer for natural gas, in accordance with the rules, and on that basis advise the Federal Government the prescribed price of natural gas for each category of retail consumer for natural gas.
(2) A licensee for natural gas referred to in subsection (1), shall submit for review by the Authority its total revenue requirement after incorporating the actual changes in the well-head prices, as notified by the Authority and other relevant factors and the Authority shall advise the Federal Government promptly of the revised prescribed prices for the licensee for natural gas.
(3) The Federal Government shall, within forty days of the advice referred to in subsections (1) and (2), advise the Authority of the minimum charges and the sale price for each category of retail consumer for natural gas for notification in the official Gazette by the Authority of the prescribed price as determined in subsections (1) and (2), the minimum charges and the sale prices for each category of retail consumers for natural gas.
(4) If the Federal Government fails to advise the Authority within the time specified in subsection (3) and the prescribed price for any category of retail consumer for natural gas determined under subsections (1) and (2) is higher than the most

recently notified sale price for that category of retail consumers for natural gas, the Authority shall notify in the official Gazette the prescribed price as determined by the Authority under sub-sections (1) and (2) to be the sale price for the said category of retail consumers for natural gas.

(5) Each licensee for natural gas shall pay to the Federal Government the development surcharge in respect of each unit of natural gas sold during the calendar month within two months of the close of that month and any amount paid by a licensee under this subsection shall be an expenditure for which allowance shall be made in computing profits or gains under section 23 of the Income Tax Ordinance, 1979 (XXXl of 1979);

Provided that when the Income Tax Ordinance, 2001] (XLIX of 2001), comes into force the provisions of the said Ordinance shall apply for the purposes of this subsection.

(6) In this section:-

(a) "category of retail consumers for natural gas" means a category of retail consumers for natural gas designated as such by the order of the Federal Government;

(b) "development surcharge" means the amount payable by each licensee for natural gas and calculated in accordance with the rules and which represents, in respect of each category of retail consumer for natural gas to which it is applicable, the amount, if any, by which the sale price exceeds the prescribed price;

(c) "licence for natural gas" means a licence for transmission, distribution or sale of natural gas to a retail consumer for natural gas granted pursuant to subsection (1) of section 23;

(d) "licensee for natural gas" means a holder of a license for natural gas;

(e) "minimum charges" means the amount a licensee for natural gas may charge a retail consumer for natural gas as notified, from time to time, under this section;

(f) "prescribed price" means the amount determined under this section, which represents the amount a licensee for natural gas would be entitled to receive from each category of its retail consumers for natural gas in order to achieve its total revenue requirement;

(g) "sale price" means the price notified under this section at which a licensee for natural gas is authorised under this Ordinance and licence to sell natural gas to that category of retail consumer for natural gas;

(h) "total revenue requirement" means for each financial year, that total amount of revenue determined by the Authority for each licensee for natural gas so as to ensure it achieves the rate of return provided in its licence for natural gas.

Rule 18 of the Rules

18. Pricing for retail consumers for natural gas.---(1) As soon as may be but no later than three days of each determination by the Authority of the total revenue requirement of a licensee, the Authority shall advise the Federal Government the price which should apply to each category of retail consumers for natural gas of that licensee.

(2) The Federal Government shall consider the Authority's determination referred to in sub-rule (1) and as soon as may be but no later than forty days of receiving the same, advise the Authority of the minimum charges and the sale price for each

category of retail consumers for natural gas which shall apply in relation to that licensee.
(3) The Authority shall, as soon as may be but no later than three days of receiving the advice from the Federal Government, notify, in the official Gazette, the price applicable to a licensee and the minimum charges and maximum sale prices which that licensee shall be permitted to charge each category of its retail consumers for natural gas.
(4) If the Federal Government fails to advise the Authority within time specified in sub-rule (2) and the price for any category of retail consumers for natural gas determined by the Authority under sub-rule (1) is higher than the most recently notified sale price for each category of retail consumers for natural gas, the Authority shall notify, in the official Gazette, the price as determined by the Authority under sub-rule (1) to be the sale price for said category of retail consumers for natural gas.
(5) No licensee shall charge any consumer, for the supply of natural gas, any sale price or minimum charge other than the sale price or minimum charge notified by the Authority pursuant to these rules and publicized by the licensee in the print and electronic media.
(6) Licensees shall be entitled to charge each retail consumer for natural gas the applicable minimum charges notified by the Authority pursuant to these rules notwithstanding that no gas has been taken by such retail consumer during the period for which such minimum charges are levied.
As per provisions of the Ordinance and the Rules, OGRA makes a determination of the estimated revenue required by a licensee for natural gas and issues the prescribed price for each licensee for a given fiscal year. The prescribed price is the amount determined which represents the amount a licensee is entitled to receive from each category of its retail consumer of natural gas in order to achieve its total revenue requirements. OGRA is then required, not later than three days of each determination, to seek advice from the Federal Government with reference to the sale price for each category of retail consumer of natural gas. The sale price is the price notified under Section 8 which a licensee for natural gas is entitled to recover against each category of retail consumer. Hence important to note is that OGRA issues the prescribed price while the Federal Government notifies the sale price. In the event of failure of the Government to advise the Authority within the stipulated time and the prescribed price for each category of retail consumer is higher than the most recently notified sale price for that category, then OGRA is required to notify the prescribed price as determined by the Authority under Section 8(1)(2) of the Ordinance to be the sale price for the said category. Meaning thereby that if the Federal Government fails to render its advice, then OGRA has to make a determination whether the prescribed price from the previous notification is the same or whether the prescribed price has gone up. In the event that the prescribed price has gone up, OGRA is required to notify that price to be the sale price. Hence Section 8 casts an obligation on the Federal Government to issue its advice within 40 days on the sale price and it also casts an obligation on OGRA to make a determination and issue a notification where the Federal Government does not issue its advice in 40 days. Section 8 in itself is a comprehensive provision. All

provisions being mandatory ensure that the process of notifying the tariff and ensuring that the licensee of natural gas receives its revenue requirements is maintained.

8. In these cases essentially a dispute has arisen on the understanding of Section 8(4) of the Ordinance. Although the Petitioners have relied on the judgment of the Hon'ble Sindh High Court at Karachi where the notification of 31.8.2015 was set aside. Certain aspects of Section 8, namely the obligation of OGRA under Section 8 and the distinction between the prescribed price and the sale price was not considered in the judgment of the Hon'ble Sindh High Court. As per the said judgment, the Notification of 31.8.2015 was based on the delayed advice of the Federal Government and although the advice was placed before the Court, it was not accepted for being technical in nature issued by some third party and not by the Federal Government. Hence the case was decided in favour of the consumers and the Notification dated 31.8.2015 was set aside.

9. This gave rise to litigation as the Petitioners who originally did not challenge the Notification of 31.8.2015 nor did they challenge the prescribed price issued by OGRA on 3.7.2014 or the final prescribed price for the fiscal year 2014-15 issued by OGRA on 27.11.2015 filed petitions to challenge the Notification of 31.8.2015. It is important to note that the provisional revenue requirement for the year 2014-15 was decided on 3.7.2014. Thereafter a final determination was made on 27.11.2015 which increased the tariff from Rs.464.94 MMBTU to Rs.528.19 MMBTU. Against this final determination, the Respondent SNGPL filed a review which was disposed of on 26.10.2016. Importantly the Petitioners did not challenge the final determination and did not challenge the review determinations for the year 2014-15. The Petitioners therefore did not avail the remedy available under the Ordinance in the form of an appeal and review, which is presumed that they had no objection to the final determination of Rs.528.19 MMBTU. It is only after the decision of the Hon'ble Sindh High Court in Suit No.1978/2015 dated 6.5.2016 that the Petitioners filed writ petitions praying therein that the impugned Notification dated 31.8.2015 is against the mandate of the law. Throughout this period the Petitioners were paying gas tariff as notified on 1.1.2013 being Rs.488.23 MMBTU.

10. So far as the revenue requirements for the fiscal year 2014-15 are concerned, they were finalized as of 27.11.2015 and any increase in the sale price of the tariff vide the impugned Notification was based on the advice of the Federal Government. In this regard, it is noted that even though the Federal Government was required to issue its advice against the provisional determination and the revenue requirements for the fiscal year 2014-15 within 40 days of having received the revenue requirements determined on 3.7.2014, OGRA continued to charge tariff at the rate of Rs.488.23 MMBTU until 31.8.2015 which then notified the sale price. So until 31.8.2015 admittedly no grievance is made out against the amount that the Petitioners are liable to pay. The Notification of 31.8.2015 was made effective from 1.9.2015 which the Petitioners are required to pay until the issuance of the next Notification dated 30.12.2016 for which the tariff was at Rs.600 MMBTU being the

notified sale price. Hence the dispute is limited for the period from 1.9.2014 to 31.8.2015 and the question is what price are the Petitioners liable to pay as the sale price for the gas tariff for the disputed period.

11. Gas tariff is determined under Section 8 of the Ordinance. The Petitioners want to pay the prescribed price of Rs.464.94 as decided on 3.7.2014. However this amount only reflects the prescribed price as determined by OGRA. The Petitioners have to pay the sale price as notified under Section 8 of the Ordinance. Section 8(4) requires OGRA to notify a sale price where the Federal Government does not issue its advice on time. As per the section OGRA shall notify the prescribed price as the sale price, where the prescribed price is higher than the most recently notified sale price. In these cases, the prescribed price was Rs.464.94 MMBTU and the most recent sale price was Rs.488.23 MMBTU which means that as per Section 8(4) of the Ordinance, since the prescribed price was less than the notified sale price, OGRA did not issue any notification and the Petitioners continued to pay Rs.488.23 MMBTU. During this period the revenue requirements for the year 2014-15 was finalized on 27.11.2015 at Rs.528.19 MMBTU, which became the baseline for the estimated revenue requirements for the next fiscal year being 2015-16. The Petitioners did not object to this baseline. On 30.12.2016 the notified sale price was Rs.600 MMBTU for the industrial sector and it remained the same in 2017 as well. The Petitioners did not agitate against the notified sale price. This aspect of the matter is important because tariff is determined first on the basis of estimated revenue requirements and then on actual costs. The Federal Government also plays a role as it makes an effort to balance all socio-economic factors and ensure that there is uniform sale price throughout the country. Hence the advice of the Federal Government is mandatory so far as Section 8 of the Ordinance is concerned because a sale price is required. OGRA has placed on file and the Federal Government does not dispute the same that several reminders were issued by OGRA that the Federal Government follows the 40 day requirement and issue its advice. Since they failed to issue the advice, the notified sale price from 2013 continued. The problem which arises in reading Section 8(3) and (4) is that if the Federal Government fails to render its advice in 40 days there is no sale price for each category of retail consumer for natural gas for that relevant fiscal year. OGRA can only issue the prescribed price under Section 8 of the Ordinance for any category of retail consumer and it is that prescribed price which can become the sale price, if it is higher. So while the 40 days requirement is mandatory, the issuance of a notified sale price is also necessary. Section 8(4) states that OGRA can notify the prescribed price to be the sale price for this period. However, OGRA also did not issue any notification under Section 8(4) of the Ordinance.

12. The question is whether the Petitioners get the benefit of the default of the Federal Government and OGRA. To my mind, the Petitioners do not get this benefit on account of the fact that the Petitioners did not challenge the prescribed price issued by OGRA on 3.7.2014 and the final price issued by OGRA on 27.11.2014 for the fiscal year 2014-15 and the notified sale price on 30.12.2016. After a considerable delay, the Petitioners filed writ petitions before the Lahore High Court,

Multan Bench and originally obtained interim orders, restraining them from paying the notified price as per the Notification dated 31.8.2015 and then sought a direction to treat their petitions as reviews before OGRA for the purposes of the notified sale price in the impugned Notification dated 31.8.2015. This fact is relevant because until the filing of the writ petitions, the Petitioners continued to pay at the notified rate of Rs.600 MMBTU as per Notification dated 31.8.2015 and there is no objection against doing so. After the decision of the Hon'ble Sindh High Court at Karachi on 6.5.2016, they challenged the Notification and stopped making payments. They then appeared before OGRA in the form of a review which remedy they never availed during the time it was available to them. Nonetheless they were heard and as their contentions were not made out, the reviews were dismissed. Now although the Federal Government and OGRA should have been compliant with Section 8 of the Ordinance, it is important to note that the entire purpose of Section 8 is to ensure that the tariff is determined and notified in a timely manner for the benefit of all concerned. The Petitioners have no right to decide what the tariff should be for any particular fiscal year on the basis of which they can file constitutional petitions. Tariff determination is a lengthy process which requires many factors to be considered. If at all they were aggrieved during the process of determination of the prescribed price, remedy was available to them under the Ordinance.

13. The Petitioners are aggrieved because they are required to pay arrears of the tariff for the period they obtained restraining orders from the Court. The Petitioners want to pay at the rate of Rs.464.94 MMBTU as opposed to the notified rate of Rs.600 MMBTU. In this regard, the Petitioners were unable to explain why they should be required to pay at the rate of Rs.464.94 MMBTU when they were paying at the rate of Rs.488.23 MMBTU as notified on 1.1.2013. Furthermore the final tariff for the year 2014-15 was Rs.528.19 MMBTU as determined by OGRA. Hence there is no logic in seeking to pay Rs.464.94 MMBTU. The very basis of the Petitioners' contention is neither reasonable nor as per the mandate of the Ordinance. Furthermore the Petitioners continued to pay as per Notification dated 31.8.2015 (impugned Notification) at the rate of Rs.600 MMBTU and as per Notification dated 30.12.2016 at the rate of Rs.600 MMBTU until the change in the sale price vide Notification dated 4.10.2018 came into force which rose to Rs.780 per MMBTU. Hence the record shows that from the date of the impugned Notification dated 31.8.2015 the Petitioners paid at the rate of Rs.600 MMBTU and maintained this price until the notification of 4.10.2018 when the sale price went up. Therefore, the Petitioners cannot justify seeking to pay the prescribed price of Rs.464.94 MMBTU which in fact was never the notified sale price. As per Section 8 of the Ordinance, the retail consumer of natural gas has to pay the sale price as notified by the Federal Government or in exceptional circumstances by OGRA.

14. In this regard, although it has been directed that the provisions of Section 8 of the Ordinance are mandatory and should be complied with, both the Federal Government and OGRA have narrated their short-comings for this time in which they were unable to comply with the requirements of Section 8. Since the

determination of the prescribed price and notification of the sale price is on-going matter, setting aside the sale price of Rs.600 MMBTU would in fact give the Petitioners a benefit they were otherwise not entitled to.

15. In view of the aforesaid, no case for interference is made out. All the Petitions are dismissed.

Schedule-A

Details of Writ Petitions mentioned in judgment

Dated 19.2.2021 passed in W.P. No. 35089/2020

Sr. Nos.	W.Ps. Nos.	Parties Name
1.	35089/20	Suraj Cotton Mills Ltd. etc. v. Federation of Pakistan etc.
2.	35367/20	Mehmooda Maqbool Mills Limited etc. v. Federation of Pakistan etc.
3.	128267/18	Allahwasaya Textile and Finishing Mills Limited etc. v. Federation of Pakistan etc.
4.	36727/20	Bilal Textile Private Limited v. Federation of Pakistan etc.
5.	43313/20	Shujabad Weaving Mills Limited v. Federation of Pakistan etc.
6.	37819/20	Ahmed Oriental Textile Mills Limited etc. v. Federation of Pakistan etc.
7.	40568/20	Karam E Kareem Spinning Mills Private Limited v. Federation of Pakistan etc.
8.	35357/20	Tanveer Spinning and Weaving Mills Limited etc. v. Federation of Pakistan etc.
9.	35652/20	Azgard Nine Limited v. Federation of Pakistan etc.
10.	35355/20	Idrees Textile Mills Limited etc. v. Federation of Pakistan etc.

KMZ/S-116/L Petitions dismissed.

PLJ 2021 Lahore 583
Present: **MRS. AYESHA A. MALIK, J.**
QAISAR ABBAS--Petitioner
versus
MEMBER (TAXES), BOARD OF REVENUE, PUNJAB, LAHORE etc.--Respondents
W.P. No. 25557 of 2019 etc., decided on 12.7.2019.

Punjab Agricultural Income Tax Act, 1997--

----Ss. 3-B & 7--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Common questions of law and facts--Recovery notices of agricultural income tax--Barred by time--Recovery could not beyond two years--Question of--Whether recovery notices issued were barred by time and whether as consequence of recovery notices issued u/S. 3-B of Act, petitioners were entitled to file appeal objections against amount sought to be recovered--Determination--Recovery notices issued under Section 3B of Act shall be deemed as assessment orders which are liable to appeal under Section 7 of Act--Respondents are obligated to hear objections and decide same in accordance with law--For purposes of cases pending before this Court and recovery undertaken by Respondents for agricultural income tax, Petitioners should be granted thirty days' time to file their appeals/objections, if at all under Section 7 of Act after which cases shall be decided in accordance with law and subsequently if any amount is due Respondents may recover same under Act and Rules--Petitioners' contention that demand for agricultural income tax for year 2012 and 2013 is barred by time is without any merit given that august Supreme Court of Pakistan has allowed recover of agricultural income tax for that period--However, amount sought to be recovered as agricultural income tax for period 2012 and 2013 is subject to right of appeal/objections which may be availed by Petitioners within 30 days' time from date of release of this judgment--It is also held that against recovery notices issued under Section 3B of Act, remedy of appeal is available to Petitioners under Section 7 of Act--Recovery notices can be challenged within 30 days' time from date of release of this judgment under Section 7 of Act before competent authority, who is directed to decide appeals filed by Petitioners within '30.days' time after which Respondents can recover agricultural income tax from petitioners as per law.
[Pp. 592 & 593] A & B

Rai Muhammad Yaseen, Ch. Muhammad Mohsin Virk, Mrs. Samia Khalid, Sayyid Ali Imran Rizvi, Mr. Masood Ahmad Wahla, Rana Sajid Rasool, Malik Muhammad Shahbaz Awan, Malik Rizwan Khalid Awan, Mr. Masood Ahmad Zafar, Sh. Muhammad Akram, Ch. Rehmat Ali and Mr. Muhammad Saleem Chaudhary, Mr. Touqeer Khalil, Mr. Muhammad Akram Awan, Ch. Imtiaz Ahmad Kamboh, Mr. Wajahat Abbas Khan, Mr. Imtiaz Hussain Khan Baloch, Mr. Shahjahan Khan, Mr. Salman Faisal, Mr. M.A. Ghaffar-ul-Haq, Mr. Shan Saeed Ghumman, Mr. Shamshad Ahmad Bajwa, Ms. Sufia Qazi and Mr. Hassan Majeed, Rana Salman Intizar, Mr. Imdad Ali Nekokara, Mian Subah Sadiq Klasoon, Mr. Ghulam Murtaza,

Mr. Mughees Ahmad Khokhar, Mian Shahid Ali Shakir and Mian Faisal Naseer, Mr. Muhammad Ozair Chughtai, Ch. Shakeel Gondal, Rana Sarfraz Ahmad, Mr. Khalid Mehmood Khan, Rana Kashif Iqbal, Rana Muhammad Afzaal, Mian Nasir Mehmood Wattoo, Mr. Niaz Ahmad Phularwan, Mian Khuram Sadiq, Rana Mushtaq Ahmad Toor, Mr. Muhammad Anas Bin Ghazi, Mr. Muhammad Arif Malhi, Mr. Javed Iqbal Kahloon, Mr. Muhammad Ishnaq Saho, Mr. Zia Haider Rizvi, Mr. Sajjad Haider Rizvi, Syed Qasim Ali Kasuri, Mr. M. Aurangzeb Khan Daha, Mr. Farhan Shahzad, Ch. Shahid Hanif Jatt, Mian Shahzad Siraj Chabay, Mr. Waqar Mushtaq, Ch. Muhammad Imran Rafique, Mr. Ehsan Ullah Ranjha, Mr. Inaam-ul-Haq Faiz Bhatti, Mr. Hammad-ul-Hassan Hanjra, Mr. Nauman Aziz, Rana Sohail Ashraf, Mr. Muhammad Ajmal Khan, Mr. Babar Niaz Dhaddar, Mr. Muhammad Zafar Iqbal Mian, Mr. Waseem Ahmad Malik, Mr. Muhammad Ahmad Bhatti, Mr. Muhammad Naeem Munawar, Rana Tasgheer Ahmad Khan, Ch. Shoukat Ali, Mr. Muhammad Akram Sheikh, Mr. Muhammad Shabbir Sanpal, Rana Kashif Iqbal, Mr. Muhammad Waqar Akram, Ch. Qamar-uz-Zaman, Mr. Hashim Aslam Butt, Mr. Rasheed Ahmad Sheikh, Mr. Muhammad Rehan Sarwar, Mr. Muhammad Shabbir Sial, Mr. Muhammad Saqib Sheikh, Mr. M. Safdar Abbas Khan, Mr. Shakeel Ahmad Basra, Mian Mansoor Ahmad, Mr. Muhammad Ayyub Aheer, Rai Amer Ijaz Kharal, Pir Muhammad Asharf Chishti, Ch. Muhammad Jehangir Wahla, Mr. Abdul Khaliq Safrani, Mr. Touseef Riaz Ghumman, Mr. Ghulam Mustafa Khan, Mr. Abdul Waheed Habib, Mr. Abdul Rauf Chaudhary, Mr. Muhammad Farooq Sheikh, Sardar Muhammad Ramzan, Sardar Muhammad Sadiq Tahir, Mr. Sajid Hussain Chaudhary, Mr. Farid Adil Chaudhary, Mr. Abdul Razzaq, Mr. Saleem Raza Asim, Mr. Sagheer Ahmad, Mr. Muhammad Imran Khan, Mr. Rabeel Qader, Mr. Muhammad Naveed Shabbir Goraya, Mr. A.S. Arieen, Mr. Ijaz Ali Bhatti, Mr. Muhammad Waqas Latif, Mr. Javed Anwar Janjua, Hafiz Ansar-ul-Haq, Mr. Muhammad Younas Khalid, Mr. Ali Husnain Buttar, Mr. Hamza Shahid Buttar, Ch. Muhammad Shakeel, Rai Akhtar Suleman, Mian Haseeb-ul-Hassan, Ch. Shabbir Hussain, Rai Muhammad Shahbaz Bhatti, Mr. Aurangzeb Chaudhry, Mr. Shahid Mehmood Khan Khilji, Ch. Basharat Ali, Mian Mansoor Ahmad, Ms., Nargis Naheed, Mian Muhammad Javed, Mr. Nasir Ahmad Awan, Mr. Muhammad Ahmad Pansota, Syed Zeeshan Haider Zaidi, Mr. Azeem Hafeez, Mr. Muhammad Younas Khalid, Mr. Shahzad Mansoor Khan, Mr. Muhammad Aamir Qadeer, Mian Shahid Ali Shakir, Mr. Muhammad Imran, Ch. Muhammad Shakeel Gondal, Ch. Nayyar Jamal, Mr. Abdul Razzaq, Mr. Saad Rasool, Sh. Sakhawat Ali, Mr. Zahid Imran Gondal and Mr. Farrukh Ilyas Cheema, Malik Muhammad Azam Awan, Mian Muhammad Hussain Chotiya, Barrister Aon Abbas Khan Sial, Malik Muhammad Riaz Tabassum, Mr. Najam-ul-Hassan, Mr. M. Zafar Iqbal, Malik Muhammad Nadeem, Malik Bashir Ahmad Khalid, Ch. Khalid Masood, Mr. Muhammad Yousaf Lurka, Mehar Mohsin Ali, Mr. Fida Hussain Matta, Mr. Jamil Akhtar Baig, Malik Muhammad Arshad Kundi, Syed Waqar Hussain Naqvi, Mr. Muhammad Asad Shah Advocates for Petitioners.

Mr. Akhtar Javed, Additional Advocate General, Punjab along with Nadeem Abbas Bhangu, Secretary (Taxes), Board of Revenue, Lahore, Ijaz Bhutta, Deputy Secretary (Recovery), Board of Revenue, Lahore, Muhammad Haroon Rasheed, Tehsildar, Kot Radha Kishan, District Kasur, Azam Shaigan, Tehsildar Cantt.

Lahore, Mr. Ahmad Raza Sultan, Tehsildar, Renala, Mian Aslam, Tehsildar, Pir Mahal, Ghulam Abbas, Naib Tehsildar, Jhang, Muhammad Ashraf, Naib Tehsildar, Pakpattan, Rana Amjad Mehmood, Tehsildar Depalpur and Mr. Ghulam Rasool, Naib Tehsildar, Pindi Bhattian for Respondents.
Mr. Sarfraz Ahmad Cheema, Advocate for Respondent (FBR in W.P. No. 34464 of 2019).
Mrs. Kausar Parveen, Advocate for Respondent (FBR in W.P. No. 32452/19 and 38264 of 2019).
Mr. Shahzad Ahmad Cheema, Advocate for Respondent (FBR in W.P. No. 38264 of 2019).
Mr. Muhammad Akram Awan, Advocate for Respondent (FBR in W.P. No. 31707 of 2019).
Mr. Javed Athar, Advocate for Respondent Commissioner Inland Revenue, Lahore in W.P. No. 30455/19.
Date of hearing: 27.6.2019.

JUDGMENT

This common judgment decides upon the issues raised in the petitions detailed in Schedule **"A"** appended with the judgment as all petitions raise common questions of law and facts. The Petitioners have challenged notices issued under Section 3B of the Punjab Agricultural Income Tax Act, 1997 (**"Act"**) by the Respondents for recovery of agricultural income tax.

2. The basic case of the Petitioners is the same. They have received notices of recovery of agricultural income tax for the assessment years 2012, 2013, 2014, 2015, 2016, 2017 and 2018. The Petitioners' contention is that these notices are barred by time as the Respondents cannot recover agricultural income tax beyond the two year limit prescribed, meaning thereby that if notices are issued in the year 2019, the Respondents can only recover agricultural income tax for the assessment year 2016-17 and 2017-18. It is also their contention that the Respondents have issued recovery notices on the basis of which they seek immediate recovery which denies the Petitioners the right to appeal as prescribed under the law. It is also their case that the amount sought to be recovered is not in accordance with law and the Respondents have failed to take into consideration factors such as that the Petitioners have not declared agriculture income tax in the returns filed by them or that they have not filed any income tax return; exemptions granted to the Petitioners by the Government of Punjab on account of flood and drought have not been considered; the fact that the Petitioners to whom the notices have been issued are not the owners of the property, hence not liable to pay the agricultural income tax; that the tax has already been paid or simply that the amounts sought to be collected have been miscalculated and are excessive amounts than the actual liability, if any, of the Petitioners. Some of the petitions have also alleged lack of jurisdiction of the Respondents as the subject land is not located in the Province of Punjab or the district. It is their contention that under the Act, the Petitioners are entitled to the right of appeal in terms of Section 7 of the Act which right cannot be exercised if the Respondents issue recovery notices without passing an assessment order. It is

also their case that in the very least, the Respondents must hear the objections of the Petitioners with respect to the amounts sought to be recovered so as to ensure that if at all there is any liability for any assessment year, then the Petitioners are made liable to pay amounts that are due from them and not otherwise.

3. Report and parawise comments have been filed on behalf of the Respondents. Learned Law Officer stated that report and parawise comments filed in some of the petitions may be read into all the petitions as the grounds stated in the petitions are essentially the same. He stated that the Deputy Secretary (Recovery), Board of Revenue, Punjab *vide* letter dated 19.2.2019 and the Secretary (Taxes), Board of Revenue, Punjab *vide* letter dated 20.3.2019 brought to the notice of all Assistant Commissioners in Punjab that the august Supreme Court of Pakistan *vide* judgment dated 8.1.2019 titled *Member (Taxes), Board of Revenue. Punjab. Lahore and others v. Qaisar Abbas and others* (2019 SCMR 446) has allowed Assistant Commissioners to collect agricultural income tax from the persons who have declared agricultural income in their returns filed under the income Tax Ordinance, 2001 ("**Ordinance**") in terms of Section 3B of the Act. As per their understanding, Section 3B read with Section 4(4) of the Act allows the Respondents to recover agricultural income tax for the assessment year 2012 onwards. Learned Law Officer argued that in terms of the dicta laid down by the august Supreme Court of Pakistan in 2019 SCMR 446 (**supra**) the Respondents are not required to levy or assess agricultural income tax rather they can issue notices for direct recovery against income declared. Hence notices were issued for payment within 15 days. He further argued that after the expiry of 15 days amounts can be recovered as arrears of land revenue as provided under the Punjab Agricultural Income Rules, 2001 ("Rules"). In order to facilitate the objective to recover all amounts due as agricultural income tax, the Board of Revenue obtained a list of persons who have declared agricultural income in their returns for the tax year 2012-13 and 2013-14 onwards. The lists were consulted and on the basis of the data provided, district-wise lists were issued to the field formations for issuance of recovery notices. Hence he stated that the data provided in the notices is correct and as per the declarations made by the Petitioners in their income tax returns with respect to agricultural income tax. Therefore, the notices are not barred by time as the matter has just been decided by the august Supreme Court of Pakistan in 2019 SCMR 446 (supra). The learned Law Officer argued that in terms thereof, the Respondents are entitled to recover agricultural income tax for the year 2012 onwards.

4. In terms of the arguments made from both sides, there are two issues which need adjudication. The first issue is whether the recovery notices issued are barred by time and secondly whether as a consequence of the recovery notices issued under Section 3B of the Act, the Petitioners are entitled to file an appeal/objections against the amounts sought to be recovered. With respect to the first issue, the august Supreme Court of Pakistan in 2019 SCMR 446 (supra) considered whether notices issued for the assessment year 2014 for recovery of agricultural income tax under Section 3B of the Act could have been issued at that time, given that Section 3B was inserted through the Finance Act on 29.6.2013 and came into force on

1.7.2013. As per the judgment the relevant assessment year began on 1.7.2014, in terms of the definition of the assessment year given in Section 2(ac) of the Act. The august Supreme Court of Pakistan concluded that the Respondents could recover agricultural income tax for the past two years, being the assessment year 2012 and 2013. Hence in terms of the decision of the august Supreme Court of Pakistan, the Respondents are entitled to recover, as arrears of agricultural income tax for the assessment year 2012 and 2013. In this regard, it is noted that earlier notices were issued to the Petitioners including the Petitioner Qaisar Abbas in the instant petition, which were challenged before this Court in W.P. No. 15628/2015 and ultimately the order of this Court dated 26.10.2015 was modified by the august Supreme Court of Pakistan to the extent that recovery for the year 2012 and 2013 was allowed. Hence it is clear that in terms of the decision of the august Supreme Court of Pakistan, the Respondents are entitled to recover agricultural income tax for the assessment year 2012 and 2013.

5. The dispute before the Court is due to the fact that the Respondents initiated a fresh process to recover agricultural income tax on the basis of which fresh notices were issued in 2019 for recovery of agricultural income tax for the year 2012 and 2013. Hence the Petitioners before the Court have raised the objection of limitation. Essentially the Respondents were required to issue recovery notices for the year 2012 and 2013 based on the *original notices* issued in the year 2014 for the assessment year 2012 and 2013 which were challenged in W.P. No. 15628/2015 and connected petitions and by referring to the decision of the august Supreme Court of Pakistan, notifying the Petitioners that they are now liable to pay the said amounts as the august Supreme Court of Pakistan has decided in favour of the Revenue Department. The fact that the Respondents did not mention the decision of the august Supreme Court of Pakistan in the notices issued in 2019 nor have they mentioned that the demand raised is as per the original demand raised in 2014, has led to confusion consequent to which so many petitions have been filed before the Court.

6. On this issue, the learned Law Officer was confronted with the notices issued in 2019 and was asked to explain whether the data contained in these notices are identical to the data contained in the original notices issued in 2014 for the assessment year 2012 and 2013. In terms of the detailed reply and list provided, he states that the data is the same and it is based on the information provided by the Petitioners in their income tax returns as obtained from the Federal Board of Revenue. Therefore it is his contention that for the purposes of the petitions before the Court, the Respondents are entitled to recover agricultural income tax for the assessment year 2012 and 2013 on the strength of the decision of the august Supreme Court of Pakistan. To this extent, the contention of the learned Law Officer is correct and the Respondents are entitled to recover agricultural income tax based on the original notices issued in 2014. However any recovery will be subject to the right of appeal under Section 7 of the Act. So far as to the recovery notices issued for the assessment year 2014, 2015 and 2016 the question of limitation has to be looked into in the first instance before any recovery can be

made. It is also noted that since right of appeal is available under the Act, propriety demands that the objection of limitation be decided by the competent authority under the Act in order to streamline the process of recovering agricultural tax. Hence the second issue becomes relevant on whether the Petitioners can file objections/appeal against the recovery notices.

7. The Petitioners have a right of appeal against the amounts sought to be recovered under Section 7 of the Act which provides that for the purposes of appeal, review or revision, an order passed under this Act shall be deemed to be an order of a Revenue Officer within the meanings of Sections 161, 162, 163 and 164 of the Punjab Land Revenue Act, 1967, provided that proceedings of *suo motu*, review or revision of an order in respect of any income year shall not be initiated after the expiration of two years from the end of the assessment year in which the total agricultural income of the said income year was first assessable. In any taxing scheme the right of appeal is provided under the law to resolve disputes of liability to pay tax. The right of appeal is a statutory right under the Act which means that any recovery is subject to the right of appeal.

8. In the cases before the Court several objections have been raised with respect to jurisdiction being that the notices issued have not been issued from the Assistant Commissioner of the relevant district where the agricultural property is located. By way of example in W.P. No. 34758/19, the Petitioner is resident of District Sheikhupura whereas the notice has been issued by Assistant Commissioner, Lahore. In W.P. No. 39480/19, the Petitioner is resident of District Narowal whereas the agriculture land is situated in North Wazirastan. In other cases objections have been raised that the Petitioners do not own any agricultural land nor have the Petitioners declared any agricultural income or that the Petitioner has never filed any income tax return. By way of example in W.P. No. 40004/19, the Petitioner claims that she is a housewife with no source of income except for foreign remittance from a family member; that she has never filed any income tax return nor declared any agricultural income yet she has been served with a recovery notice. In another set of cases, the Petitioners claim exemption on the basis of notification issued by the Disaster Management Department declaring their area exempt from agricultural income tax for the relevant years 2012, 2013, 2014, 2015 and 2016. Hence on the strength of the notifications they claim that they are not liable to pay agricultural income tax. By way of example, the Petitioner in W.P. No. 39556/19 states that he is entitled to exemption from agricultural income tax on the basis of notification dated 23.5.2012, 28.7.2016, 2.6.2017 and 21.1.2019. In another set of petitions, the Petitioners claim that they are not the owners of any agricultural land nor have they declared any agricultural income in their income tax returns yet they have been served with recovery notices. In W.P. No. 36974/2019, the Petitioner claims that he has never filed any income tax returns, hence the question of applying Section 3B of the Act is totally without jurisdiction. In other cases, the Petitioners claim that they have already paid the total agricultural income tax yet notices have been issued. By way of example in W.P. No. 36709/2019, the Petitioner claims that he has paid the total agricultural income tax for the years

2015, 2016, 2017 and 2018, hence he is not required to pay any amount. In another set of petitions, the Petitioners' claim that they took the benefit of amnesty scheme, 2018, hence they are not liable to pay agricultural income tax. These are all substantive issues which need resolution under the Act before any recovery can be initiated.

9. On the basis of the aforesaid, it is evident that notwithstanding the statement made by the learned Law Officer, that all amounts were correctly taken from the data provided by the Federal Board of Revenue is correct, there are discrepancies in the recovery notices that have been issued. The question is what is the effect of Section 7 of the Act when recovery notices are issued under Section 3B of the Act. In this regard, the august Supreme Court of Pakistan in its decision 2019 SCMR 446 (supra) held that for the purposes of Section 3B of the Act, where an assessee has declared agricultural income in its income tax returns, the Respondents can issue recovery notices directly and are not required to levy and assess agricultural income tax in terms of Section 3 of the Act. Essentially the august Supreme Court of Pakistan has held that the Respondents are entitled to recover agricultural income tax on the basis of the declaration given in the income tax returns, as per Section 3B of the Act. In a taxing statute an assessment order is necessary in order to support the demand raised and to ensure that the taxing officer has taxed a person as per the confines of the law. It ensures uniformity and equality in the demand raised in the absence of which doubt is raised and arbitrary exercise of jurisdiction is possible as there is no check on the taxing officer, and a citizen is substantially without protection from unequal and unjust demands. Under the Act Section 3 is the charging section which calls for the levy, assessment and collection of tax. Three important steps on the basis of which agricultural income tax can be recovered. In this regard Section 3B of the Act merely provides that a person is liable to pay agricultural income tax on the basis of agricultural income declared in the income tax return. Hence it imposes a liability to pay tax on the basis of an admission of earning agricultural income. Section 3 and 3B of the Act are the charging sections of the taxing statute which have to be enforced through the procedure prescribed under the Act. The procedural machinery is provided for under Section 4, 4A, 4B, 4C and 4D read with the Rules. These Sections set out the process on the basis of which the taxing officer will compute and collect agricultural income tax and the recovery notice is the *final* step that has to be taken once tax has been charged. A recovery notice means that the liability to pay tax has been determined, in this case based on the declaration given under Section 3B of the Act. However it does not mean that the taxing officer cannot assess and levy agricultural income tax on the basis of the revenue record before it. Hence a recovery notice is premised on an assessment order which sets out the details of the tax liability. In the cases of agricultural income tax the august Supreme Court of Pakistan has held that an assessment order is not required under Section 3B of the Act and that the Respondents can initiate recovery on the basis of the declaration made in the income tax return. However it has not curtailed the right of appeal under Section 7 of the Act nor has it allowed the Respondents to ignore the procedure prescribed under the Act and the Rules especially with reference to computation of tax. In

terms of the decision of the august Supreme Court of Pakistan, the judgment of this Court in W.P. No. 15628/2015 was modified to the extent that an assessment order is not mandatory under Section 3B of the Act, however at the same time the august Supreme Court of Pakistan upheld the findings that the assessment order can be challenged under Section 7 of the Act which gives the right of appeal to the taxpayer and it has also upheld the findings that calculations must be provided of the tax levied. Therefore the Respondents are required to disclose the information taken from the Federal Board of Revenue, the rate applied and the tax sought to be recovered in the recovery notices so that the taxpayer is clear on what amount is due against agricultural income tax.

10. It is further noted that the Respondents must follow the procedure under the Act and the Rules to ensure that the rights of the land owners are protected and that the obligation to pay tax follows due process. There is a complete procedure provided under the Act and the Rules to collect agricultural income tax which requires the Respondents to issue notice to the taxpayer calling for payment and requires, as of right that the taxpayer be given time to file an appeal, review or revision against the order of Revenue Officer. It appears that the Respondents failed to bring these facts into the notice of the august Supreme Court of Pakistan while arguing in the case 2019 SCMR 446 (supra) and are now misinterpreting the judgment of the august Supreme Court of Pakistan by ignoring the statutory right of appeal, review or revision available under Section 7 of the Act.

11. The thrust of the Respondents' case before the Court is that they can make direct recovery on the strength of the agricultural income declared under Section 3B of the Act. There is no cavil to the statement because the law itself provides that the Respondents can recover agricultural income tax on the basis of declared agricultural income in the income tax returns for any assessment year filed under the Act in terms of the rates specified in the second schedule. However the taxpayer has a right to appeal against the amount sought to be recovered even if it is based on a declaration in the income tax return and direct recovery inflicted by the Respondents adversely affects the Petitioners' right of appeal under Section 7 of the Act. Furthermore the objections raised before this Court are substantive issues and necessitate a decision by the competent authority before agricultural income tax is recovered. In the cases before the Court objections with regard to limitation; objections with regard to jurisdiction; with regard to amount sought to be recovered; with regard to ownership and with regard to exemptions offered by the Government itself require due deliberation and entitle the Petitioners due process under the Act.

12. Under the circumstances, the recovery notices issued under Section 3B of the Act shall be deemed as assessment orders which are liable to appeal under Section 7 of the Act. The Respondents are obligated to hear the objections and decide the same in accordance with law. For the purposes of the cases pending before this Court and the recovery undertaken by the Respondents for agricultural income tax, the Petitioners should be granted thirty days' time to file their appeals/objections, if at all under Section 7 of the Act after which the cases shall be decided in

accordance with law and subsequently if any amount is due the Respondents may recover the same under the Act and the Rules.

13. In view of the aforesaid, while partly allowing the Petitions, this Court finds as follows:--

(i) The Petitioners' contention that demand for agricultural income tax for the year 2012 and 2013 is barred by time is without any merit given that the august Supreme Court of Pakistan has allowed recovery of agricultural income tax for that period. However, the amount sought to be recovered as agricultural income tax for the period 2012 and 2013 is subject to right of appeal/objections which may be availed by the Petitioners within 30 days' time from the date of release of this judgment.

(ii) It is also held that against the recovery notices issued under Section 3B of the Act, remedy of appeal is available to the Petitioners under Section 7 of the Act. In this regard, the recovery notices can be challenged within 30 days' time from the date of release of this judgment under Section 7 of the Act before the competent authority, who is directed to decide the appeals filed by the Petitioners within 30 days' time after which the Respondents can recover agricultural income tax from the Petitioners, as per law.

(Y.A.) Petitions partly allowed

2021 M L D 1395
[Lahore]
Before Ayesha A. Malik, J
JANNAT BIBI---Petitioner
Versus
TALAY BIBI and others---Respondents
Writ Petition No.28997 of 2012, decided on 5th April, 2021.

Civil Procedure Code (V of 1908)---

----O.XVI, R.1---Summons to give evidence or produce documents---Scope---Defendant moved application seeking permission to summon eleven witnesses and to produce seven documents---Trial Court allowed the application whereas Appellate Court dismissed the same---Validity---When a witness was not named in the list of witnesses as required under O.XVI, R.1, C.P.C., such witness could not be subsequently called unless sufficient cause was given---Defendant had cited "inadvertence" as a reason for not mentioning the names of said witnesses in the list of witnesses, which reason was not sufficient since the defendant had essentially relied upon public documents as well as public officers namely Record Keeper and Registry Clerk along with Registry Moharrir amongst others as her witnesses---Said persons were all known and available to the defendant when she had filed her list of witnesses---Order of the revisional court was in accordance with the law and the Trial Court's order to allow the application to decide the case for a just and fair decision in the case was in total negation of the requirements of the law---Constitutional petition was dismissed, in circumstances.

Muhammad Anwar and others v. Mst. Ilyas Begum and others PLD 2013 SC 255 and Haji Zarwar Khan through L.Rs. v. Haji Rehman Bangash and others 2016 SCMR 1976 ref.
Malik Amjad Pervez for Petitioner.
Abid Iqbal Butt for Respondent No.1.

ORDER
C.M. No.1 of 2020.
AYESHA A. MALIK, J.----This is an application for restoration of the titled-petition which was dismissed for non-prosecution on 10.11.2020.

2. For the reasons stated in this CM duly supported with an affidavit, the application is allowed and the titled petition is restored to its original number and is fixed for hearing today with the consent of the learned counsel for the parties.
Main Case

3. Through the instant Petition, the Petitioner has impugned judgment dated 6.10.2012 passed by Respondent No.7, Additional District Judge, Chiniot.

4. The basic case of the Petitioner is that Respondent No.1 filed a suit for declaration titled Taley Bibi and others v. Mst. Jannat Bibi and others against the Petitioner on 16.1.1998, with the prayer that Hibba Nama No.1720 dated 1.10.1997 with respect to land measuring 50 kanals situated at Chak No.187/JB Chiniot, in favour of the Petitioner and subsequent sale by the Petitioner vide mutation No.674 dated 14.2.1998 in favour of Respondents Nos.2 to 6 be declared void and illegal. The Petitioner filed an application on 12.3.2012 for summoning of witnesses and for production of documents in the suit pending before Civil Judge, Bhowana which was resisted by Respondent No.1 by filing written reply to the said application. However, Civil Judge, Bhowana vide order dated 18.4.2012 allowed the application to the extent of summoning of witnesses as well as production of documents that is registered gift deed dated 1.10.1999, certified copy of Register Haqdaranzamin for the year 1991-92, certified copy of Khasra girdawari for the year 1996 as well as public documents. However, to the extent of production of record of criminal case mentioned in para 9 of the application, the same were not found relevant, hence the application to that extent was dismissed. Aggrieved of this order of 18.4.2012, Respondent No.1 filed civil revision before the Additional District Judge, Chiniot which was allowed vide order dated 6.10.2012.

5. The impugned order dated 6.10.2012 passed by the Additional District Judge, Chiniot finds that the issues in the suit were framed on 2.6.1999. After recording the evidence of the plaintiffs the case was fixed for 25.10.2009 for the evidence of the defendants which they did not produce despite having availed many adjournments. So ultimately vide order dated 17.6.2009 the right of defendant No.1 for producing evidence was closed by the trial court. This order of 17.6.2009 was challenged in revision and ultimately set aside vide order dated 13.1.2010 whereby defendant No.1 was granted only one opportunity to produce her evidence. Thereafter she produced three witnesses and sought an adjournment which was refused on 2.2.2010. Finally the right to adduce evidence was closed on 9.2.2010. The case was then fixed for final arguments when defendant No.1 moved an application seeking permission to summon 11 witnesses and to produce seven documents. The trial court allowed the application vide order dated 18.4.2012 but the revisional court set aside the order of 18.4.2012 vide impugned order dated 6.10.2012. Hence this Petition.

6. The order of the trial court dated 18.4.2012 partially allowed the application of the Petitioner on the ground that the witnesses and the documents are necessary for a just decision of the case and the same will help the court to decide the matter fairly. With respect to the Petitioner's request to produce certain criminal record mentioned in para-9 of the application, the same were not allowed on the ground that they are not relevant with respect to the dispute at hand. The revisional court vide judgment dated 6.10.2012 set aside the order of the trial court on the ground that the trial court has ignored the mandatory provisions of Order XIII, Rules 1 and 2, Order XVI, Rule 1 read with Order XVII, Rule 3 Civil Procedure Code, 1908 ("C.P.C."). The court concluded that the trial court must decide the case in accordance with law and cannot deviate from the mandatory provisions of the law.

The Petitioner is aggrieved by this order essentially on the ground that since it will not help the decision of the case, she should be allowed to produce the desired documents as well as witnesses. Further states that the law on this point is settled.

7. So far as the list of witnesses is concerned, if the witnesses have not been named in the list of witnesses as required under Order XVI, Rule 1, C.P.C., the witness cannot be called subsequently unless sufficient cause is given. In this case the application filed by the Petitioner provides "inadvertence" as a reason for not calling the eleven witnesses which reason is not sufficient since the Petitioner has essentially relied upon public documents as well as public officers namely Record Keeper and Registry Clerk along with Registry Moharrir amongst others as her witnesses. These people were all known and available to the Petitioner when she filed her list of witnesses. Reliance is placed on Muhammad Anwar and others v. Mst. Ilyas Begum and others (PLD 2013 SC 255) and Haji Zarwar Khan through L.Rs. v. Haji Rehman Bangash and others (2016 SCMR 1976). Hence the order of the revisional court is in accordance with the law and the trial courts order to allow the application to decide the case for a just and fair decision in the case is in total negation of the requirements of the law.
8. Under the circumstances, the instant Petition is dismissed and the impugned judgment dated 6.10.2012 passed by the Additional District Judge, Chiniot is maintained.

SA/J-6/L Petition dismissed.

PLJ 2021 Lahore 642

Present: **MRS. AYESHA A. MALIK, J.**

MUHAMMAD ASIF SULEHRIA ADVOCATE etc.--Petitioners

versus

PAKISTAN BAR COUNCIL through Vice Chairman, Islamabad etc.--Respondents

W.P. No. 24754 of 2021, decided on 1.6.2021.

Constitution of Pakistan, 1973--

----Art. 199--Annual Election of Tehsil Bar Association Ferozewala--Appointment of observer--Report of observer--Issuance of notification by election board--Withdrawal of show-cause notices--Direction to--Executive Committee Punjab Bar Council is directed to hear all parties within a period of two weeks' time on issue of whether Tehsil Bar election took place on 9.1.2021 and whether Petitioners have made out a case that fresh elections should take place in Tehsil Bar Ferozewala in light of report of observer in this regard, order of this Court passed in CM No. 2/2021 will continue until a decision is made by Executive Committee Punjab Bar Council --Executive Committee Punjab Bar Council decides matter in favour of Petitioners then it should issue directions to hold fresh elections for Tehsil Bar Ferozewala and in alternate if it concludes that fresh elections are not required then notification dated 9.1.2021 can be restored and become effective--Petition disposed of.

[Pp. 644 & 645] A & B

Ref. 2020 SCMR 631; PLD 2017 SC 231.

Chaudhary Ishtiaq Ahmad Khan and Mr. Adnan Ahmad Chaudhry, Advocates for Petitioners with Petitioners in person.

Mr. Azam Nazir Tarar and Barrister Asadullah Chattha, Advocates for Respondent No. 1, Pakistan Bar Council, Islamabad.

Mr. Amjad Iqbal Khan, Vice Chairman, Punjab Bar Council, *Mr. Muhammad Asif Mehmood,* Advocate for Secretary Punjab Bar Council, *Mr. Muhammad Ashraf Rahi,* Secretary, Punjab Bar Council and *Mian Muhammad Rafi,* Assistant Secretary, Punjab Bar Council.

Mr. Muhammad Asif Mian, Advocate for Respondent No. 9.

Khawaja Mohsin Abbas, Mr. Qamar Hayat Bhuttah and Mr. Hamid Iftikhar Pannu, Advocates for Respondent Nos. 10 to 15.

Date of hearing: 1.6.2021.

ORDER

Through this Petition, the Petitioners have challenged order dated 9.1.2021 passed by the Election Board, Bar Association, Ferozewala, order dated 29.1.2021 passed by the Vice-Chairman, Punjab Bar Council, essentially on the ground that the election of Tehsil Bar Ferozwala never took place, which fact is evident from the report of Observer dated 18.1.2021 and that the impugned notification dated 9.1.2021 notifying a new executive committee has been issued by the Election Board against the mandate of law.

2. Report and parawise comments have been filed on behalf of the Respondents. The case has been argued at great length. During the course of arguments, an effort was made to resolve the dispute. It is brought to the attention of the Court that *vide* order dated 6.3.2021 passed by the Pakistan Bar Council on an appeal filed by Petitioner No. 1, the matter was remanded to the Executive Committee of Punjab Bar Council for its decision on merit, after providing an opportunity of hearing to all the parties.

3. In this regard, the basic contention of the Petitioners is that the matter of finalizing the voters' list as well as with respect to disputes that arose on election day that is 9.1.2021, an Observer Mr. Zabi Ullah Nagra, Advocate issued his report dated 15.1.2021 wherein he has clearly stated that he was available on election day till 01 PM and that the election process had not started until then. Learned counsel for the Petitioners stated that the fact that there was no election on that day is certified by the report of the Observer dated 15.1.2021, hence the impugned notification dated 9.1.2021 issued by Election Board showing that elections were held on 9.1.2021 is totally without basis as clearly the record shows that there were no elections held on 9.1.2021.

4. On behalf of the Respondents, an objection has been taken with respect to the maintainability of the instant Petition and in this regard reliance has been placed on *Mirza Muhammad Nazakat Baig v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and another* (2020 SCMR 631). Furthermore it is stated that the Pakistan Bar Council, in an effort to resolve the matter, gave the Petitioner an opportunity to appear before the Executive Committee of the Punjab Bar Council to ascertain the factual position with respect to the holding of elections on 9.1.2021 and decide the matter accordingly. Hence if the Petitioner go to the Executive Committee they can set out their case.

5. After much deliberations and with the consent of all the parties, subject to all legal objections on maintainability as raised by the Respondents and defended by the Petitioners on the ground of statutory violation while relying on *Muhammad Shoaib Shaheen and others v. Pakistan Bar Council and others* (PLD 2017 SC 231), in an attempt to resolve the matter amicably between the parties, in terms of order dated 6.3.2021 passed by the Pakistan Bar Council, Respondent No. 5 is directed to hear all the parties within a period of two weeks' time on the issue of whether the tehsil bar election took place on 9.1.2021 and whether the Petitioners have made out a case that fresh elections should take place in Tehsil Bar Ferozewala in light of the report of Observer dated 15.1.2021. In this regard, the order of this Court dated 13.4.2021 passed in CM No. 2/2021 will continue until a decision is made by Respondent No. 5. In the event that Respondent No. 5 decides the matter in favour of the Petitioners then it should issue directions to hold fresh elections for Tehsil Bar Ferozewala and in the alternate if it concludes that fresh elections are not required then the notification dated 9.1.2021 can be restored and become effective. So far as the show-cause notices dated 3.4.2021 issued by Respondent No. 5 is concerned, it is resolved that no disciplinary action will be taken against the Petitioners and the notices so issued are withdrawn.

6. Disposed of in the above terms.

(Y.A.) Petition disposed of

PLJ 2021 Lahore 653
Present: **MRS. AYESHA A. MALIK, J.**
JAVAID IQBAL and 7 others--Petitioners
versus
PAKISTAN BAR COUNCIL through Chairman Appellate Committee and 58 others--Respondents
W.P. No. 22982 of 2021, decided on 1.6.2021.

Legal Practitioners and Bar Councils Act, 1973--

----S. 15--Constitution of Pakistan, 1973, Art. 199--Elections of Tehsil Bar Association, Jaranwala--Pre-election dispute--Order of Pakistan Bar Council--Direction to--During course of arguments, in an effort to resolve dispute between parties, given that issue is of a pre-election dispute, for which Petitioners seek a hearing by an impartial body, it is agreed in terms of Section 15 of Act that Appellate Committee, Punjab shall co-opt two members--Matter is referred to Appellate Committee Punjab II who shall co-opt two members other than from Punjab and decide matter afresh within three weeks' time from receipt of order, after hearing all parties--Petition was disposed of. [P. 654] A & B

Ref. 2020 SCMR 631.
Chaudhary Ishtiaq Ahmad Khan and Mr. Adnan Ahmad Chaudhry, Advocates for Petitioners with Petitioners in person.
Mr. Azam Nazir Tarar and Chaudhary Sultan Mehmood, Advocates for Respondent No. 1, Pakistan Bar Council.
Mian Muhammad Zafar Iqbal, Advocate for Respondents No. 5 and 6.
Mr. Ghulam Sarwar Nihung, Advocate for Respondents No. 17 to 37.
Mr. Muhammad Asif Mehmood, Advocate for Secretary Punjab Bar Council.
Mr. Amjad Iqbal Khan, Vice Chairman, Punjab Bar Council, *Mr. Muhammad Ashraf Rahi,* Secretary, Punjab Bar Council and *Mian Muhammad Rafi,* Assistant Secretary, Punjab Bar Council.
Date of hearing: 1.6.2021.

ORDER
Through this Petition, the Petitioners have challenged the impugned order dated 1.3.2021 passed by Respondent No. 1, result declaration of election of Tehsil Bar Association, Jaranwala dated
5.3.2021 and the conduct of elections dated 6.2.2021 of Tehsil Bar Association, Jaranwala.

2. The case of the Petitioners is that the order of 1.3.2021 has been passed unlawfully by the Respondent No. 1, Chairman Appellate Committee, Punjab II which is against the mandate of the Legal Practitioners and Bar Councils Act, 1973 ("Act").

3. Report and parawise comments have been filed on behalf of Respondents No. 2 to 4. An objection has been taken with respect to the maintainability of the instant Petition while relying on *Mirza Muhammad Nazakat Baig v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and another* (2020 SCMR 631).

4. During the course of arguments, in an effort to resolve the dispute between the parties, given that the issue is of a pre-election dispute, for which the Petitioners seek a hearing by an impartial body, it is agreed in terms of Section 15 of the Act that the Appellate Committee, Punjab II shall co-opt two members, not being members from the Punjab, to hear the case afresh and decide the same on its merits.

5. After due deliberation and with the consent of the parties, it is agreed and decided that:

(i) the impugned order dated 1.3.2021 passed by Respondent No. 1, Chairman Appellate Committee, Punjab II is set aside;

(ii) the matter is referred to the Appellate Committee Punjab II who shall co-opt two members other than from Punjab and decide the matter afresh within three weeks' time from receipt of the order, after hearing all parties.

6. Disposed of in the above terms.

(Y.A.) Petition disposed of

PLJ 2021 Lahore 684

Present: **MRS. AYESHA A. MALIK, J.**

Syed **IQBAL HUSSAIN SHAH GILLANI--Petitioner**

versus

PAKISTAN BAR COUNCIL through Secretary etc.--Respondents

W.P. No. 53310 of 2020, decided on 27.10.2020.

Supreme Court Bar Association of Pakistan Rules, 1989--

----Rr. 13 & 14--Constitution of Pakistan, 1973, Art. 199(1)(c)--Elections of SCBAP--No objections were raised against nomination papers--Question of--Maintainability of petition--Association must perform functions in relation to Federal or Provincial Government and must be under control of Federal or Provincial Government--Subsequently order clarifies issue specifically with reference to SCBAP--Therefore, in terms of august Supreme Court judgments, this constitutional petition is not maintainable against SCBAP--Petition was dismissed. [Pp. 686 & 687] A

Barrister Haroon Dugal, Sardar Khurram Latif Khan Khosa, Malik Noor Muhammad Awan, Mr. Arshad Malik Awan, Mr. Zubair Khalid Chaudhary, Mr. Nasir Khan Bannu Sai and *Rana Zia Abdur Rehman*, Advocates along with Petitioner.

Ms. Ambreen Moeen, DAG. Chaudhary Sultan Mehmood and *Ms. Samran Mushtaq Chaudhary*, Advocates for Respondent No. 1, Pakistan Bar Council.

Ms. Saima Amir, Mr. Naeem Jan Malik and *Chaudhary Nazir Hussain*, Advocates for Respondent No. 3 along with Respondent No. 3.

Date of hearing: 27.10.2020.

JUDGMENT

Through this Petition, the Petitioner has impugned order dated 20.10.2020 passed by Respondent No. 2 being the Chairman Executive Committee of the Pakistan Bar Council.

2. The case of the Petitioner is that he is contesting the elections of the Supreme Court Bar Association Pakistan (**"SCBAP"**), for the office of Vice President for the Province of KPK; that no objections were raised against his nomination papers, hence he proceeded as per the election schedule with his campaign. The Petitioner received a call from the Pakistan Bar Council, Islamabad on 16.10.2020 that an appeal filed by Respondent No. 3 was pending and that he should appear before the Executive Committee on 19.10.2020. The Petitioner in person along with his counsel argued that filing of the appeal and the hearing of the appeal is totally contrary to the election schedule issued under Rules 13 and 14 of the Supreme Court Bar Association of Pakistan Rules, 1989 (**"Rules"**). Learned counsel argued that the Petitioner has a right to participate in the elections which are to be held as per election schedule and that the Respondents cannot violate the requirements of

the Rules as the same amounts to disenfranchising the Petitioner. Learned counsel further argued that the appeal was barred by time and the direction to remove the name of the Petitioner from the list of candidates on 19.10.2020 and 20.10.2020 is in contravention to the process issued under the election schedule, as well as with *mala fide* intent.

3. On behalf of the Respondents, it is argued that the constitutional petition is not maintainable. Reliance has been placed on the order dated 28.1.2020 passed by the august Supreme Court of Pakistan in Civil Appeal No. 1729/2019 titled *Mirza Muhammad Nazamat Baig v. Federation of Pakistan through Secretary Ministry of Law and Justice, Islamabad and another* wherein it is categorically held that constitutional petition against the SCBAP is not maintainable. The Respondent counsel also relied upon *Abdul Sattar Chughtai Malik v. Pakistan Bar Council through Secretary and another* (PLD 2007 Lahore 170) on the basis of which it is clear that the rules of the Supreme Court Bar Association are not statutory, hence any violation claimed thereof is not amenable to writ jurisdiction.

4. The preliminary issue before the Court is with respect to maintainability of this constitutional petition. In terms of the order of the august Supreme Court of Pakistan dated 28.1.2020 passed in Civil Appeal No. 1729/2019, a constitutional petition against the SCBAP is not maintainable as the Federal Government does not have any administrative control over the affairs of the SCBAP, the function of the SCBAP is not in connection with the affairs of the Federation, the Provinces or the local authority as contemplated under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 ("**Constitution**") and it is an autonomous body which generates its own funds. Consequently a constitutional petition does not lie against SCBAP. Further that the Rules are not statutory hence any violation of the Rules cannot be enforced though a constitutional petition.

5. Learned counsel for the Petitioner when confronted with the same could not justify the maintainability of the instant Petition as he has impugned order dated 20.10.2020 passed by Respondent No. 2 being the Executive Committee of Pakistan Bar Council and he seeks a direction against Respondent No. 4 being the Chairman Election Board, SCBAP comply with the dates given in the election schedule, meaning the enforcement of Rules 13 and 14 of the Rules. They have placed reliance *"Mrs. Nasira Iqbal v. Appeal Committee (Punjab No. II), Pakistan Bar Council through Chairman and 5 others"* (PLD 2010 Lahore 175), which is not relevant given the Supreme Court judgment relied upon. They have also relied upon *"Pakistan Defence Officers Housing Authority v. Mrs. Itrat Sajjad Khan and others"* (2017 SCMR 2010), which also requires that the rules be statutory in order for it to be enforced in constitutional jurisdiction. Hence the cases relied upon are not relevant for the purposes of the Petitioner's case on maintainability. In the case *Pakistan Olympic Association through President and others v. Nadeem Aftab Sindhu and others* (2019 SCR 221) the august Supreme Court has held that in order for a constitutional petition to be maintainable against an association under Article 199(1)(c) of the Constitution, the association must perform functions in relation to

the Federal or Provincial Government and must be under the control of the Federal or Provincial Government. Subsequently the order relied upon dated 28.1.2020 clarifies the issue specifically with reference to SCBAP. Therefore, in terms of the august

Supreme Court judgments, this constitutional petition is not maintainable against SCBAP.

6. Under the circumstances, the instant petition in **dismissed** for being not maintainable.

P L D 2021 Lahore 654
Before Ayesha A. Malik, J
HAMZA BASHIR and others---Petitioners
Versus
PAKISTAN MEDICAL COMMISSION through President and others--Respondents

Writ Petitions Nos. 30346, 30812, 30078, 30479 and 34213 of 2021, heard on 9th June, 2021.

(a) Pakistan Medical Commission Act (XXXIII of 2020)---

----Ss. 13(c), 32 & 37---Pakistan Medical Tribunal Act (XXXIV of 2020), S.6(11)---Admission Regulations, 2020-2021, Reglns.18, 19, 19-A & 19-F---Medical and Dental Undergraduate Education (Admission, Curriculum and Conduct) Regulations, 2021, Reglns. 10 & 21---Constitution of Pakistan, Art. 10-A---Re-admission process---Due process, principle of---Applicability---Petitioners were students of medical colleges who were aggrieved of directions issued by Pakistan Medical Commission for initiating process of re-admission---Validity---Orders in question were not appealable before Medical Tribunal as those were not specific orders passed on a specific complaint---Orders in question were identical and had suspended admission of petitioners and their interview marks without hearing them---Pakistan Medical Commission did not exercise its authority as per law and entire decision making process was contrary to principles of due process---Pakistan Medical Commission was to ensure that process of admission was not tainted, it was complied with regulations so as to ensure that students with higher merits were given admission---Admission process itself was competitive and private colleges were given discretion of 20% marks with respect to interview---Entire dispute before High Court hinged on the manner in which 20% marks were granted---Though Pakistan Medical Commission asserted that merit and transparency was necessary and it was in order to attain merit and transparency that such exercise was undertaken but the manner in which Pakistan Medical Commission attempted to resolve the problem was in contravention to its own Admission Regulations, 2020-2021 and Medical and Dental Undergraduate Education (Admission, Curriculum and Conduct) Regulations, 2021,and in negation to the authority it could exercise under Pakistan Medical Commission Act, 2020---High Court observed that Pakistan Medical Commission should have addressed each and every complaint on its merit, passing a specific order with respect to basic complaint against respective college, which order would be appealable before Medical Tribunal---High Court set aside order passed by Pakistan Medical Commission---Constitutional petition was allowed, in circumstances.

Town Committee, Gakhar Mandi v. Authority under the Payment of Wages Act Gujranwala and 57 others PLD 2002 SC 452; Muhammad Aslam v. Senior Member (Colonies), Board of Revenue, Punjab and others 2004 SCMR 1587; Dr. Sher

Afghan Khan Niazi v. Ali S. Habib and others 2011 SCMR 1813; Haleem ur Rehman v. Province of Sindh and others 2019 SCMR 1653; Pakistan Medical and Dental Council v. Shahida Islam Medical Complex (Pvt.) Limited and others 2019 CLC 1761; Muhammad Fahad Malik through Safdar Ali Malik v. Pakistan Medical and Dental Council through its President and others PLD 2018 Lah. 75 and Pakistan Medical and Dental Council through President and 3 others v. Muhammad Fahad Malik and 10 others 2018 SCMR 1956 ref.

(b) Constitution of Pakistan---

----Art. 199---Constitutional petition---Judicial review---Scope---High Court can always in Constitutional jurisdiction review decision making process in order to ensure that competent authority has acted in accordance with law, maintained principles of natural justice and due process and has not in any manner abused its authority.

Muhammad Safdar Shaheen Pirzada and Toseef Shaheen Pirzada for Petitioners (in W.Ps. Nos.30346 of 2021 and 34213 of 2021).
Mian Ismat Ullah and Shakeel Ahmad Pasha for Petitioners (in W.P. No.30078 of 2021).
Altaf Hussain Bajwa, Vice Mian Muhammad Saeed for Petitioners (in W.Ps. Nos.30479 and 30812 of 2021).
Ms. Ambreen Moeen, Deputy Attorney General for Pakistan along with M. Rashid Umar, Assistant Attorney General for Pakistan for Respondents.
Barrister Chaudhary Muhammad Umar and Rana Muhammad Ansar for Respondent PMC.
Imran Muhammad Sarwar for Respondent UHS.
Mahmood A. Sheikh for Respondent Al-Aleem Medical College, Lahore (in W.P. No.30812 of 2021).
Adeel Shahid Karim, Vice Khalid Ihsaq for Respondent Sahara Medical College (in W.Ps. Nos.34213 and 30346 of 2021).
Muhammad Rashid and Farooq Saeed Khan for Respondent Akhtar Saeed Medical College (in W.P. No.30078 of 2021).

Date of hearing: 9th June, 2021.

JUDGMENT

AYESHA A. MALIK J.---This common judgment decides upon the issues raised in the instant Petition as well as connected W.Ps. Nos.30812/2021, 30078/2021, 30479/2021 and 34213/2021 as all the Petitions raise common questions of law and facts. The Petitioners are students of the Respondent medical and dental colleges and have challenged advertisement dated 29.4.2021 issued by the Examination Department, Pakistan Medical Commission, Islamabad ("PMC") wherein the process of re-admission is to take place with respect to the listed colleges, which

includes the college of the Petitioners along with order dated 24.4.2021 issued by the PMC in the instant Petition as well as in W.P. No. 30479/2021, W.P. No.30078/2021 and W.P. No.30812/2021.

2. Facts of the case are that the Petitioners are all students who took admission in medical and dental colleges for the 2020-21 session. They have paid the fees and are attending classes for the past three months. The Petitioners are aggrieved by the advertisement dated 29.4.2021 issued by the Examination Department PMC which essentially calls for the process of re-admission in the medical and dental colleges which includes the college of the Petitioners that is Sahara Medical College, Narowal (W.P. No.30346/2021 and W.P. No.34213/2021), Akhtar Saeed Medical and Dental College, Lahore (W.P. No.30078/ 2021) and Al-Aleem Medical College, Lahore (W.P. No.30812/2021 and W.P. No.30479/2021).

3. The case of the Petitioners is that there is no justification whatsoever for commencing this process of re-admission given that the Petitioners have participated in the admission process and have passed the Medical and Dental Colleges Admission Test ("MDCAT") but also the interview. After participating in an extremely competitive process they were admitted in the respective colleges and have commenced their education in terms thereof. The Petitioners are also aggrieved by the order dated 24.4.2021 issued by the PMC on the basis of which PMC has concluded that the admission process for the respective medical colleges are tainted, in contravention to the admission regulations and that the interview process is non-transparent, in violation of the regulations, hence cancelled. The Petitioners stated that on the basis of a general order, the rights of the Petitioners with respect to their admission in medical colleges has been severely prejudiced; that they have not been heard and that the allegations levelled against the respective Respondent colleges do not necessarily establish any involvement of the Petitioners in procuring admission nor does it suggest that the merit of the Petitioners does not warrant admission.

4. Report and parawise comments have been filed on behalf of Respondent PMC in all the Petitions. They have raised a preliminary objection with respect to the maintainability of the Petitions on the ground that remedy of appeal under Section 37 of the Pakistan Medical Commission Act, 2020 ("PMC Act") is available to the Petitioners and they can challenge the impugned orders of 24.4.2021 by filing an appeal before the Medical Tribunal which has been established pursuant to the Medical Tribunal Act, 2020 ("MT Act"). Learned counsel for the Respondent PMC stated that since the Medical Tribunal is functional and its rules and regulations have been framed, hence the Petitioners may approach the Medical Tribunal for redressal of their grievance. In this regard, learned counsel has relied upon Section 10 of the MT Act which provides for the abatement of any suit or proceedings with reference to any matter which falls within the jurisdiction of the Medical Tribunal. Learned counsel also stated that the PMC received numerous complaints with reference to the admission process of different colleges and after giving a hearing to

the relevant colleges, the PMC concluded that there were serious violations of the regulations; that the interview process was not transparent and that the colleges were unable to substantiate that they followed due process and the regulations with reference to the admissions. Learned counsel pointed out that some of the discrepancies highlighted are that the challan forms issued by the colleges were paid prior to any merit list being issued; that the students were admitted after the cutoff date; that no interview was conducted nor any merit list was issued; that the various different provisions of the PMC Act and the Admission Regulations (Amended) 2020-2021 ("2020 Regulations") have been violated. Learned counsel stated that notices were issued to the colleges pursuant to which the impugned order dated 24.4.2021 was issued. In this regard, he further explained that the impugned advertisement does not mean or suggest that the admission of the Petitioners have been cancelled. The advertisement basically calls upon students to apply for admissions, being those students who did not get admission in any college yet are on the merit, so that their cases can be considered with reference to the colleges listed in the advertisement. Hence he stated that the objective is to find students who were deliberately denied admission even though they fell within the merit of the college.

5. Reply has also been filed on behalf of the respective colleges. It is their common case that the allegations levied are totally without basis; that they are general in nature and that the complaints filed against the colleges do not necessarily suggest that the college has compromised on the merit. It is their case that a proper inquiry has not been conducted in the matter and instead a general order has been passed declaring their admission process faulty which is totally without basis. In this context, learned counsel for Al-Aleem Medical College, Lahore in W.P. No.30812/2021 stated that the allegation levied against the college has nothing to do with the admission process rather it is with reference to the procuring a proper insurance policy. In this regard, learned counsel for Respondent PMC has clarified that show cause notices were issued to all the colleges before the Court regarding the irregularities in the admission processes for the session 2020-21, including Al-Aleem Medical College, Lahore.

6. In terms of the reply filed in the instant Petition by Sahara Medical College, documents have been appended along with specific replies to all the allegations essentially to counter the fact that the complaints filed necessitated PMC to issue the impugned advertisement. It is their case that they followed the rules and regulations; they published the interview schedule along with merit list and that with reference to the complaints appended with the reply of the PMC most of the students do not even fall within the cutoff merit of the college. So it is stated that the closing merit of Sahara Medical College is 75.909% whereas the complainants referred to in the reply filed by the PMC do not meet this merit. Essentially they have refuted the factual basis on which PMC has concluded that the college has contravened the requirements of the 2020 Regulations.

Preliminary Objections

7. The preliminary objection raised by the counsel for PMC is that in terms of Section 37 of the PMC Act, an appeal lies to the Medical Tribunal against any order of the PMC. Hence, the instant Petitions are not maintainable as the Petitioners can file an appeal before the Medical Tribunal. Section 37 of the MT Act is reproduced as under:

(1) Any person including an employee of the Commission aggrieved by any order or direction of the Commission, including the Council, Authority or disciplinary committee, under any provision of this Act, or rules or regulations may prefer an appeal only before the Medical Tribunal within thirty days of the date of communication of the impugned order or decision.

(2) An appeal to the Medical Tribunal shall be in such form, contain such particulars and be accompanied by such fees as may be prescribed.

The MT Act establishes the Medical Tribunal under section 4, to hear appeals, complaints or claims in terms of section 6(11) of the MT Act. In terms of the PMC Act, section 32 provides for disciplinary proceedings, suspension or cancellation of license. Subsection (3) of section 32 provides that the PMC shall on the complaint of any person or authority or of its own motion on information received, initiate disciplinary proceedings against any recognized institution in respect of medical negligence, misconduct or violation of any obligation under the Act or any rules or regulations or directions of the PMC. This order is appealable under section 37 of the PMC Act before the Medical Tribunal. Hence a complaint can either be heard by the PMC or can be heard by the Medical Tribunal with respect to irregular admissions or invalid admissions or refusal of admission. In these cases PMC has statedly heard about 400 complaints against different colleges with reference to irregular admissions.

8. In this context, it is also important to note that although PMC claims to have taken action as a consequence of the 400 complaints that were heard, surprisingly they have not concluded in any of the impugned orders that any one of the 400 complainants deserves admission on merit and was not granted the same. They have also not concluded that any particular complainant has established that they were deliberately and wrongfully denied admission. The PMC concluded in the impugned orders that the admission process lacked transparency and is in contravention to the 2020 Regulations. However they have not pointed out which of the admitted students was wrongfully admitted against the merit and in contravention of the 2020 Regulations. Furthermore the impugned advertisement calls for students who were denied admission to come forward, with their merit so that it can be checked as to whether the colleges acted against the 2020 Regulations yet there appears to be no justifiable reason to issue the advertisement in search of other students who have been denied admission, when in the first instance PMC

should have decided upon the complaints and the fate of the complainants admissions before it went in search of other candidates. The fundamental flaw in the impugned advertisement is that it appears to be reaching out to candidates, once again to apply to the named medical and dental college on the basis of their previous merit to ascertain whether or not they were left out of the process. If these candidates have not approached the PMC till date, notwithstanding the fact that the PMC was hearing complaints on the matter, there appears to be no reason for issuing the impugned advertisement and reaching out to candidates who have not filed any complaints. Furthermore PMC should have inquired into the individual complaints filed before it to ascertain whether or not the college violated the 2020 Regulations and denied a deserving candidate admission. In this context, the biggest issue before the PMC was the discretion exercised by the colleges with respect to 20% marks that were allocated pursuant to the interviews. One of the PMC's grievance is that the interview marks were given without any guideline in a non-transparent manner, adverse to merit. However, this too is a general impression and the PMC has admittedly not considered the case of each and every complainant vis-a-vis the allocation of marks given in the interview to a candidate to conclude wrongful exercise of discretion. Although discretion is given to private medical colleges to grant 20% marks for the interview, there is nothing in the impugned orders to show that the PMC has identified candidates who were wrongfully admitted, hence their admission should be cancelled.

9. Learned counsel for PMC claims that the PMC heard 400 complaints and thereafter passed the impugned orders with respect to each of the Respondent medical college. The impugned orders before this Court, however are not specific orders against 400 complaints statedly filed, rather in all Petitions before the Court, the impugned orders are identical. When confronted with the same, learned counsel for PMC tried to show that there are distinguishable features in each of the orders. However, a bare reading of each order shows that essentially they are identical in terms of content and at best, each of the impugned orders with respect to each of the medical colleges before this Court, only gives reference the name of one student admitted beyond the cut off date. All other content is identical, reference to the Regulations that were breached are identical and the conclusion drawn in each of the impugned orders with respect to admission of the students and cancellation of the interview marks is the same. On the face of it, the impugned orders show lack of due process and natural justice as the admission of the admitted students have been suspended and their interview marks have been cancelled without hearing them and without determining whether in fact these students were in any manner responsible for procuring their admissions contrary to the merit. As the rights of these students are adversely affected, their right to due process has been totally ignored in the decision making process. More so, even though PMC claims to have heard 400 complaints with reference to the various different medical and dental colleges, the impugned orders do not reference any specific complaint or name any of the complainants or conclude that the complaint is genuine and that candidate was deprived of admission. Hence the conclusion drawn by the PMC through its disciplinary committee in the impugned orders is presumptive and not based on a

factual inquiry or due process. Consequently the entire decision making process is flawed and against the mandate of the law.

10. The primary objection raised by the Petitioners is that the impugned order and the advertisement is against the norms of due process and violates the principles of natural justice as the Petitioners who are all students were never heard yet in terms of the impugned order their admissions have been suspended and their interview marks have been cancelled. This means that none of the Petitioners before the Court were given a chance to reply or refute any claims made by any of the complainants before the PMC nor were they confronted with any evidence to suggest that they were in any manner involved in wrongfully procuring admission at their respective college. There is no provision under the PMC Act or its 2020 Regulations which allows the PMC to pass an omnibus order against 400 complaints that too without giving affected parties a hearing. It may be that the PMC has formed an impression that the admission processes for some colleges was tainted and that the Respondent medical college did not diligently exercise their discretion with respect to the interview process and the interview marks or that they did not follow 2020 Regulations but PMC is required to hear a specific complaint and pass an order on its merit.

11. This Court in constitutional jurisdiction can review all actions which are contrary to the principles of natural justice, due process, in violation of statute or rules and regulations framed thereunder. The entire argument of the Respondent PMC is that the Medical Tribunal has been established under the MT Act to hear and decide all appeals, complaints or claims instituted before it. Hence the Petitioners could file a complaint before the Medical Tribunal, being the adequate, statutory remedy available to them. In this regard while the general rule is that where there is a statutory remedy available, then writ jurisdiction should not be invoked, there are exceptions to this rule, which will depend on the facts and circumstances of the case. The august Supreme Court of Pakistan in various different judgments has held that constitutional jurisdiction can be invoked to rectify errors for which there is no adequate or efficacious remedy; where orders are patently illegal; in abuse of authority, without jurisdiction or in excess of jurisdiction, in violation of the statute or even to avoid multiplicity of disputes so as to protect and preserve the rights before the Court. The august Supreme Court of Pakistan has defined adequacy and efficacious remedy so as to ensure that the forum available should redress the grievance appropriately. Reliance is placed on Town Committee, Gakhar Mandi v. Authority under the Payment of Wages Act Gujranwala and 57 others (PLD 2002 SC 452), Muhammad Aslam v. Senior Member (Colonies), Board of Revenue, Punjab and others (2004 SCMR 1587), Dr. Sher Afghan Khan Niazi v. Ali S. Habib and others (2011 SCMR 1813) and Haleem ur Rehman v. Province of Sindh and others (2019 SCMR 1653). In the instant cases, the impugned orders are not appealable before the Medical Tribunal because they are not specific orders passed on a specific complaint. The impugned orders are all identical and have suspended the admission of the Petitioners and their

interview marks without hearing them. On the face of it, PMC has not exercised its authority as per law and the entire decision making process is contrary to the principles of due process.

12. Therefore in the context of the above, this Court can always in constitutional jurisdiction review the decision making process in order to ensure that the competent authority has acted in accordance with law, maintained the principles of natural justice and due process and has not in any manner abused its authority. To the mind of this Court, the orders impugned through these Writ Petitions are in violation of the statutory mandate given to the PMC to hear complaints and decide upon the same. They are also in violation of the statutory mandate given to PMC to oversee the admission process and to take disciplinary action where required. As this aspect of the matter touches merits of the case, I deem it appropriate to decide the same on its merits holding that the instant Petitions as maintainable and that the remedy before the Medical Tribunal neither adequate nor efficacious for the purposes of the dispute before this Court.

On merit

13. The basic issue before the Court is whether the PMC is authorized under the PMC Act to pass the impugned orders and issue the impugned advertisement on the basis of which it has attempted to initiate admission for candidates who applied to a medical or dental college in the published list, as per the advertisement, yet were not admitted in the medical or dental college and are re-invited on the basis of the advertisement to submit their intent for admission.

14. The PMC was established pursuant to the PMC Act. The preamble of the PMC Act sets out its objectives that is to provide regulations and control of the medical profession as well as to establish a uniform minimum standard of basic and higher medical education and training and recognition of qualifications in medicine and dentistry. One of the basic functions of the PMC is to frame regulations for conduct of admissions in medical and dental colleges and to approve the examination structure and standard of the MDCAT. It is important to note that the PMC in terms of Section 3 of the PMC Act consists of a Medical and Dental Council, the National Medical and Dental Academic Board and the National Medical Authority. The National Medical and Dental Academic Board in terms of Section 13(c) of the PMC Act is responsible to formulate examination structures and standards for the MDCAT for approval by the Council. The National Medical Authority is responsible to conduct the examinations provided for under the PMC Act and is also responsible to implement the decisions of the Council and the Board. The MDCAT is conducted pursuant to Section 18 of the PMC Act, annually on a date approved by the Council as per the standard approved by the Board. Section 18(3) of the PMC Act provides for admission to medical or dental programs conducted by public colleges to be regulated as per the policy provided by the Provincial Government and admissions to private college in accordance with the criteria and

requirements stipulated by the private college, at least one year in advance of the scheduled admissions which will include any entrance test to be conducted by a private college. It also provides that the marks obtained in the MDCAT will constitute fifty percent of the weightage for the purposes of admissions in public colleges. Section 18 does not provide any information with reference to the admission criteria and the weightage that is to be given by a private college for admission. In this context, the 2020 Regulations which were issued pursuant to section 8(2)(f) of the PMC Act are relevant. These Regulations are applicable to all private and public medical and dental colleges with reference to 2021 session specifically. It is important to note that it is with reference to these regulations that the impugned orders have concluded that the Respondent Colleges have not been compliant with the prescribed admission requirements.

15. The 2020 Regulations provide that any student seeking admission in any medical or dental college has to pass the MDCAT exam and the passing marks were statedly 60%. All admissions in public and private medical and dental colleges had to be concluded before 21.2.2021 and classes were required to begin from February 2021. All private and public colleges have allocated number of seats and no college is allowed to admit beyond the allocated seats. These Regulations also regulate admissions in private colleges. Relevant to the dispute are Regulations 18, 19, 19A to 19F which PMC has relied upon to show that the Respondent colleges have not fulfilled the prescribed requirements.

16. By way of background it is important to note that the PMC was established pursuant to the PMC Act which was promulgated on 22.9.2020 and was published in the official gazette on 24.9.2020. The advertisement for holding the MDCAT by the PMC was published on 22.10.2020 and the MDCAT was conducted on 29.11.2020 and 13.12.2020 (for students who had tested Covid-19 and were unable to appear on the examination held on 29.11.2020). The result of the MDCAT was announced on 16.12.2020. During this time the relevant Regulations were the Admission Regulations 2020-2021. The PMC thereafter issued the Medical and Dental Undergraduate Education (Admissions, Curriculum and Conduct) Regulations, 2021 ("2021 Regulations") on 4.6.2021 which now govern the admission process. However, so far as the 2020 Regulations are concerned, it is important to note that these Regulations were amended twice, once on 17.11.2020 and then on 23.12.2020. Hence it would be fair to state that until 23.12.2020 the process of regulating the admissions for the year 2020-21 was undergoing change. In this regard, the Private Association of Medical and Dental Institutions ("PAMI") also challenged the role of the PMC with reference to admissions in private colleges and ultimately with the intervention of the Court, a consensus was reached between the PMC and PAMI whereafter the 2020 Regulations were amended and specifically Regulations 19A to 19F were incorporated. A significant change was brought about which allowed private medical and dental colleges to give weightage, such that 50% MDCAT, 30% F.Sc or its equivalent and 20% marks reserved for interview by the private colleges. For the purposes of the dispute at hand, PMC has

raised questions specifically with respect to the manner in which the 20% marks were given, that is the decision making process and the discretion exercised by the private colleges when awarding 20% marks in the interviews. The basic contention of PMC before the Court is that transparency and merit be maintained and it is in the context of achieving these goals of transparency and merit that this entire exercise is being undertaken. Hence PMC states that it is scrutinizing the admission process and the merit list to ensure that the 2020 Regulations have been complied with, that the merit list has not been compromised and more importantly candidates who claim that they were deliberately ousted from the system notwithstanding their merit are not denied the opportunity to pursue a career in the medical or dental profession.

17. In the context of the instant Petition, as per the record, notices were issued to the college on 5.4.2021 to appear on 8.4.2021 and the impugned order was passed on 24.4.2021. As per the impugned order, para 7 refers to one student who was admitted after the close of the admission deadline in violation of Regulation 19D of the 2020 Regulations. The impugned order makes reference to various provisions of the 2020 Regulations and finds that there are inherent discrepancies and irregularities in the admission process; that the interview process is not properly documented and that the college should adopt a transparent system to inform students of the interview so as to ensure that a fair opportunity is given to all candidates; that no merit list based on the interview marks was available and that the record shows that the students were admitted on the day of their interview. So the impugned order concludes that a pick and choose approach seems to have been adopted, therefore it suggests that some students who may have been on the merit were not duly considered. In this context, they have relied upon fee deposit slips to show that fees have been deposited prior to the issuance of the merit list. The impugned order concludes that the admission process is in contravention to the 2020 Regulations and therefore the admission of the students for the session 2020-21 in the college are deemed as suspended and the interview marks by the college were held to be non-transparent and cancelled. The PMC thereafter decided that an advertisement should be issued informing any student who appeared on the national merit list of the college to re-apply if they did not get admission in any college, within five days of the impugned advertisement. A bench mark merit has been awarded to the colleges and the objective is to determine whether any candidate has a higher merit than the bench mark and has been left out from the admission process. Interestingly the impugned orders in all connected Petitions being for Al-Aleem Medical College and Akhtar Saeed Medical College are identical to the impugned orders in the instant Petition. The allegations are similar with reference to the admission of students after the close of the admission date naming one specific student and the date of their admission in the context of each of the respective colleges. However, to the extent of the specific complaints raised and the conclusions drawn by PMC from a review of the documents, the impugned orders do not specifically deal with any of the complaints it was statedly hearing. These impugned orders have led this Court to conclude that notwithstanding the complaints before the PMC, an omnibus order has been passed without checking the

merit of the complaint or veracity of the complainant and a general observation has been made that the admission process is tainted, hence should be re-advertised so as to invite candidates who believe that they were wronged or pushed out of the admission process deliberately. To my mind this approach by the PMC is not only in contravention to the 2020 Regulations but also defies the logic raised. As per their own contentions there were 400 complaints which were heard and decided. However the decision of 400 complaints is in the form of an omnibus order with respect to 20 colleges. So it is unclear as to what the specific grievance of each of the complainant was and with respect to which college. Furthermore no relief was granted to any of the 400 candidates, that is no candidate has been found entitled to admission. The record of the admitted students has not been referred to, so it is unclear as to why their admission has been suspended and interview marks cancelled. Apparently, the specific allegations of each and every complainant with reference to a specific medical and dental college has not been duly considered. Where the complainant has alleged that they have been left out of the process and that even though they have the merit they were not properly considered, it required PMC to investigate/ inquire and determine whether or not that a particular candidate was left out of the process unfairly and whether they are entitled to admission. Similarly where the complainant has alleged that they were never called for the interview or that the merit list was never published, it required PMC to make some sort of factual finding before it could assume that the respective Respondent colleges have not been compliant with the 2020 Regulations. Although it is stated that the record was checked, the mere fact that there are identical orders in all Petitions before the Court suggests that the record was not properly checked and a presumption was made with respect to the admission process undertaken.

18. It is also important to note that in terms of the 2021 Regulations issued on 4.6.2021, the PMC has set out the processes with respect to the admissions for public as well as private colleges but relevant to the dispute at hand, it has also set out its ability to regulate the admission process. In terms of Regulation 10 of the 2021 Regulations, reproduced hereunder, the PMC can review the admission process during or after the completion of the process and it has the power to cancel any admission if that admission is in contravention to the Regulations after giving the student a right of hearing. Also important to note is that a student can submit a complaint to the Authority or the Medical Tribunal in respect of irregular admissions made or admission being refused by a college and that this complaint has to be decided by the Authority or the Medical Tribunal within 15 days.

10. Review of Admissions Process by Authority.-(1) The Authority may review the admissions process of each college during and on completion of the process where such process shall be completed by the Authority within thirty days of the final date of admissions.

(2) If the Authority finds any irregular admission having been made by the college, the Authority shall have the right to cancel such admission subject to having granted both the college and the affected student a right to be heard.

(3) A student may submit a complaint to the Authority or the Medical Tribunal in respect of any irregular admission made or admission invalidly refused by a college. Such complaint if made to the Authority shall be heard and decided within fifteen days of the same being submitted after hearing both the complainant and the college.

Regulation 28 of the 2021 Regulations provides for penalties that the PMC can impose on the medical and dental college for violation of any provision of the Regulations. Appendix 1 set outs the contraventions and provides the penalties that can be imposed.

28. Penalties. - The Authority shall impose a penalty as may be prescribed by the Medical and Dental Council and provided for in Appendix I for any violation of any provisions of these Regulations. In the event a specific penalty is not provided for any violation, the Authority may advise the Medical and Dental Council to prescribe a penalty for such violation and if approved the same would be imposed notwithstanding that such penalty was not provided for in Appendix I.

19. On the basis of the 2021 Regulations, PMC can decide a complaint and it can declare the admission of a candidate illegal or irregular thereby cancelling it subject to granting the college and the affected students a right of hearing. This is not the process that was undertaken by the PMC with respect to the impugned orders where the Petitioners being students who were granted admission have not been heard and more importantly there is no clear specific order on a complaint made before the PMC rather an omnibus order has been passed with respect to all the colleges before the Court. Furthermore in terms of Regulation 28 of the 2021 Regulations, PMC can impose a penalty on any college for violating the Regulations. However, the impugned orders set out to suspend the admissions and cancel the interview marks but does not impose any penalty on the colleges. The mandate of the 2021 Regulations clearly provide that PMC is to hear a complaint and decide upon it and thereafter can impose a penalty if it is required. Although it was argued that the 2021 Regulations came in June 2021 and the impugned orders and advertisement were issued before the 2021 Regulations, PMC is obligated to follow the principles of due process, justice and to avoid vague and generalized enforcement as it affects the requirements of predictability and stability leaving potential for unfair surprises in their decision making. In this case, the PMC has neglected to decide upon the 400 complaints. Instead it has formed a general opinion of irregularities which it is now attempting to defend before this Court. It is clarified that even if the objective of the PMC is to retain transparency and merit, it has attempted to do so in a manner that it is not authorized under the law. Even though the 2021 Regulations were notified in June 2021, this is the PMC's own doing and there is nothing in the 2020 Regulations

or the PMC Act which permits PMC to pass a general order on 400 complaints. This by itself is a violation of the mandate under the PMC Act and the MT Act.

20. In this regard, it is important to note that the process of admission from the time of announcement of the schedule of the MDCAT exam to the issuance of the merit list and the filling up of vacancies is regularly litigated upon not only by the colleges but also by students on one pretext or the other. A common dominant cause over the last few years has been the constant change in the regulator, the statute and the admission processes, that too just before the MDCAT exam. Not only have these frequent changes led to confusion and multiple litigation but has also destroyed confidence in the regulator and the system on the basis of which admission is granted in a highly competitive profession. This Court in various different judgments has looked into the issues raised and has held that change in law and admission processes should never be made at the last moment, before the MDCAT exam or during an academic session so as to disturb the preparation that candidates have made in anticipation of the MDCAT exam. Reference is made to Pakistan Medical and Dental Council v. Shahida Islam Medical Complex (Pvt.) Limited etc. (2019 CLC 1761). This Court has also held that it is the function of the regulator to set out uniform standards and prescribed conditions for admission in public and private medical colleges and that the regulator can take penal action against an institution for non-compliance with its regulations. Reference is on Muhammad Fahad Malik through Safdar Ali Malik v. Pakistan Medical and Dental Council through its President etc. (PLD 2018 Lahore 75). This judgment has been upheld by the august Supreme Court of Pakistan in Pakistan Medical and Dental Council through President and 3 others v. Muhammad Fahad Malik and 10 others (2018 SCMR 1956) which means that the PMC as a frontline regulator should perform its functions so as to preserve the merit and confidence of the colleges and students and refrain from arbitrary and discriminatory decisions. The present impugned orders have created further disruption by placing the Petitioners and other admitted candidates in a state of flux, as their admission stands suspended as do their interview marks and PMC has not stated what is their fate once candidates re-surface for admission. Are these admitted students to re-apply? or will their merit be scrutinized? As to the college if they have breached the 2020 Regulations to what consequence and how will PMC ensure that it is not repeated? Hence even though they allege that the college violated the 2020 Regulations, there is no action against the college, rather admitted students have been penalized without any hearing or allegation against them.

21. Hence the PMC's contention that there are irregularities and illegalities with respect to the admission process of the listed colleges in the advertisement has not been established by way of the impugned orders. The Respondent medical colleges in their report and parawise comments have addressed the various different allegations raised in the impugned order to assert their contention that they did not compromise on the merit and that they did not in any manner prejudice the rights of any of the candidates especially the complainants but stated that they were entitled

to admission in the instant Petitions. As per the report and parawise comments filed in the instant Petition and the documents appended by Sahara Medical College, the complainants who stated that they were not given admission despite their merit did not meet the cut off merit of the college, hence were not granted admission. These documents and facts suggest that the PMC was required to adjudicate on each complaint separately in order to ascertain its veracity and merit and that the impugned orders are based on presumption. In this regard, where the PMC is of the opinion that a college has not complied with the terms of the 2021 Regulations, it can issue notice setting out its case with respect to breach of regulations and compromise on merit, giving not only the college but the respective complainant and any candidate who may be adversely affected by an order of the PMC an opportunity of hearing. PMC can also impose penalty on the colleges that breaches its regulations in order to curtail and prevent any of the discrepancies and irregularities/illegalities set out by PMC.

22. The fundamental job of the regulator PMC is to ensure that the processes of admission is not tainted, it is complied with the regulations so as to ensure that the students with the higher merit are given admission. The admission process itself is competitive and since private colleges were given discretion of 20% marks with respect to the interview, the entire dispute before the Court hinges on the manner in which 20% marks were granted. It is also important to note that although PMC has asserted that merit and transparency is necessary and it is in order to attain merit and transparency that this exercise has been undertaken, the manner in which the PMC is attempting to resolve the problem is in contravention to its own 2020 and 2021 Regulations and in negation to the authority it can exercise under the PMC Act. PMC should have addressed each and every complaint on its merit, passing a specific order with respect to the basic complaint against the respective college, which order would be appealable before the Medical Tribunal.

23. In view of the aforesaid, these Petitions are allowed, impugned advertisement dated 29.4.2021 and impugned orders dated 24.4.2021 issued by the PMC are set aside. However, PMC can take necessary action against the Respondent college or others in accordance with the 2021 Regulations by following due process.

MH/H-13/l Petition allowed

2021 C L C 1606
[Lahore]
Before Ayesha A. Malik, J
MUHAMMAD ASHRAF----Petitioner
Versus
ADDITIONAL DISTRICT JUDGE and others----Respondents

Writ Petition No.39494 of 2019, decided on 3rd June, 2021.

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

----S.5, Sched.---Recovery of dowry articles, maintenance for wife and minors and child birth expenses---Quantum---Propriety---Husband/petitioner presented no evidence to substantiate his claim that no dowry was given to the wife---Appellate court after perusing the evidence and record rightly enhanced the maintenance for wife from Rs.4,000/- to Rs.6,000/- per month till the expiry of Iddat period; enhanced maintenance allowance for both minors from Rs.4,000/- to Rs.7,000/- per month each with 10% annual increase till their legal entitlement; allowed the wife to recover Rs.10,000/- from the husband as (child) delivery expenditures on the ground that she gave birth to one of the minors through a midwife at home hence some expenditures was definitely borne out at the birth of the baby---Fact that the husband had married three times and had other children shall not deprive the respondent-wife and the minors from their rightful claim---Constitutional petition filed by the petitioner-husband was dismissed.

(b) Constitution of Pakistan---

----Art.199---Constitutional jurisdiction of the High Court---Scope---Interference in orders/judgments of courts below---In constitutional jurisdiction, the High Court was not sitting as an appellate court and could not reappraise the evidence---Interference in constitutional jurisdiction could only be done where the Courts below had acted illegally or with material irregularity or exercised jurisdiction not vested with them or passed orders which were in excess of their jurisdiction---Even in a case where it was alleged that there was misreading and non-reading of evidence, the same would not mean re appraisal of the evidence but would have to fall within the purview of being a material irregularity or illegality on the part of the subordinate courts.

Mian Tariq Saeed Salotra for Petitioner.

Daniyal Ijaz Chadhary for Respondents Nos.3 to 5.

ORDER

AYESHA A. MALIK, J.---Through this petition, the Petitioner has impugned judgment dated 21.12.2018 passed by Respondent No.2, Senior Civil Judge, Okara and judgment dated 13.05.2019 passed by Respondent No.1, Additional District Judge, Okara.

2. Facts of the case are that Respondent No.3 filed a suit for dissolution of marriage, maintenance allowance, delivery expenses of Respondents Nos.4 and 5 and recovery of dowry articles or its alternate price of Rs.1,650,100/- against the Petitioner, which was decreed by Respondent No.2, Senior Civil Judge, Okara vide judgment dated 21.12.2018 holding Respondent No.3 entitled to recover dowry articles as mentioned in the plaint except the articles deleted in the findings of issue No.4 or alternate price of articles of Rs.300,000/- from the Petitioner. Respondents Nos.4 and 5 held entitled to recover maintenance allowance at the rate of Rs.4,000/- per month each from the date of institution of suit till their legal entitlement or custody is shifted. Respondent No.3 found to be entitled to recover maintenance allowance only for her period of "Iddat" at the rate or Rs.4,000/- per month. Feeling aggrieved both the parties filed their separate appeals before Respondent No.1 who vide judgment dated 13.05.2019, dismissed the appeal filed by the Petitioner and partially allowed the appeal filed by Respondent No.3 holding her entitled to recover articles mentioned in list "Mark-J" or in alternative their deprecated price Rs.100,000/-. The Respondents Nos.4 and 5 also held entitled to recover maintenance allowance at the rate of Rs.7,000/- per month each with 10% annual increase till their legal entitlement. Respondent No.3 was also held entitled to recover past maintenance allowance at the rate of Rs.6,000/- per month from February, 2016 till expiry of her Iddat period and Rs.10,000/- as maternity expenditures of Respondent No.5. Hence this petition.

3. In support of this petition, learned counsel for the Petitioner stated that the Petitioner has proved through evidence that Respondent No.3 did not bring any dowry articles at the time of marriage as it was his 3rd marriage and it is a matter of common practice that dowry is not given in 3rd marriage. Learned counsel stated 'that both the courts were required to keep in mind the financial status of the Petitioner before passing the order on maintenance allowance which was enhanced as the Petitioner is a Traffic Warden (BS-14) in City Traffic Police, Lahore having no other source of income. Learned counsel stated that there are material contradictions in the statements of the witnesses produced by Respondent No.3. Hence, the judgments passed by the courts are based on misreading and non-reading of evidence and are liable to be set aside.

4. On the other hand, learned counsel for Respondent No.3 opposes the submissions made by learned counsel for the Petitioner and prays for dismissal of the instant Petition.

5. The main issue in this Petition is whether Respondent No.3 was able to prove her case with respect to dowry articles, maintenance and delivery expenses. In terms of the record, the list of dowry articles Mark-J was produced by Respondent No.3 on the basis of which the trial court held that Respondent No.3 is entitled to recover dowry articles or in the alternate Rs.300,000/- while keeping in mind the nature of the articles and their depreciation value. In the appeal, the learned Additional District Judge not only endorsed the findings of trial court on this issue but also held

Respondent No.3 entitled to recover the items mentioned in the list Mark-J based on the evidence and receipts produced. There is nothing in the evidence of the Petitioner to substantiate his claim that no dowry was given to Respondent No.3. So far as maintenance for Respondent No.3 is concerned, the Appellate Court enhanced the same from Rs.4,000/- to Rs.6,000/- per month from February, 2016 till the expiry of Iddat period and for Respondents Nos.4 and 5 maintenance allowance was enhanced at the rate of Rs.7,000/- per month each with 10% annual increase till their legal entitlement. The Appellate Court also allowed Respondent No.3 to recover Rs.10,000/- from the Petitioner as delivery expenditures on the ground that she gave birth to the minor through a midwife at home hence some expenditures was definitely borne out at the birth of the baby (Respondent No.5). Therefore, the judgment is as per the evidence and record. No illegality is made out. The fact that the Petitioner has married three times and has other children shall not deprive the instant Respondents from their rightful claim.

6. It is noted that in constitutional jurisdiction, this court is not sitting as an appellate court and cannot reappraise the evidence. Interference in constitutional jurisdiction can only be done where the Courts below have acted illegally or with material irregularity or exercised jurisdiction not vested with them or passed orders which were in excess of their jurisdiction. Even in a case where it is alleged that there is misreading and non-reading of evidence, the same will not mean re-appraisal of the evidence but will have to fall within the purview of being a material irregularity or illegality on the part of the subordinate courts.

7. Under the circumstances, no case for interference is made out. Consequently, this petition is dismissed.

KMZ/M-107/L Petition dismissed

2021 C L D 1144

[Lahore]

Before Ayesha A. Malik

and Jawad Hassan, JJ

MUHAMMAD SAJJAD AHMAD KHAN

and others---Appellants/Petitioners

versus

SOUTH CHEMICALS (PVT.) LIMITED

and others---Respondents

Environmental Appeals Nos. 1441 and 1436 of 2014 and Writ Petition No. 1998 of 2015, decided on 12th April, 2021.

Punjab Environmental Protection Act (XXXIV of 1997)---

----S. 23--- Appeals from order of the Environmental Tribunal---Scope--- Respondent established a chemical plant in an agricultural area to produce sulphuric acid with the approval of the Environmental Protection Agency (EPA) for construction as well as operation of the plant---EPA, later on, carried out a site inspection and found that the plant was violating the terms of its approval, hence issued a show cause notice after which it cancelled its approval---Orders were challenged before the Punjab Environmental Tribunal whereby the Tribunal set aside the show cause notice as well as the cancellation order---Held; approvals granted by the EPA had expired, both the appeals had become infructuous---Separate Constitutional petitions filed by residents of the area were disposed of by the High Court with the observation that the EPA would take up the prayer in the Constitutional petition if and when the process for issuance of permission to commence the operations of the plant started---EPA was also directed by the High Court to set proper standards for sulphuric acid plants and acid mist gases emitted to ensure that international standards were followed to protect the environment---Appeals and Constitutional petition were disposed of accordingly. [pp. 1145, 1147] A & B

Muhammad Umar Riaz for Appellants and for Petitioners (in W.P. No. 1998 of 2015).

Ms. Aliya Ijaz, A.A.G. on behalf of the Appellant (in E.A. No.1436 of 2014 along with Nabila Khalid, AD Legal EPA).

Ahmed Rafay Alam for Respondent No. 1.

ORDER

This order decides upon the issues raised in the instant Environmental Appeal No. 1441/2014 filed by Sajjad Ahmad Khan etc. along with connected Environmental Appeal No.1436/2014 filed by the Government of Punjab through Director General, Environment Protection Agency, Lahore **("EPA")**. Both the appeals impugn order dated 6.5.2014 passed by the Punjab Environmental Tribunal **("Tribunal")** wherein show cause notice dated 18.6.2012 and cancellation of environmental approval order dated 5.7.2013

against Respondent No.1 was set aside. Along with these appeals, W.P. No. 1998/2015 filed by the Appellants seeking a direction to the Respondents to act strictly in accordance with law has also been heard.

2. The basic facts are that Respondent No.1 established a chemical plant in an agricultural area at Pir Tannu, 38 KM Multan Bahwalpur Road, Multan to produce Sulphuric Acid **("Plant")**. The EPA granted approval for construction as well as for the operations on 18.4.2011 and 12.4.2012 respectively. The Plant was constructed and became functional. The EPA carried out a site inspection and found that the Plant was violating the terms of its approval, hence issued show cause notice dated 18.6.2012 after which it cancelled its approval on 5.7.2013. These orders were challenged before the Tribunal by Respondent No.1, whereby the Tribunal set aside the show cause notice as well as the cancellation order vide its decision dated 6.5.2014 which has been impugned in the two appeals before the Court. Through W.P. No.1998/2015, the Petitioners state that they have complained against the establishment of the Plant as it has been set up in an agricultural area and it creates acid mist which is hazardous to the people residing in the area as well as to the environment which primarily is an agricultural area.

3. As per the order sheet, these cases have been pending since 2014. Vide order dated 6.4.2016, the entire record of the EPA was called for including the Environmental Impact Assessment **("EIA")** and the Environmental Management Plan to assess the allegations narrated in both appeals against the Plant. Thereafter vide order dated 19.5.2016 an Environmental Consultant was appointed by the Court to verify whether the Respondent company is compliant with the environment approvals granted. The report was submitted on 15.11.2016 against which objections were filed on 20.9.2017. Vide order dated 24.10.2017 the objections were heard and the Court directed that the Consultant revisit the Plant and ascertain and verify whether the Plant is compliant with all 22 conditions imposed by the EPA and whether emissions being caused by the Plant are as per the desired standards. Thereafter vide order dated 17.4.2019 on the report filed by then Consultant after revisit to the Plant arguments were heard at length. At this point it is important to note that even the Government of Punjab has filed an appeal in which they state that the land on which the Plant has been constructed is agricultural land and has not been converted for industrial use. The Court was also informed that there are no standards on the basis of which the EPA is able to determine whether any air or water pollution is being caused and more importantly whether the *acid mist* emitted from the Plant being dangerous to the population residing nearby. On 4.11.2019 a detailed report was submitted by the Government of Punjab on the issue of conversion of land. In the meantime it was confirmed that there are no specific standards for a sulphuric acid plant as per international practice. Hence both the parties before the Court being the complainant in the W.P. and the Plant itself were asked to provide international guidelines and standards with reference to sulphuric acid plants and *acid mist*. These have been duly filed by the parties and the representative of the EPA have acknowledged that they themselves have not

considered any or specific international standards with reference to the sulphuric acid plants and *acid mist*.

4. Learned counsel for the Respondent has also brought the attention of the Court to the fact that the EPA granted approval for construction as well as for the operations on 18.4.2011 and 12.4.2012 respectively which has now expired and in terms of the Punjab Environmental Protection Act, 1997 **("Act")**, the Respondent company is required to re-initiate the process of getting the permission afresh. Therefore he stated that the issues raised before this Court can be re-visited by the EPA with specific emphasis on the standards and guidelines required for sulphuric acid plants as well as the issues raised by the Government of Punjab with reference to the conversion of land. He stated that these are all factual matters which will take time and that the EPA is the competent body to look into the same before it can grant any further approvals. Learned Law Officer along with Nabila Khalid, AD Legal, EPA and all the parties before the Court agreed with the request of the learned counsel for the Respondents.

5. The Petitioners in W.P. No.1998/2015 stated that they have been pursuing this matter since the approvals were granted as they reside in the area and have agricultural land in the area. Further state that not only the people of the area but also their crops and the land is being adversely affected by the *acid mist* which fact has not been taken into consideration by the EPA at the time of according the environmental approval. Even with respect to the mitigation measures proposed by the EPA and the consultant he stated that nothing was specifically done to address the acid mist gases which are emitted on a large scale by the Plant when it is functional. Therefore the counsel stated that proper guidelines and standards must be adopted in the first instance before granting any permission to the Respondent Company. Learned counsel for the Respondent Company/Plant stated that the Company has invested a large amount of money in the establishment of the Plant and therefore will make every possible effort to ensure that proper standards are adopted and that it is compliant with the same before it attains any approval and commences operation.

6. In the light of what has been stated it is noted that since the approvals granted by the EPA have expired, both the appeals have become infructuous and that the prayer in the WP will now be taken up by the EPA if and when the process for issuance of permission to commence operations of the Plant begins. In the meantime the EPA should set proper standards for sulphuric acid Plants and acid mist gases emitted to ensure that international standards are followed to protect the environment.

7. Hence both the appeals and Writ Petition are disposed of accordingly.

SA/M-76/Lah. Order accordingly.

2021 C L D 1400

[Lahore]

Before Ayesha A. Malik and
Shams Mehmood Mirza, JJ

DAVID DIWAN MASIH and another---Appellants

versus

NATIONAL BANK OF PAKISTAN
and another---Respondents

E.F.A. No. 1017 of 2014, decided on 7th October, 2021.

Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----Ss. 19, 15, 9 & 22---Civil Procedure Code (V of 1908) S. 47, O. XXI, Rr. 89 & 90---Procedure of Banking Court---Execution of decree of Banking Court---Auction/sale of mortgaged property --- Objections against auction/sale of mortgaged property, adjudication of---Scope---Appellants impugned order of Banking Court whereby appellants' application objecting to sale of mortgaged property on basis of appellant being bona fide owner of a portion of said property was dismissed by Banking Court---Validity---Banking Court had held that decree-holder Bank had every right to get said property auctioned for realization of decretal amount but also paradoxically stated appellant should avail civil remedy at proper forum against judgment-debtor---Impugned order relied solely on report of a Tehsildar who never appeared as witness and failed to consider that decree-holder Bank failed to tender any evidence, oral or documentary, to rebut evidence of appellant---Issues were wrongly framed by Banking Court as allegation of appellant was that his portion of said property did not form part of the mortgage and such issue was not framed---Banking Court also wrongly concluded that appellant was to approach civil court for determination of his objections as Executing Court under S. 47, C.P.C. had all powers to adjudicate questions necessary for execution and satisfaction of a decree---Impugned order was set aside, and matter was remanded to Banking Court with direction to decide the matter after considering all evidence and recasting issue with regard to objections of appellants---Appeal was allowed, accordingly.

[pp. 1402, 1403] A, B, C & D

Tariq Masood and Hassan Tariq for Appellants.

Kamran Babar for Respondent/Bank.

ORDER

This appeal is filed under section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (the Ordinance) to lay a challenge to order dated 30.05.2014 passed by the banking court in dismissing the

application filed by the appellants objecting to the attachment of his property.

2. The relevant facts for determination of the controversy in this appeal may be stated as under Respondent No.2 being an employee of the respondent bank availed a finance facility and as security for repayment of the finance mortgaged his property measuring 1 Kanal 70 Sq. feet falling in Khasra Nos.3128 and 3129 purchased through sale, deed 25.05.1989. In consequence of his default in repayment of the finance, the respondent bank filed a recovery suit against him in which a decree was passed on 14.03.2001. The respondent bank filed the execution application and got the mortgaged property attached on 26.09.2001. The appellants filed an objection application before the banking court on 07.11.2001 claiming to be owner of land measuring 5 Marla purchased through sale deed dated 29.09.1997 from respondent No.2. It was averred that land measuring 5 Marla was a different property having no nexus with land measuring 1 Kanal 70 Sq. feet mortgaged with the respondent bank. A reply was filed by the respondent bank to the objection application stating that the 5 Marla plot under the occupation of the appellants was part of the mortgaged property.

3. The banking court on 12.07.2002 farmed the following issues:-

1) Whether the objectors are bona fide purchasers to the extent of 5-Marlas of the mortgaged property of the judgment debtor. If so, since what date with what effect?

2) Whether the objectors have come to this court with unclean hands and are in collusion with the judgment debtor?

3) Relief

4. Appellant No.1 entered the witness box as OW-1 on 24.09.2003 and tendered in evidence the sale deed in his favour as Exh.OW.1 when he was cross-examined by the respondent bank. The banking court on 24.09.2003 passed the order that the right of the respondent to lead evidence had already been closed on 10.09.2002 and accordingly fixed the case for arguments on the objection application of the appellants.

5. The record reflects that the respondent bank on 26.02.2005 stated before the banking court that it has approached the revenue authorities for demarcation of the property in dispute whereupon the matter lingered on for quite some time. During the course of arguments on the objection application, the banking court on 20.06.2009 at the request of both the parties directed the concerned Tehsildar to submit a report of demarcation in respect of the properties comprised in the two sale deeds. The report was submitted on 14.07.2011 before the banking court. The appellants thereafter filed their objections on the report of the Tehsildar and reply thereto was also submitted by the respondent bank.

6. The banking court through order dated 30.05.2014 (impugned herein) rendered its findings on issue No.1 against the appellants by placing reliance on

the report of the Tehsildar which reported that respondent No.1 sold portions from his property mortgaged with the respondent bank to various persons including the appellants. It was accordingly held by the banking court that the "....decree holder bank has every right to get the mortgaged property auctioned for realization of decretal amount." Having arrived at this conclusion, the banking court paradoxically stated as under:

> The objectors should seek proper remedy against the judgment debtor from competent forum. Under the law, a summary procedure is adopted by Banking Court for determination of objections and claims of the parties. Whether the piece of 5-Marla land purchased by the objectors is different from the mortgaged property, is a complicated question and Civil Court would be the ultimate and competent forum for its determination. Therefore, it cannot be held that objectors are bona fide purchasers as they failed to take the proper care and caution in purchasing the property from the judgment debtor at relevant time. Hence the issue is decided accordingly against the objections.

7. The order passed by the banking court is not sustainable for the reason that it relied solely on the report of Tehsildar whereas he never appeared in the witness box. The said report was thus not proved in accordance with law. The banking court also failed to consider that the respondent bank did not tender any evidence, oral or documentary to rebut the evidence of the appellants. The order sheet shows that the banking court on 10.09.2002 framed the issues without fixing the onus to proof thereon and adjourned the case for evidence of the parties to 10.09.2002. On the basis of the allegations leveled in the objection petition, the appellants being the objectors were required to initiate the evidence. Be that as it may, the banking court on the adjourned date of hearing i.e. 10.09.2002 closed the right of the parties to produce evidence. On an application filed by the appellants, only they were allowed to produce one witness by the banking court on 09.01.2003. The order was a material irregularity on the part of the banking court as the respondent bank ought to be given opportunity to produce evidence. It may be pointed out that the respondent bank has now filed an application bearing C.M. No. 1-C of 2020 before us under Order XLI, Rule 27, C.P.C. for producing additional evidence in shape of certified copies of sale deed registered on 31.05.1989 in respect of land measuring 1 Kanal 70 sq. feet in favour of respondent No. 2 and mortgage deed registered on 16.03.1995.

8. The issues were also wrongly framed by the banking court. The precise allegation of the appellants was that their plot of 5 Marla was not part of the mortgaged property whereas the respondent bank asserted that it was so. On this disputed question of fact, the banking court did not frame any issue. It was not the case of the appellants that they were bona fide purchasers for valuable consideration without notice of the mortgage charge of the respondent bank. Such an allegation would imply that the appellants do not deny that the land

under their occupation is part of the mortgaged property. Had this been the case, the respondent bank would only be required to prove the registration of the mortgage deed in its favour to repel the stance of the appellants. The banking court also wrongly concluded that the appellants were required to approach the civil court for determination of their objections. The executing court under section 47, C.P.C. has the necessary powers to adjudicate upon all questions for the execution, discharge and satisfaction of the decree without putting the parties to the trouble of filing a separate suit.

9. In view of what has been stated above, we allow this appeal and set aside order dated 30.05.2014 with the result that the objection application filed by' the appellants shall be deemed to be pending adjudication before the banking court. The banking court shall provide an opportunity to the respondent bank to adduce evidence, oral as well as documentary. The banking court shall also summon the concerned Tehsildar who submitted the report as court witness. In case, he is not available, the banking court shall order for a fresh demarcation report from the concerned Tehsildar to be prepared in accordance with the High Court Rules and Orders before proceeding in the matter. We also recast Issue No.1 as follows:

> 1. Whether plot measuring 5 Marla purchased by the objectors through sale deed registered on 29.09.1997 forms part of land measuring I Kanal 70 Sq.feet mortgaged with the respondent bank? OP Parties.

10. Since it is an old matter, it is expected that the banking court shall decide the objection application expeditiously within a period of three months from the date of the appearance of the parties. The parties are directed to appear before the banking court on 02.11.2021.

11. C.M. No. 1-C of 2020 stands disposed of.

KMZ/D-8/L Appeal allowed

Stereo. H C J D A 38.

Judgment Sheet

IN THE LAHORE HIGH COURT AT LAHORE
JUDICIAL DEPARTMENT

WP No.13141/2020
Ali Zayyam Tayyab etc. *Vs.*
Federation of Pakistan etc.

J U D G M E N T

Date of Hearing	8.5.2020, 11.5.2020, 18.5.2020 and 21.5.2020.
Petitioners By:	Barrister Muhammad Umar Riaz and Ms. Bushra Saqib, Advocates.
Respondents By:	Ms. Ambreen Moeen, DAG. Mr. Akhtar Javed, Additional Advocate General, Punjab. Mr. Imran Muhammad Sarwar, Advocate for Respondent UHS along with Professor Dr. Javed Akram, Vice Chancellor, UHS, Dr. Allah Rakha, Team Leader Admissions, Hassan Raza Abid, Deputy Registrar, Zahid Mehmood, Assistant Registrar (Legal) and Hamza Izhar Malik, Manager Litigations (Legal) UHS. Chaudhary Muhammad Umar, Advocate for Respondent PMDC on Court's call. **<u>CMs Under Order 1 Rule 10 CPC</u>** Mr. Javed Bashir, Advocate for Applicants in CMs No.3 and 4 of 2020. Ch. Ali Muhammad, Advocate for Applicant in CM No.5/2020. Mr. Muhammad Ahmad Qayyum, Advocate for Applicants in CMs No.6 and 24 of 2020. Rai Faisal Tufail Kharal, Advocate for Applicant in CM No.7/2020. Barrister Haroon Dugal and Chaudhary Habib-ur-Rehman, Advocates for Applicants in CMs No.8, 9, 10, 11 and 22 of 2020. Mr. Abid Saqi and Ms. Sabahat Rizvi, Advocates for

	Applicants in CMs No.12 and 15 of 2020. Mr. Khalid Jamil, Advocate for Applicant in CM No.13/2020. Mr. Kamran Hashmat, Advocate for Applicant in CM No.14/2020. Rana Muhammad Asif, Advocate for Applicants in CMs No.16 and 17 of 2020. Mr. Muhammad Naveed Shabbir Goraya, Advocate for Applicant in CM No.18/2020. Mr. M. Asad Manzoor Butt, Advocate for Applicant in CM No.19/2020. Mr. Saif-ul-Malook, Advocate for Applicant in CMs No.20 and 21 of 2020. Mr. Waheed Afzal Malik, Advocate for Applicant in CM No.23/2020. Mr. Tariq Dogar, Advocate for Applicant in CM No.25/2020. Mr. Nusrat Ali Joyia, Advocate for Applicant Pakistan Medical Association in CM No.26/ 2020. Mr. Imtiaz Noor Malik, Advocate for Applicant in CM No.27/2020. Mr. Khalid Ishaq, Advocate for Applicant in CM No.29/2020. Malik Muhammad Riaz Kalwal, Advocate for Applicant in CM No.33/2020.

Ayesha A. Malik J: Through this Petition, the Petitioners challenge the decision taken by the Government of Punjab vide advertisement dated 27.2.2020 with respect to the admissions in private sector medical and dental institutions of the Punjab.

2. Learned counsel for the Petitioners stated that the process for admission in public and private medical colleges is underway. The Petitioners along with other students applied for admission and the merit lists were under process, when suddenly on account of the advertisement dated 27.2.2020 issued by the Chairman, Provincial Admission Commission, Punjab pursuant to the decision taken by the Government of Punjab, it is stated that fresh preferences should be given to the

Government of Punjab so that they can make fresh order of preference for all private medical and dental institutions in the Punjab. Effectively the advertisement required the restart of the admission process which was almost final. Learned counsel argued that the Government of Punjab has no role whatsoever with the admission process. Respondent No.3, UHS is the Admitting University which is required to conduct a centralized medical and dental admission test and make admissions in public and private medical and dental colleges. The supervisory role is of the Admission Board, under the Pakistan Medical and Dental Council ("**PMDC**") and the Provincial Admission Committee is required to make admissions as per the policy given by PMDC. He argued that the decision taken by the Government of Punjab was on account of the various different complaints received with respect to the admission process and the placement of students contrary to the merit by Pakistan Medical Commission ("**PMC**"). However, even this matter has to be considered by the Admissions Board along with the Provincial Admission Committee. He further argued that by seeking fresh preferences, the Petitioner along with others are aggrieved as they have already commenced their studies and have been attending classes at their respective institutions for almost three months. Hence any displacement at this stage would adversely affect the academic year of the Petitioners.

3. During the pendency of this Petition, several other petitions were filed challenging the same notification and the overall placement being contrary to the merit. Subsequently many applications under Order 1 Rule 10 Civil Procedure Code, 1908 ("**CPC**") were filed by students who also had the same grievance and were also aggrieved by the manner in which the merit lists were prepared. The common grievance of all Applicants before the Court is that the merit has been compromised and they have been treated unfairly. Further that they have not been given admission on the basis of their merit or preference and instead students with lower merit have been granted admission in high merit colleges.

4. On behalf of Respondent UHS, Professor Dr. Javed Akram, Vice Chancellor, UHS and Dr. Allah Rakha, Team Leader Admissions appeared along with their counsel and apprised the Court of the facts leading up to the problems. It

is their contention that PMC in its 4th meeting held on 8.1.2020 decided to stop upgradation of the merit list and instead directed that admission be granted to candidates from the waiting list. Pursuant to this decision, UHS displayed the merit list for MBBS and BDS students on 29.1.2020. A large number of candidates who were expecting upgradation based on their merit and as per their preferences were aggrieved by this list as the merit was compromised. Furthermore subsequent to the decision of the Islamabad High Court on 11.2.2020 where the establishment of the PMC was declared unconstitutional, a void was created in the admission process which came to a hault on 19.2.2020. Therefore, the Provincial Admission Committee vide its order dated 19.2.2020 decided to grant a fresh opportunity to all candidates being the advertisement challenged before the Court.

5. During the course of arguments, the Petitioners along with all Applicants before the Court and the Respondent UHS agreed that if a methodology is devised by the Court to fix the merit then the grievance of the Petitioners and the Applicants would be redressed. The Government of Punjab made a categorical statement before the Court that their intent was only to redress the grievances of the candidates and that they have no objection whatsoever to the request of the candidates that the Court supervise the UHS in the admission process to reach a fair conclusion. Consequently the complete merit list as displayed by the UHS on 4.11.2019 was placed before the Court. Dr. Allah Rakha, Team Leader Admissions stated that if the list displayed on 29.1.2020 was disregarded in totality then an effort could be made to adjust the merit of all students as per their preference and others as per their merit. In this regard, he explained that where candidates did not meet the merit of their three preferences, they were placed in colleges as per their merit (for the purposes of this case these students are referred to as *forced placement candidates*). Hence vide order dated 13.3.2020, this Court directed that to the extent of forced placement candidates the list of 29.1.2020 be disregarded and forced placement be made on the basis of merit. In order to implement this decision, the Court directed that:

(i) Forced placement must be made strictly on the basis of the merit.

(ii) The 6th list of MBBS dated 10.1.2020, 7th list of MBBS dated 17.1.2020 and 8th list for MBBS dated 29.1.2020 to the extent of forced placement be revised with respect to the merit to ensure that all forced placements are made as per the merit of the college.

(iii) In the same way 5th list of BDS dated 10.1.2020, 6th list of BDS dated 16.1.2020 and 7th list of BDS dated 29.1.2020 be also revised to the extent of forced placement.

(iv) Once these lists are provided to the Court on 17.3.2020 and meet the requirements of the Court, the same shall be publicized for all candidates to see and the candidates will be given the option to decide whether they wish to be upgraded as per the list or not. It is clarified that these are provisional lists and are not to be acted upon until a clear direction from the Court is given. It is once again clarified that Government of Punjab has no role to play in the formulation of these lists.

6. It was also pointed out that two colleges namely Watim Medical College, Rawalpindi and Azra Naheed Dental College, Lahore have issued special lists on the basis of the meeting of the PMC dated 30.11.2019. It was again reiterated that candidates placed in these colleges were from the waiting list and not in accordance with the upgradation of the merit. Further that these colleges never offered admission when the process of admission was initiated. They were subsequently registered and candidates from the waiting list were adjusted in these two institutions. The counsel for the UHS also informed the Court that there are 3327 seats in the private medical colleges out of which 2501 students have been placed as per their preferred choice. 826 candidates have been placed as forced placement and in the same manner there are 824 BDS seats out of which 620 candidates have been placed as per their preferred choice and 204 candidates as per forced placement. After going through the data provided, the Court directed vide orders dated 17.3.2020 and 28.4.2020 to revise the merit list, such that all forced placement candidates can exercise the option to either stay at their given institution or else be upgraded as per their merit. With respect to the candidates exercising this option, the Court was informed that out of the candidates 485 MBBS and 71 BDS students want to stay at their current college. The Court then directed that those candidates

who wanted to be moved as per their merit should be upgraded and those candidates who did not respond as well as those candidates who did not agree with the placement methodology be placed as per their merit. This list was again brought to the Court on 29.4.2020. On this date the Court directed that all preference candidates on the basis of the merit list issued on 17.1.2020 for MBBS and 16.1.2020 for BDS should be given the option to be upgraded based on their preferences. Once again the list of 29.1.2020 was disregarded as it was totally against the merit. This exercise was concluded and placed before the Court on 4.5.2020, 5.5.2020 and 12.5.2020 when UHS was directed to finalize the merit list with respect to all candidates being the preference candidates as well as forced placement candidates.

7. Professor Dr. Javed Akram, Vice Chancellor, UHS informed the Court that on 30.4.2020 a meeting was held of the Admissions Board of the Adhoc Council under the chairmanship of Mr. Justice (Retd) Ejaz Afzal Khan, President PMDC. In this meeting it was decided that merit list issued by PMC on 29.1.2020 with respect to MBBS and BDS colleges was unfair, unjust and had compromised on the merit, hence the list should be revised and candidates should be upgraded strictly on the basis of the merit. It was also decided that there should be no further placement of candidates in Watim Medical College, Rawalpindi and Azra Naheed, Dental College, Lahore as the fate of these colleges is yet to be determined by the Adhoc Council. The Vice Chancellor submitted this statement in writing before the Court. He also explained that in order to save time as the admission process is a very lengthy exercise, it was decided at the meeting that the real problem was the merit list of 29.1.2020 wherein the process of upgradation was stopped and instead candidates from the waiting list were placed in the merit list thereby compromising the merit. At this time it was clarified that the Court had already disregarded the list of 29.1.2020 with respect to the preference candidates as well as forced placement candidates as a bare review of the list of 29.1.2020 itself shows that the merit had been badly compromised.

8. Throughout the course of these proceedings the Admission Team from the UHS along with Dr. Javed Akram have assisted the Court from the original record,

stating the discrepancies and sharing the contents of the e-mails of the aggrieved candidates. As per the record, the MDCAT exam was held on 28.8.2019 and the result announced on 1.9.2019. Applications for admission were called for in MBBS and BDS programs online on 30.9.2020. On 4.11.2019 Respondent No.3, UHS displayed the provisional merit list of all candidates who applied for MBBS and BDS programs. This list gave all candidates a chance to see where they fall in the overall merit. Prior to calling for the three preferences, candidates were also informed that if they do not meet the merit of their preference they will be placed in order of merit. It is important to note that on 20.10.2019 the Pakistan Medical Commission Ordinance, 2019 was promulgated, establishing the PMC which took over the admission process. The PMC continued with the admission process which is governed by the MBBS and BDS (Admissions, House Job and Internship) Regulations, 2018 ("**Regulations**"). On 5.11.2019 candidates were required to state their three preferences in order of preference as per the procedure prescribed for public sector medical and dental colleges. Respondent No.3 prepared the 1st merit list on 22.11.2019 on the basis of given preferences. Where a candidate did not meet the required merit as per their preference, the candidate was placed in a college as per their merit with the least number of seats left vacant, that is the highest merit college available to the candidate. This process is computerized and accordingly the following merit lists were published.

MBBS

i. 2nd Selection List displayed on 6.12.2019
ii. 3rd Selection List displayed on 18.12.2019
iii. 4th Selection List displayed on 26.12.2019
iv. 5th Selection List displayed on 31.12.2019
v. 6th Selection List displayed on 10.01.2020
vi. 7th Selection List displayed on 17.01.2020
vii. 8th Selection List displayed on 29.01.2020

BDS

i. 2nd Selection List displayed on 6.12.2019
ii. 3rd Selection List displayed on 26.12.2019
iii. 4th Selection List displayed on 31.12.2019
iv. 5th Selection List displayed on 10.01.2020
v. 6th Selection List displayed on 17.01.2020
vi. 7th Selection List displayed on 29.01.2020

9. As per the admission process under the Regulations, which was being followed by the PMC, three important decisions were made for the purposes of admission:

i) Selected candidates were bound to deposit the prescribed fee in the online account of their respective college. Where a candidate failed to make the deposit of the fee their seat became vacant.

ii) Upgradation process was adopted only for those candidates who had paid the requisite fee.

iii) On 8.1.2020, PMC in its 4th meeting decided to stop the upgradation process and admit students from the waiting list. Pursuant to this decision, the list of 29.1.2020 for BDS and MBBS was published.

By this time a large number of complaints had come to surface where candidates felt that their merit had been grossly compromised. It was also decided by the PMC that students admitted by 31.1.2020 shall be considered final and no further upgradation shall take place and admissions shall be closed. This led to absolute confusion and uproar by the candidates, particularly those whose merit had been compromised by not upgrading them. On 11.2.2020 PMC was declared unconstitutional by the Islamabad High Court, leaving the Provincial Administration Committee with the daunting task of dealing with numerous complaints and finalizing the merit lists. On 13.3.2020 this Court directed UHS to re-adjust the merit of the forced placed candidates as per their merit. On 17.3.2020, the Court was informed that there are 3327 seats in private medical and dental institutions out of which 2501 students have been placed as per their preference choice. 826 candidates for MBBS and 204 for BDS have been forced placed by UHS. In order to resolve the issue candidates were given the option to move to a college of higher merit or to stay at their respective college. On 28.4.2020 the Court was informed that 485 MBBS candidates and 71 BDS candidates exercised their

option, whereas 201 MBBS and 48 BDS candidates did not agree with the admission process in total. Dr. Allah Rakha, Team Leader Admissions, UHS also stated that 179 MBBS and 96 BDS candidates failed to respond within the given time. Therefore in order to facilitate the process, the Court ordered that those who had exercised their option to stay at the admitted college should be retained there and the rest adjusted as per merit. This is essentially because it is not the fault of the candidates that they were given admission in their respective colleges and that they were studying in the colleges for three months. This is the case of the present Petitioners, who state that they followed the process, deposited the fees and commenced with the classes in their colleges as admitted by PMC and UHS. Therefore, they are not at fault and now at this stage should not be made to change their colleges even if they are placed lower in merit. The contention of the Petitioners is justified, considering the ratio in the case "*Chairman, Selection Committee/Principal, King Edward Medical College, Lahore and 2 others v. Wasif Zamir Ahmad and another"* (**1997 SCMR 15**) wherein the august Supreme Court of Pakistan has held that where students are not at fault they should not be made to suffer the consequences of the wrongful decisions of the authority, being the PMC in this case. Hence candidates who exercised their option to stay where they are were retained and the remaining forced placed candidates were placed as per merit.

10. So far as the preferences candidates are concerned, they are the candidates who needed to be upgraded as per their given preferences as the Court ordered on 29.4.2020 and 4.5.2020 that they be upgraded as per their given preferences. Once the list was finalized it was posted on the UHS website on 5.5.2020 and selected candidates were required to deposit the prescribed fee within the due date given by the respective college. In this way a second list was issued on 8.5.2020 after necessary adjustments were made based on the decisions of the candidates. The merit lists have been finalized and 20.5.2020 was fixed as the cutoff date for completing the lists and filling all available vacancies. Consequently after the cutoff date of 20.5.2020 the admission process will cease and no further adjustment should be made, even for the purposes of filling vacant seats.

11. Throughout this process, the Court with the assistance of the counsel for the UHS, especially Professor Dr. Javed Akram, Vice Chancellor, UHS, and Dr. Allah Rakha, Team Leader Admissions, has tried to minimize the issues and rectify the merit lists to the extent possible. It is important to note that the admission process was almost complete when this Petition along with others and all applications under Order 1 Rule 10 of CPC were filed. Eight lists for MBBS and seven lists for BDS were issued and candidates were placed at medical and dental colleges. Many candidates had accepted admissions based on the merit lists issued and have joined their respective colleges. Therefore, prudency required to cause least amount of disturbance and ensure that the merit was upheld. In this regard the Adhoc Council of the PMDC, as constituted by the august Supreme Court of Pakistan also decided that the merit should be retained and the merit list of 29.1.2020 prepared under the orders of PMC have no effect.

12. The Petitioners before the Court, after participating in this extensive process of adjusting the merit are no longer aggrieved. They have been placed in the medical and dental colleges as per the orders of the Court and have no grievance. The Court also heard several applications under Order 1 Rule 10 of the CPC where many candidates sought permission to join the proceedings and be made party to the instant Petition. The Admissions team under Dr. Allah Rakha, Team Leader Admissions and under the supervision of Vice Chancellor Dr. Javed Akram were present in Court along with their counsel and the entire record for all Petitioners/Applicants. The Applicants' grievances were heard, the record was consulted and the issue was decided through separate orders. In this regard, it is necessary to highlight that there is a lot of misconception among candidates on account of the order of preference from the three preferences called for by the UHS vide its advertisement dated 15.9.2019. The advertisement clearly prescribes that candidates should enter the names of three colleges in order of preference and that the order of preference is final and cannot be changed. This condition was mandatory, therefore subsequent changes cannot be entertained. The UHS then prepared college-wise selection lists on the basis of the preference given. Where a candidate did not meet the merit of their preference they were placed in the next

highest merit college, based on the number of vacant seats. The entire process is computerized and through the upgradation process candidates are shifted to the colleges as per their merit. It is important to note that the right of upgradation is given to candidates who have paid the total fee.

13. After following this process all candidates have been adjusted and the Court also ordered that all vacant seats be filled up in this process so as to ensure maximum admission. Therefore, contentions that the merit has been ignored or that candidates have not been placed as per merit, is a misconceived argument as candidates have been considered against their three preferences and considerations such as preferred city, closer to home, preference of some other college cannot be entertained as all candidates are bound by the same process and procedure and cannot be adjusted as per their desire or convenience. At this point, it is necessary to note that the admission process for the 2019-20 session has been delayed due to the challenges raised against the establishment of the PMC and subsequently Covid-19. The process started in September, 2019 and has taken until May, 2020 to be completed. Many candidates during this time joined their respective colleges and started their classes. These candidates, being the Petitioners, cannot be penalized as they followed the process and accepted admission as per the merit lists. In the effort to adjust the candidates and fix the merit, all candidates were given the option to either be adjusted as per merit or else stay where they were placed as per the selection lists detailed in the order of the Court dated 17.3.2020. Majority of the candidates exercised their option to stay where they were, which option was granted by the Court as the students cannot be made liable for the decisions taken by the PMC with reference to admission. For the remaining candidates before the Court, the issues are more of personal convenience rather than merit. The UHS or the Court cannot ignore the Regulations or the terms provided in the advertisement of 15.9.2020 which all candidates were aware of Admissions in MBBS and BDS is highly competitive and merit is considered down to the third decimal point. Hence the only factor which determines admission is merit and candidates cannot claim preference based on personal convenience.

14. The merit has been finalized and the process of upgradation is now complete. Majority of the candidates have accepted their selection as per the merit lists. Those who appeared before the Court, their applications were decided through independent orders based on the original record and their merit. Therefore in view of the above, the advertisement under challenge is no longer relevant. The merit as finalized has been posted, hence the instant petition is **disposed of** in the above terms.

(AYESHA A.MALIK)
JUDGE

Allah Bakhsh*

Stereo. H C J D A 38.

Judgment Sheet

IN THE LAHORE HIGH COURT AT LAHORE
JUDICIAL DEPARTMENT

WP No.7350/2019

Muhammad Zarak Rasool

Versus

National Database and Registration Authority through its Chairman etc.

J U D G M E N T

Date of Hearing	**16.10.2019**
Petitioner By:	Rana Zulfiqar Ali Khan, Syed Qamar Ali Rizvi and Mr. M. Ikram Ulllah Khan, Advocates.
Respondents By:	Mr. Hamid Rafique, Advocate for Respondents No.1 to 3.

Ayesha A. Malik J: This petition filed through the mother of Muhammad Zarak Rasool, a minor, the decision of Respondent National Database Registration Authority ("**NADRA**") allowing the father of the minor to unilaterally change the name of the minor from Muhammad Zarak Rasool to Muhammad Umar Rasool has been called into question.

2. The Petitioner is a minor named Muhammad Zarak Rasool whose parents were divorced on 11.8.2015. Thereafter his parents have had serious differences and disputes over the Petitioner, such that it compelled the mother of the Petitioner to file WP No.35849/2016 for the issuance of the minor's child registration certificate (Form B) from NADRA. By order dated 15.7.2017 the matter was resolved and ultimately the Form B was issued on 3.5.2017 showing Muhammad Zarak Rasool as the minor son of the Petitioner (mother) and Respondent No.4. Soon thereafter Respondent No.4 without disclosing any information to the mother moved an application for change of name of the minor from Muhammad Zarak Rasool to Muhammad Umar Rasool which was allowed without any deliberation, without any notice and without seeking the opinion or consent of the mother. Learned counsel for the Petitioner argued that proceedings in the different suits filed by the Petitioner

for recovery of maintenance allowance and petitions for the issuance of guardianship certificate and for interim as well as permanent custody of the minor are pending before the Family Court and Guardian Judge at Lahore wherein the name of the minor is shown as Muhammad Zarak Rasool. By unilaterally changing the name of the minor from Muhammad Zarak Rasool to Muhammad Umar Rasool, the rights of the Petitioner in all pending proceedings are adversely affected. Learned counsel further stated that if at all any such change was to be made, it had to be made with the consent of both the parents. Learned counsel also submitted that reliance on Clauses (a)(b)(c) of the NADRA Registration Policy ("**Policy**") is totally misconceived because the stated Clauses allow change of name in NADRA record without disclosing disputes and pending cases where a name change is relevant.

3. On behalf of the Respondent NADRA, it is stated that an application was moved by the father, Respondent No.4 for change of name of the minor from Muhammad Zarak Rasool to Muhammad Umar Rasool with an affidavit to this effect. Clauses (a)(b)(c) under the Modification of National Identity Card (S/CNIC-S/NICOP/CRC) of the Policy allows for name change on the basis of the affidavit by an immediate relative. Hence he argued that the name change was done in accordance with law and no illegality is made out. Learned counsel for the Respondents when confronted on whether the mother of the minor Muhammad Zarak Rasool was issued notice or whether her consent was sought, stated that in terms of Clauses (a)(b)(c), the affidavit of one family member is sufficient to change the name.

4. The basic issue before the Court is with reference to the change of name of the minor by Respondent No.4 without the consent of the Petitioner mother namely Kosar Batool on the basis of an application moved by the father/Respondent No.4 before NADRA.

5. National Database and Registration Authority Ordinance, 2000 ("**Ordinance**") preamble stipulates that it is *an Ordinance to provide for the establishment of the National Database and Registration Authority so as to facilitate the registration of all persons and the establishment and maintenance of*

multipurpose database, data warehouses, networking, interfacing of databases and related facilities. Section 9 of the Ordinance 2000 provides that *every citizen in or out of Pakistan who has attained the age of eighteen years shall get himself and a parent or guardian of every citizen who has not attained that age shall, not later than one month after the birth of such citizen, get such citizen registered in accordance with the provisions of this Ordinance*. The primary purpose of this Ordinance and the authority thereunder is to register persons or classes thereof including citizens. Section 5 of the Ordinance provides that the basic purpose of NADRA is to develop and establish a system of registration to bring within its purview all persons and things as deemed necessary. Section 21 of the Ordinance calls for information regarding births and deaths, marriages and divorce. B-Form is the Child Registration Certificate ("**CRC**") for children under the age of 18 years. Hence in terms of its mandate NADRA must ensure that the correct data is entered with reference to the citizens and in this case in the CRC.

6. NADRA has invoked Clauses under Registration Policy (Version 4) which states as follows:

Modification of National Identity Card (S/CNIC-S/NICOP/CRC)

	a.	Original S/CNIC-S/NICOP/CRC of applicant AND
	b.	Affidavit as per format attested by Oath Commissioner/Certificate from Dar-Ul-Afta (due to religion change only) AND
	c.	Application of CNICF from any blood/immediate relative.
Exceptions /Remarks	i.	Above mentioned document(s) are for modification only, for correction in name no document(s) is required and every possible measure shall be used to facilitate applicant.
	ii.	Applicant neither can revert back to his/her previous name nor can modify name for 2nd time except female applicant (modified name with husband/father).
	iii.	Once applicant modifies his/her name, all dependents shall also modify their registration document (if required).

7. On the basis of the stated Clauses, Respondent No.4 moved an application and required that the name of the minor be changed from Muhammad Zarak Rasool to Muhammad Umar Rasool. The name change was done in a routine matter without notice to the mother and without consideration of the earlier writ petition seeking a direction to NADRA to issue the CRC in the name of the minor which is a clear indication of the troubled relations between the parents over the minor. NADRA granted the permission to Respondent No.4 without application of mind and without due consideration of the fact that there may be disputes pending between the parents over the minor. In this regard, the Respondent NADRA was obligated to call both the parents and get an affidavit from each of the parents on the name change request in the CRC. This prevents misuse of the Policy and ensures that both the parties are agreeable with reference to the change of name. In the event that there is a dispute between the parties, the same will become apparent to NADRA who should not allow the change of name unless the disputes are settled. By allowing change of name in the CRC through a unilateral process, disputes pertaining to a minor between parents are in fact prejudiced or adversely affected where the name has been changed without due notice to the parents. Under the circumstances the decision of NADRA to change the name of the minor from Muhammad Zarak Rasool to Muhammad Umar Rasool is declared illegal. However, if Respondent No.4 is desirous to change the name, he can always move a fresh application with the consent of mother which should be processed accordingly.

8. In view of the aforesaid, the instant petition is **allowed** and the NADRA is directed to revert the name of the minor in the CRC to his original name of Muhammad Zarak Rasool immediately and issue a fresh certificate accordingly. NADRA should also amend its policy on change of name so as to ensure that the policy is not misused through unilateral name change applications.

(AYESHA A.MALIK)
JUDGE

Allah Bakhsh*

Stereo. H C J D A 38.

Judgment Sheet

IN THE LAHORE HIGH COURT AT LAHORE
JUDICIAL DEPARTMENT

WP No.18066/2014

Learning Alliance (Private) Limited etc.

Versus

Province of Punjab etc.

J U D G M E N T

Date of Hearing	**10.10.2019, 18.12.2019, 25.2.2020, 4.11.2020, 26.11.2020 and 15.12.2020.**
Advocates for Petitioners:	Mr. Iftikharuddin Riaz and Mr. Imran Iqbal, Barrister Muhammad Umar Riaz and Mr. Waqas Umar, Mr. Ali Sibtain Fazli, Mr. Hasham Ahmad Khan and Mr. Esa Jalil, Syed Ali Zafar, Ms. Mehak Zafar and Mr. Mubashir Aslam Zar, Mr. Nadeem ud Din Malik and Mr. Asad Ayub, Mr. Munawar-us-Salam and Mr. Haroon Mumtaz, Mian Qamar uz Zaman, Syed Salman Haider Jafri, Mr. Munib Iqbal, Mr. Aamir Majeed Rana and Rana M. Wakil Khan, Ms. Ayesha Warsi, Ms. Amna Warsi and Mr. Sohail Asghar Chaudhary, Dr. Ilyas Zafar, Mr. Sultan Mahmood, Mr. Ashraf Bhatti, Rana Muhammad Asif, Mr. Muhammad Baleegh uz Zaman, Mr. Azmat Lodhi, Mr. Muhammad Akhtar Rana, Mian Ijaz Hussain, Syed Shahab Qutub, Mian Tariq Hassan and Ms. Maria Farooq, Mr. Muhammad Shabbir Hussain and Mr. Nadeem Shehzad, Mr. Usman Ali Bhoon and Malik Ahsan Mehmood,

	Mr. Tahir Attique Piracha, Chaudhary Muhammad Naseer and Ms. Samra Malik, Mr. Abid Hussain Chaudhary, Mr. Muhammad Akram Khawaja, Khawaja Ahmad Hassan Anwari, Mr. Mehboob Azhar Sheikh, Mr. Muqtedir Akhtar Shabbir and Mirza Shahryar Beg, Mr. Muhammad Raza Qureshi, Mr. Asad Javed and Mr. Sikendar Abbas, Malik Aslam Ali Saif, Mr. Nusrat Joya, Mian Ijaz Latif, Chaudhary Inayat Ullah and Ms. Bushra Inayat, Mr. Mushtaq Ahmad Chaudhary and Ch. Habib ur Rehman, Mr. Hashim Sabir Raja, Mr. Sohail Arshad, Mr. Ghulam Abbas Tarar, Mr. Zahir Abbas, Mr. Khalid Khan, Mr. Muhammad Immad Qamar, Mr. Muhammad Adil Khokhar, Chaudhary Tariq Mehmood, Mr. Noor Muhammad Khan Chandia, Mr. Waheed Afzal Malik, Mr. Shahid Rafiq Mayo, Mr. Talaat Farooq Sheikh, Mr. Qamar Hayat Bhuttah, Mr. Sheraz Khalid, Mr. Muhammad Sohail Anjum, Mr. Masood Sadiq, Mr. Asad Ali Bajwa, Mr. Muhammad Yasin Bhatti.
Advocate for Respondents:	Mr. Akhtar Javed, Additional Advocate General, Punjab along with Muhammad Fahad, Litigation Officer, LG&CD Department. Mr. Mustafa Ramday, Ms. Nadia Hafeez, Ms. Rabia Hassan, Mr. Saad Sibghatullah, Mr. Asfand Mir, Mr. Waqar A. Sheikh, Syed Muhammad Ali Mehdi

	Bukhari, Sahabzada Muzaffar Ali Khan, Mr. Amir Saeed Rawn, Mr. Ahmad Jamal, Advocates for Respondent LDA along with Ali Nusrat, Director Town Planning, Naveed Ahmad Bhatti, Director (Commercial), Mehmood Ali, Muhammad Haris Ali, Deputy Directors, Qasim Abbas Bhatti, Deputy Director Law, Muhammad Shoaib, Assistant Director. Mr. Iftikhar Ahmad Mian, Advocate for City District Government, Lahore. Barrister Chaudhary Saeed H. Nangra, Sardar M.S. Tahir and Mr. Zafar Iqbal Bhatti, Advocate for the Respondents.

Ayesha A. Malik J: This common judgment decides upon the issues raised in the instant Petition along with connected Petitions, as detailed in Schedule "**A**" appended with the judgment, as all Petitions raise common questions of law and facts. The instant Petition along with connected petitions essentially challenge the vires of provisions of the Lahore Development Authority Act, 1975 ("**LDA Act**") as well as provisions of the Lahore Development Authority Land Use Rules, 2014 ("**2014 Rules**") and consequently demand that notifications seeking payment of commercialization/conversion fee be set aside.

The case of the Petitioners

2. The Petitioners before the Court are either owners or tenants of properties who have been asked to pay conversion fee by the LDA under the 2014 Rules for carrying out commercial activity at their property. The Petitioners have either impugned demand notices issued by Lahore Development Authority ("**LDA**") for payment of conversion fee or have challenged public notices dated 28.12.2012 and 5.1.2013 issued in leading newspapers both english and urdu on the basis of which, a list was provided of commercial areas and the public was informed that they have seven days to have their properties converted permanently, for commercial use after payment of conversion fee. In some cases the Petitioners have challenged the vires of certain provisions of the LDA Act on the ground that they do not have the power to levy conversion fee as this power vests with the Local Government and in some

cases the challenge is with respect to the authority of the LDA to demand a one time conversion fee.

3. The instant Petitioner is a school located within the Gulberg Scheme whose contention is that they have been paying temporary commercialization fee for the property for a long time and that there is no basis to charge permanent commercialization fee from the Petitioners. There are several other petitions filed by schools on the same ground being WP Nos.12224/16, 12222/16, 12225/15, 12216/16 and 12220/16. In other cases, the Petitioners state that they are engaged in commercial activity on commercial roads, that their property is located in a commercial area, hence there is no reason to convert the land usage as its usage has been declared commercial. In this context, the relevant areas where the business of the Petitioners are located within the Gulberg Scheme are MM Alam Road, Jail Road, Main Boulevard Road and Zafar Ali Road amongst others. The other locations in dispute are Iqbal Town Scheme, Multan Road, College Road and Lawrence Road which are all declared commercial by the LDA. In this context, the basic arguments of the Petitioners are as follows:

(i) The Petitioners have been doing commercial business at their properties for a long time and have been paying commercialization fee having all requisite permissions in place. Therefore there is no legal justification for charging a one time conversion fee under the LDA Act and the 2014 Rules for the purposes of carrying out commercial activity on their properties;

(ii) The Petitioners are located on a road or segment of road which has been declared commercial, hence there is no legal justification for charging conversion fee as the land usage is declared commercial. Hence the Petitioners should not be required to pay conversion fee;

(iii) The Petitioners have challenged the demand for one time conversion fee on the ground that they should be allowed to pay annual commercialization fee and that a one time lumpsum amount not only is financially not viable but that no *quid pro quo* is offered on the basis of such a huge amount charged by LDA;

(iv) That Sections 4, 6, 13, 14, 14A, 18, 19, 28 and 37 of the LDA Act ("**the Challenged Provisions**") violate Article 140A of the Constitution of Islamic Republic of Pakistan, 1973 ("**Constitution"**) which envisages a three tier system of government being Federal, Provincial and Local, hence are ultra vires the Constitution and should be declared so;

(v) That the impugned sections usurps the power of the Local Government in favour of the LDA which is not only against the mandate of the Constitution but also deprives the Local Government of its ability to raise revenue to carry out its functions under the Punjab Local Government Act, 2013;

(vi) That the quantum of the conversion fee prescribed is arbitrary, excessive and discriminatory;

(vii) That the 2014 Rules do not prescribe the manner in which the fee shall be charged rather a flat rate of 20% of the commercial value of the property is the required rate charged by the Respondents.

4. The argument essentially made by the learned counsel for the Petitioners is that LDA does not have the power to levy or collect a conversion fee under Section 28 of the LDA Act for land usage which is declared commercial that is where the land usage has been declared commercial, there is no legal basis to recover conversion fee. Further that if at all any fee can be levied it is only to recover cost incurred for conversion within a specified scheme. This requires proper disclosure by LDA of the cost incurred and the amounts statedly to be recovered. Hence it is argued that the conversion fee at the rate of 20% of the commercial value of the property is arbitrary, without basis, exorbitant and does not fall within the mandate of Section 28 of the LDA Act. It is also argued that there is no *quid pro quo* offered by the LDA for the fee they are charging. In this regard, the argument is that in order to levy a fee *quid pro quo* is mandatory. Reliance is placed on *Collector of Customs and others v. Sheikh Spinning Mills* (**1999 SCMR 1402**), *Pakcom Limited and others v. Federation of Pakistan and others* (**PLD 2011 SC 44**), *Federation of*

Pakistan through Secretary M/o Petroleum and Natural Resources and another v. Durrani Ceramics and others (**2014 SCMR 1630**).

5. Learned counsel for the Petitioners also argued that LDA cannot charge a one time fee for permanent conversion as that not only goes against the *quid pro quo* requirement but also against the mandate of Section 28 read with Section 31 of the LDA Act. Learned counsel for the Petitioners also argued that the LDA Act read with the 2014 Rules seeks to vest the powers of the Local Government in a non-elected authority which is fundamentally opposed to Article 140A read with Article 32 of the Constitution and offends the fundamental rights of the Petitioners. Reliance has been placed on *Lahore Development Authority through D.G. and others v. Ms. Imrana Tiwana and others* (**2015 SCMR 1739**) ("**Imrana Tiwana Case**") to urge the point that these aspects of the matter have not been considered by the august Supreme Court of Pakistan in the said judgment. Learned counsel further argued that Local Government is an elected body which is responsible under the Local Government Act, 2013 (as the relevant law at the time) to essentially develop land use plans, classification and re-classification along with development of markets and zoning rules while considering public transport, roads and other infrastructure. In this regard, the function of the Local Government has been handed over to the LDA which not only is unconstitutional but deprives the Local Government from its ability to do its functions through its elected representative as well as to raise revenue to carry out its functions as contemplated under the Local Government Act. Hence they argued that there is no means of harmonizing the functions of an elected local government viz-a-viz the impugned Sections of the LDA Act.

The case of the Respondents

6. On behalf of LDA it is argued that the vires of the sections challenged has already been settled in the Imrana Tiwana Case wherein it was held that these provisions being the Challenged Provisions of the LDA Act are to be construed harmoniously with the functions of the Local Government under the Local Government Act, such that they are compliant with each other in furtherance of their functions and responsibilities. It is also argued that LDA carries out most of

the development works in the Lahore Division with the help of WASA and TEPA and that the re-classification of various different schemes falls within the mandate of the LDA Act as well as the 2014 Rules; that the Gulberg Scheme was re-classified so as to facilitate the inhabitants of the areas and to ensure that commercial activity was restricted to particular zones to protect overflow issues and that the District Planning and Design Committee, Lahore has reviewed all recommendations made by the LDA with respect to the commercial and frozen roads which led ultimately to the Notification of 29.6.2011 issued by the Director General, LDA; that the LDA can charge conversion fee on the basis of Section 28 of the LDA Act read with Rule 28 of the 2014 Rules and as such no illegality has been committed by the LDA.

7. So far as the *quid pro quo* argument is concerned, it is argued that LDA provides a large number of services for the development and facilitation of its schemes, hence it can charge a one time permanent conversion fee. In this regard, learned counsel argued that the LDA maintains the LDA Fund and the Urban Development Fund from which it is required to provide various different services. In this regard, learned counsel argued that if there was no *quid pro quo* the properties being used commercially or industrially would be of no use to the Petitioners as the commercial or industrial value of the land is on account of the services provided by LDA for that area. During the course of arguments, learned counsel also informed the Court that the Lahore Development Authority Land Use Rules, 2014 have been repealed by the Lahore Development Authority Land Use Rules, 2020 ("**2020 Rules**") on the basis of which many of the pending Petitions have become infructuous as the 2020 Rules have once again introduced the concept of temporary commercialization, hence for those Petitioners who are aggrieved by permanent conversion, the option of availing temporary commercialization is once again available. However, LDA's counsel requested that the matter be decided on its merit to settle the long standing issue.

Issues before the Court

8. On the basis of the arguments made, the issue before the Court is primarily whether the LDA can levy a conversion fee in areas which are declared to be

commercial; whether such a fee can be a one time fee and whether the fee charged is as per the requirements of Section 28 of the LDA Act. Also in issue are the vires of Sections 4, 6, 13, 14, 14A, 18, 19, 28 and 37 of the LDA Act with specific reference as to whether these powers should be exercised by the Local Government and whether the Imrana Tiwana Case considered the issue of financial autonomy of the Local Government, particularly with reference to the impact on revenue generation for the Local Government viz-a-viz conversion fees.

The Background

9. The dispute between the parties is essentially under the 2014 Rules, on account of the changes in policy with respect to commercial use of land and levy of fee for conversion in land use. In order to appreciate the dispute of the Petitioners, it is necessary to understand the changes in policies adopted by the LDA over the years with respect to commercialization that is commercial use of land and the levy of conversion fee along with the concept of change in land use.

10. On 26.12.1990 the Government of Punjab through the Housing, Physical and Environmental Planning Department issued the first commercialization policy for residential plots on the basis of which residential property could be converted into commercial property. On 27.3.1993 the policy was revised whereby commercialization was allowed subject to the permission granted by a committee, after due deliberation of the roads and streets *which could be converted for commercial usage*, thereby allowing residential plots to be used for commercial purposes. As per this policy commercialization fee was charged in lumpsum at the rate of 25% of the market value, in advance and it required an NOC to be obtained from adjoining properties prior to converting the land use of the property.

11. The Commercialization Rules 2001 ("**Commercialization Rules**") were notified for the first time on 2.7.2001 by the Government of Punjab, Housing, Urban Development and Public Health Engineering Department, Lahore under Section 44 of the LDA Act and Section 43 of the Punjab Development of Cities Act, 1976. As per these Rules, a commercialization committee could notify the roads and streets on which commercial activity was permitted and commercialization fee was charged at the rate of 20% of the value of the property,

based on the valuation table prepared under the Stamp Act, 1899 or 20% of the average sale price for the preceding 12 months in case of rural areas. The Commercialization Rules provided for annual commercialization as well as temporary commercialization and also constituted a commercial committee to implement the rules.

12. On 17.3.2008 in exercise of powers under Section 44 (rule making power) of the LDA Act, Lahore Development Authority Land Use Conversion Rules, 2008 ("**2008 Rules**") were notified and the Commercialization Rules were repealed. As per these Rules, the LDA had to prepare List A, B, C and D which provided for the roads or segment of roads and buildings declared commercial as well as plots and buildings where temporary commercialization was permitted. In terms of Rule 9 of the 2008 Rules, LDA could deem a building, plot or land facing a commercial road *as converted to commercial use* after payment of conversion fee and an occupant of a building, plot or land facing the roads on List A could use the land for commercial use without payment of conversion fee. It also provided for temporary commercialization in terms of List C and D and required phasing out of temporary commercialization of buildings in List C. Rule 18 of the 2008 Rules provided for the fee for conversion of land use when residential or open areas were converted to commercial use. The rate prescribed was 10% of the value of the land as per the valuation table or the average sale price over the preceding 12 months where valuation table was not available. Important to note that until 2008 roads declared commercial could be used for commercial purposes, without any conversion fee.

13. The 2008 Rules were repealed vide Notification dated 10.02.2009 and the LDA Land Use (Classification, Re-classification and Re-development), 2009 ("**2009 Rules**") were notified which Rules introduced the concept of land use classification and essentially provided for the various different land uses which were permissible or prohibited. As per these Rules, land use was classified as residential, commercial, industrial, peri-urban, agricultural and notified area. A procedure was set out in Chapter III of the 2009 Rules for the classification of land use and in terms of Chapter IV, land use could be reclassified by the LDA and notified accordingly. An entire process was set out for reclassification of land use,

based on the development and growth in the area, which required for the re-classified scheme to be notified. Fee for land use conversion was prescribed in Rule 55 and also provided under Rule 62 that a building, plot or land facing the roads mentioned in List A as converted for commercial use, however the land owners had to pay a conversion fee.

14. Consequent to the 2009 Rules, Notification dated 5.11.2009 was issued by the LDA, which covered 58 roads and segments of roads, which were declared as commercial, named in List A. This List A published on 13.11.2009 provided for the names of the roads and the segments, its starting point, its ending point with all dimensions and also provided for the type of commercial activity allowed on roads. Important to note that these roads were declared as permanent for commercial use. Hence their land usage was declared to be commercial. The LDA also provided for the list of roads, segments of roads, which were not allowed any future or further commercial use as List B. Some of the areas under dispute before this Court are named roads or segments of roads provided in List A such as Jail Road, Main Boulevard Gulberg, M.M Alam Road, Hali Road, Stadium Road, Shahrah-e-Quaid-e-Azam Road, Mall Road and Link Road which have been declared as commercial roads. In the same way, Model Town Link Road, Al-Madinah Road Township, Maulana Shoukat Ali Road, College Road and Zafar Ali Road are also listed as roads in commercial use. This Notification was amended on 29.6.2011 published on 25.7.2011 such that List A and List B were further amended to add roads which can and cannot be commercial in future.

15. On 1.2.2012 a Notification was issued under Rule 42 of the 2009 Rules providing for the land use reclassification plan of the Gulberg Scheme as approved by the Authority as per its reclassification plan. Rules 1 to 3 of the Notification provides as under:-

(1)	The general restrictions/terms of this re-classification scheme shall apply on the respective roads/commercial corridors and in Institutional Zones permitted for future commercial/institutional use, in addition to any restrictions specifically imposed on these

	roads (commercial corridors) and institutional zones.
(2)	Nothing in this notification shall affect the status of a building, plot or land, which has been converted on payment of the conversion fee under any law for the time being in force.
(3)	Subject to any legal restrictions imposed under any law for the time being in force, an occupant of a building, plot or land may use the building, plot or land for a purpose permitted under the Re-classification Plan on payment of the conversion fee.

Essentially this Notification re-classified land use in the Gulberg Scheme, as per the Reclassification Plan but importantly did not affect the status of a building, plot or land which had been converted on payment of conversion fee under any law. This meant that for land use, which had been converted and conversion fee had been paid, that property retained its converted land use. The Notification is silent so far as the named roads in List A are concerned, which suggests that they maintain their status of being declared commercial despite the reclassification exercise. It also required a conversion fee be paid for commercial use as per the re-classified plan.

Hence the dispute starts at this point when conversion fee was sought for conversion of land use as per the re-classification of a scheme.

16. The 2009 Rules were repealed by the 2014 Rules, which essentially maintained the same concept of classification and reclassification of land use. Fee for conversion of land use was prescribed in Rule 28 and Rule 31 deals with temporary commercialization. In April 2014, LDA also notified the Master Plan Rules, 2014 which provided for the master plans, its amendments and provided that these rules shall prevail in the event of inconsistency with the 2009 Rules. Some of the Petitioners before this Court have relied on the LDA Integrated Master Plan for Lahore 2021 dated 6.10.2004 to show that the land use is commercial since 2004 under the Master Plan. Most of the Petitioners before the Court are involved in commercial activity in areas where commercial use is permissible and they have been carrying on commercial activity by way of permanent or annual commercialization fee under the different rules and Notifications. Also important to note is that the LDA was given the power to carry out land use classification and re-classification by way of an amendment to the LDA Act by the Lahore Development

Authority (Amendment) Act XXVI of 2013 ("**2013 Amendment**") . So prior to 2013, LDA could modify a scheme but change of land use, through re-classification was specifically introduced vide the 2013 Amendment wherein Section 14 of the LDA Act provides that LDA can notify a scheme by change of land use through classification or reclassification or redevelopment. In the same way through the 2013 Amendment in Section 28 of the LDA Act, an amendment was made allowing LDA to raise funds by imposing fees to meet the cost of reclassification and conversion of any property, amongst others. Prior to the amendment, LDA could only levy fees with the consent of the Government and a scheme could be modified as per the prescribed rules, in the same way as prescribed for the preparation of a scheme. Consequently the 2013 Amendment allowed LDA to raise funds without any approval from the Government and for reasons such as planning, expansion, classification, re-classification which by itself is general and means and suggests any and all functions of the LDA.

17. The Government of Punjab has now issued the 2020 Rules under Section 44 of the LDA Act and repealed the 2014 Rules. The 2020 Rules defines commercial area and commercial use of property and has maintained the chapter on conversion, commercialization and permissibility fee as well as temporary commercialization.

18. From the aforesaid, it can be said that the Government of Punjab and the LDA through various different policies and rules have regulated land use, its conversion and commercial use of the land. Over time, due to rapid development and population growth, there has been an increase in the commercial use of property and on account of this rapid growth reliance on the master plan eroded and instead LDA's land use rules governed conversion of land use. The Government of Punjab also issued the Punjab Land Use (Classification, Reclassification and Development) Rules, 2009 under Section 191 of the Punjab Local Government Ordinance, 2001 for the benefit of the Local Government which are similar to the 2014 Rules. These Rules still exist and are to be enforced by the Local Government to the extent of the notified controlled area which defines their jurisdiction. Consequently what has resulted is a haphazard manner of land use conversion and approval for commercial use of land which then necessitated the concept of re-classification by the LDA.

This essentially meant surveying the areas and notifying new usages as per the existing use of land in the area. Important to note is that historically LDA has relied upon different commercialization policies which allowed for the commercialization of properties on temporary or annual basis subject to certain conditions. At the time there was no land use plan guiding conversion and commercialization policies. Reliance was made on the Master Plan of Lahore. Commercial use of land was granted on need basis and was fairly random. LDA then introduced Lists A to D which set out roads which were commercial and roads which were frozen, so no further commercial activity could take place on these roads and roads on which temporary commercialization was allowed. The idea was to regulate land use conversion and streamline classified land use as declared by LDA. Ultimately through re-classification it increased the areas where commercial activity is permissible and required a conversion fee to be paid simply on account of the re-classification of the Gulberg Scheme. Hence the conversion fee under challenge in these cases, primarily arises on account of the re-classification exercise. During this time, LDA has also tried to phase out temporary commercialization, however it has not been successful in doing so. LDA has again provided for phasing out temporary commercialization through the 2020 Rules.

19. The shift in policies has not advanced the cause of LDA, that is to make the process of land use conversion for commercial purposes effective and more efficient. Under the 2008 Rules, there was no definition given to conversion of land use and instead Rule 9 provided for a deemed conversion status of buildings, plots or land facing a commercial road as mentioned in List A, being the list of land converted for commercial use. As per the 2008 Rules, an occupant of any building, plot or land facing a commercial road as notified in List A did not have to pay any conversion fee. Conversion fee was defined under Rule 18 of the 2008 Rules where LDA could levy the said fee for change of residential or open area to commercial use at the rate of 10% of the value of the commercial land. The 2009 Rules defined *commercial area* under Rule 2 as well as *commercial use* being land which is predominantly used for commercial purposes. Land use was classified as per its usage introducing several categories of land use which meant that LDA was

allowing other than residential land to be converted for commercial use or other usage. The 2014 Rules defined *land use plan* as the plan that sets out land uses and defined *master plan* as the traditional method for presenting land use. A detailed process of reclassification of land use was carried out which was an effort to keep pace with the rapid urban growth. The dispute before the Court pertains to the fee levied on conversion of land use for properties covered under List A. Therefore in order to appreciate the case of the Petitioners, it is necessary to understand the concept of land use and its conversion as the entire dispute is based on this.

Conversion of Land Use: The Concept

20. The LDA Act defines *conversion* under Section 3 of the LDA Act to mean change in use of land from the one provided in an approved scheme or master plan. Scheme is also defined under Section 3(w) of the LDA Act to mean a project approved for urban development, re-development or renewal and includes larger area plan, areas specified and notified for specific use, traffic control plans, classification and re-classification plans, housing scheme or zoning scheme. Section 13 of the LDA Act requires the LDA to prepare schemes and provides for its requirements. Section 14 of the LDA Act provides that LDA can change the land use within a scheme through classification or re-classification or redevelopment as per the prescribed manner. Section 38 of the LDA Act provides that where a property's usage is converted to a different usage, then the one provided under a scheme or master plan or classification it must be with the approval of the Authority. The 2014 Rules defines *conversion of land* in Rule 2(c) to mean the change in use of land or property from the one originally provided in an approved scheme or the master plan. *Master Plan* has been defined to mean *the traditional method for presenting a set of land usage, allocation and control measures in the form of a map in graphical form and is supported by written statement of goals and objectives, strategy, financial implications and policies for planning and development for an area and includes a structure plan, an outline development plan a spatial plan, peri-urban structure plan*. The relevant master plans referred to are the Master Plan of Greater Lahore 1966, and the Lahore Integrated Master Plan 2021. These Master Plans initially served as the fundamental document responsible

for urban planning and future growth of Lahore. However, with time LDA relied upon its land use rules and land classification and re-classification schemes as they were based on more recent surveys and represented a more accurate picture of land use. Land Use is classified as residential, commercial, industrial and institutional amongst others in Chapter II of the 2014 Rules. As per the 2014 Rules, *Commercial Area* means *an area which is designed for commercial use as per approved scheme or master plan, or is being used as such in the established built up area*. Commercial Use means *land use which is predominantly connected with sale and distribution of goods and services*. List A means *roads or segments of roads, on which commercial use has been permitted under the Lahore Development Authority Land Use (Classification, Reclassification and Redevelopment) Rules, 2009 or Punjab Land Use (Classification, Reclassification and Redevelopment) Rules, 2009*. List B means *roads or segments of roads, on which commercial use has been prohibited under the Lahore Development Authority Land Use (Classification, Reclassification and Redevelopment) Rules, 2009 or Punjab Land Use (Classification, Reclassification and Redevelopment) Rules, 2009*. The 2014 Rules prescribe the permitted land use of commercial areas amongst other land usage. It also requires LDA to prepare a land use classification map and prepare a land use reclassification scheme of a project area. The intent being to allow LDA to change land use permissibility as per the trending usage in the project area. As per the 2014 Rules temporary commercialization was not allowed by the LDA in areas permitted for commercialization in the master plan, re-classified areas or areas permitted for commercial use and roads mentioned in List A. This means that for these given areas LDA required land usage to be permanently converted by the owners against a one time conversion fee.

21. So in the scheme of planning and development the master plan sets out a general plan of the areas and their land usages. The land use plan set out the overall vision of the manner in which land can or cannot be used as it separates uses which are incompatible with each other, so that areas are earmarked with a purpose which is conducive to the environment and provides the required amenities for the given land use. This was necessary as schemes like Gulberg had changed from largely

residential to permanently commercial. The land use rules, provided for the classification of land use and allowed conversion as per the rules. List A provided for the declared roads and segment of roads which were commercial as it reflected the permanent usage of the road or segment of roads. Essentially roads mentioned in List A were declared as commercial by the LDA since 2008 on the basis of the prevailing land use.

22. The challenge faced by the LDA through the process of devising policies for commercialization and then conversion of land use has been to maintain the conversion process as close to the master plan and the land use plan devised by them. However this has not been possible or practical as the increased pace of development put pressure on land use for commercial purposes whereas the aspects of planning, development and execution did not necessarily keep the same pace. LDA then entered into a phase of reclassification of certain areas where on the basis of the existing usage of land, they modified the land usage and developed a new land use plan. As per the 2014 Rules, in areas where the land use is declared as commercial, those who were carrying on business in these areas and have paid permanent commercialization fee or conversion fee under a previous policy or rules were made liable to pay a one time conversion fee, based on the reclassification of the scheme. Essentially there was no conversion of land use, but the exercise of re-classification became the basis of the demand for the one time fee. In the cases before the Court, this is primarily relevant to the Gulberg Scheme. Interestingly LDA is charging a one time conversion fee even though the status of land use has not changed by way of the reclassification scheme. That is to say the land use has not been converted as the Petitioners before the Court are covered under List A. Hence LDA is charging conversion fee on roads that have been declared commercial that is where the land use is declared as commercial. LDA claims that even though the roads have been declared commercial, the individual properties on that road are not commercial. This logic totally defies the concept of land use plan and land use classification as the only objective of *land use classification* and *land use plan* is to declare areas within which classified usage can take place. Hence there appears to be no logic in requiring the owner to pay for conversion of land

use, as the land use has not been converted. However, in individual cases which relate to housing schemes or areas not covered under List A, LDA has to first ascertain whether the area is commercial or residential and whether in fact there is any land use conversion.

23. *Land use* essentially is a planning device which ensures that individuals use their land in the interest of the environment and for the surrounding area. The purpose of classifying land use, is to provide the permissible limits of land usage. Conversion of land use means that the owner of the land, takes permission to convert the land use from that which is prescribed in the land use plan or scheme. So land use conversion means that where the area is classified as residential or institutional permission is sought to use the land for a different purpose other than that prescribed. Where the land usage is as per its classification, then there is no element of conversion involved. This is why conversion must be as per the rules with the permission of the Authority. In the present cases, LDA seeks to recover conversion fee, where there is no element of conversion involved.

24. The argument given by the LDA that each individual property is required to be converted even though it is located on a road or segment of roads declared commercial (List A) is totally misconceived, as the reason the said roads were declared commercial in the first case is because the usage on that road was primarily commercial, hence the road was declared permanently commercial. This means that the land use for the area is commercial. Since the land usage was declared on the basis of existing usage of the land, the requirement of individual property owners to convert the land usage of property has no basis as their property stands converted with the declaration made by the LDA. In this regard, it is important to note that the declaration of a road as commercial is based on the usage of the property around that road and not *per se* the actual road itself. Hence there is no justification to demand a conversion fee on properties facing roads or segment of roads as named in List A. The entire concept of land use conversion is based on changing the use of land from the one provided in the scheme or master plan or land use plan. Hence where there is no conversion in land use, a conversion fee cannot be levied. The Petitioners have also challenged the quantum of the fee being

contrary to the requirements of Section 28 of the LDA Act. Hence the scope and purpose to charge conversion fee is also relevant, to decide on the basic issue.

On the issue of levy of fee for conversion of land use

25. One of the justifications that the LDA has given for charging conversion fee is that it is responsible for preserving, protecting and developing areas which are declared commercial for which it requires revenue as it has to provide a large number of facilities such as roads, parking, water, sanitation including facilities such as fire fighting arrangements, water hydrants which are the requirements of any major urban city today. Hence the power to levy and collect fee is co-related to the basic function of the LDA which involves planning and development, to improve the environment which includes aspects of traffic, transport, water supply, sewerage, drainage, waste disposal and matters connected therewith. In this context, they allege that both services and *quid pro quo* are present to justify the fee. They state that Section 28 of the LDA Act allows LDA to raise adequate funds to meet its costs, hence conversion fee is a valid fee under the LDA Act.

26. The power to levy and collect fee is pursuant to Section 28 of the LDA Act which reads as follow:-

> **28. Rates and fees.–** (1) The Authority may raise adequate funds to meet the cost of planning, expansion, execution, development, redevelopment, maintenance, zoning, classification, reclassification, augmentation, supervision, regulation and conversion of any property or any present and future scheme or any part of the scheme, by imposing rates, fees, surcharge, other charges and fines in the prescribed manner.
>
> (1a) The Authority may, in the prescribed manner, impose fee on change of land use owing to classification and reclassification.
>
> (2) The rates, fees and other charges for water supply, sewerage and drainage schemes] shall be such as to provide sufficient revenues
>
> (i) to cover the operating expenses including taxes, if any, and interest to provide adequate maintenance and depreciation;
>
> (ii) to meet repayments on long term indebtedness to the extent that such repayments exceed the provision of

		depreciation;
	(iii)	to finance the normal year to year extension of any of such schemes and to provide a reasonable portion of the cost of future major expansion of such schemes.

27. As per Section 28(1a) of the LDA Act, the LDA can levy a fee on the change of land use owing to classification or re-classification, to raise *adequate* funds to meet the cost of planning, expansion, development and re-development amongst other reasons as listed in Section 28 of the LDA Act. Section 3(k) of the LDA Act defines the word 'fee' to mean *an amount levied by the Authority on the land, area, scheme or property on account of any privilege, benefit, services, transfer of rights and interests, issuance of a licence or permission or any cost and includes charges for provision of water supply, construction, maintenance and network of roads, drainage, sewerage and other services*. So the conversion fee is for a benefit or service or for recovering costs which includes charges for water supply, maintenance of roads, drainage, sewerage and other services all relevant to conversion of land use. Section 28(1) vests power in LDA to raise adequate funds to meet the cost of conversion of any property. Hence what is fundamental to the levy of conversion fee is that it requires *adequate funds* to meet the *cost of conversion*. Although LDA can raise adequate funds to meet the cost of planning, expansion, development, maintenance, for the purposes of a *conversion fee*, all amounts raised have to be adequate to meet the cost of conversion. As per Section 3(i) *conversion* means change in land use from the approved scheme or master plan. So a conversion fee can be charged for change of land use and change of land use is on account of the change from the classification or re-classification of a scheme. Section 44 of the LDA Act provides for the powers to make rules for carrying into the effect the purpose of the LDA Act. Pursuant to these powers, the Commercialization Rules were issued vide Notification dated 02.07.2001, the 2008 Rules, the 2009 Rules, the 2014 Rules and now the 2020 Rules. Rule 28 of the 2014 Rules prescribes as follows:

28. Fee for conversion of land use. (1) Conversion of land use, by preparation, amendment in the master plan, by declaration of peri-urban area under the Lahore Development Authority Master Plan Rules 2014, and by reclassification under Lahore Development Authority Land Use (Classification, Reclassification and Redevelopment) Rules, 2009, Punjab Land Use (Classification, reclassification and Redevelopment) Rules, 2009 or under these rules, shall not entitle any person to use the land for such notified, converted, reclassified use unless the conversion fee is paid in a manner given hereinafter:

Land Use	Rates
I. On the approved roads as mentioned in list A of the Gazette Notification dated 29.06.2011	20% of the commercial value of the total area of ownership, as provided in the valuation table.
II. Upon Re-Classification under the Lahore Development Authority Land Use Rules, 2009, Punjab Land Use (Classification, Reclassification and Redevelopment) Rules 2009 or under these rules:	
a. From Peri Urban, Residential, Agricultural Areas to Commercial.	a. 20% of the commercial value of the total area of ownership, as provided in the valuation table.
b. From Residential, Agricultural, Peri Urban to Industrial, Institutional, Intercity Service Area.	b. 10% of the commercial value of the total area of ownership, as provided in the valuation table.
c. From Institutional or Industrial and Intercity Service Area to Commercial.	c. 10% of the commercial value of the total area of ownership, as provided in the valuation table.
III. Upon Declaration of Peri- Urban Area:	
a. from agriculture area to residential area	a. 5% of the residential value of the total area of ownership, as provided in the valuation table.
b. from agriculture area to commercial area	
c. from agriculture area to Industrial, Institutional, intercity	b. 20% of the commercial value of the

services.	total area of ownership, as provided in the valuation table c. 10% of the commercial value of the total area of ownership, as provided in the valuation table
IV. On permissible uses under rule 4(b), 7(b), and 8(b)	20% of the commercial value of the total area of ownership, as provided In the valuation table
(2) The Authority shall not levy conversion fee for the conversion of land use to an educational or a healthcare Institutional use if the proposed educational Institution or healthcare institution is: (a) owned by a philanthropic, charitable or non-profit organization; (b) is exempt from the payment of income tax; and (c) its audited accounts for last three years reflect that it provides services to the needy or the poor, free of cost or on no profit basis. (3) The Authority may allow payment of fee in four equal quarterly installments over a period of one year. In case of default, the fee already paid shall, subject to an opportunity of hearing, be forfeited and the offer of commercialization shall stand withdrawn.	

28. As per the 2014 Rules, conversion fee applicable to properties located on approved roads or segments of roads was 20% of the commercial value of the total land. Annual commercialization fee is applicable only to properties located on non-approved roads or in frozen zones operating prior to the 1.2.2012 Notification issued by the Chief Metropolitan Officer, LDA, Lahore. This means that for areas declared commercial, a permanent conversion fee has to be paid, one time and for roads not declared commercial an annual fee is to be paid on a temporary basis as the area is not declared commercial. The question that arises is that once an area is declared commercial, how does a one time fee raise adequate funds to meet the costs of conversion and whether LDA is obligated to declare the costs incurred or likely to incur in order to justify the quantum of the fee charged. LDA has justified its fee structure for commercial use of land on permanent basis as being a regulatory fee, a service fee and a *quid pro quo* fee required for providing services both as regulator and facilitator for the given area. They argue that fee for conversion of

land use is necessary as it is in the nature of a license granted by the LDA to use the land for a specific purpose. Also that LDA has to ensure that the area meets the requirements of the given land use, in terms of facilities such as road, network, parking, traffic flow and impact, utility services, water, sanitation, sewerage etc. Furthermore as it is a regulatory fee, it does not require any *quid pro quo* and the only test is to ascertain if there is a nexus between the fee charged and the administrative services provided. Reliance is placed on *Collector of Customs and others v. Sheikh Spinning Mills* (**1999 SCMR 1402**), *Seven Up Bottling Company (Pvt.) Ltd. v. Lahore Development Authority (L.D.A.), Lahore through Managing Director, WASA and its Deputy Director Revenue (South), WASA, Lahore Development Authority and another* (**2003 CLC 513**), *Pakcom Limited and others v. Federation of Pakistan and others* (**PLD 2011 SC 44**), *Federation of Pakistan through Secretary M/o Petroleum and Natural Resources and another v. Durrani Ceramics and others* (**2014 SCMR 1630**) and *Trade Serve International (Private) Limited and others v. Pakistan Electronic Media Regulatory Authority and others* (**PLD 2017 Lahore 563**). From the arguments raised it appears that the fee charged under Section 28 of the LDA Act is an all encompassing fee to serve the purpose of revenue collection.

29. In the cases before the Court, land use conversion is from residential to commercial, hence LDA seeks to levy a conversion fee for commercial use of the land. However, where roads, buildings, areas have been declared commercial, can it be said that a conversion fee should be charged for the purposes of development and maintenance of the area. Historically LDA charged a commercialization fee for carrying out commercial activity in a permitted area. The Commercialization Rules provided for permanent as well as temporary commercialization fee as per the users' requirements. In cases where permanent commercialization fee was paid under the Commercialization Rules, the land use stands permanently converted consequent to the said Rules. In the same way, the 2008 and 2009 Rules declared certain roads or segments of roads as approved for commercial use, permitting commercial activity on those roads. With the re-classification exercise, LDA required that a one time fee be paid for conversion of land use to commercial for all

properties including those declared commercial permanently. They state that re-classification meant that the classifications were decided afresh, hence the fee has to be paid. They also state that while the road has been declared commercial the individual plots have not been converted, hence given that it is a declared commercial area, a land owner can convert its residential plot to commercial on payment of conversion fee. They also argue that once this fee is paid, no further fee will be required with respect to land use conversion. However, this does not address the issue raised by some of the Petitioners who have *paid* permanent commercialization fee under the Commercialization Rules. Why are they required to pay any further amounts as they have converted their land permanently prior to the re-classification scheme. Then there are other Petitioners, who have been paying annual commercialization fee in areas declared as commercial because the rules at the time allowed it. These Petitioners are required to pay a one time fee, in a declared area, where in fact there is no land use conversion. Some of the Petitioners before the Court have been doing business on these roads, by paying temporary commercialization fee and their main grievance is that they should not have to pay a conversion fee or in the alternate should be allowed to pay a temporary fee at a reasonable rate. Their argument is that as the land use has been converted by the LDA, hence there is no reason to charge a conversion fee. This argument is supported by the 2020 Rules which allows occupants of already approved property to apply for temporary or annual commercialization at the rate of 1.25% of the commercial value of the land as per the prevailing valuation table. Hence the entire case of LDA of charging a one time fee has itself undergone a change with the 2020 Rules as the 2020 Rules again gives land owners the option to pay annual fee in declared commercial areas. It also totally negates the argument that the one time fee is necessary to meet the adequate costs incurred by the LDA in developing the area to meet the cost of conversion.

30. Important to note is that once again through the 2020 Rules LDA has stated that temporary commercialization shall be phased out by 30.6.2024 which means that on approved roads (List A) conversion fee will have to be paid after 30.6.2024. Hence the basic dispute remains that is should the Petitioners pay a conversion fee,

for land declared as commercial. In the first case, as already has been stated once the land use has been declared by LDA, no further conversion is required. As the only justification for the levy of the fee is revenue collection then it is necessary to understand the purpose and manner of revenue collection. Section 28 of the LDA Act requires LDA to charge a fee for conversion of land use to meet the *cost of classification or re-classification and conversion*. This means that LDA can charge a fee to recover the cost it has incurred to develop an area as per its land use. This stands to reason as the LDA is the Authority responsible for planning and development in the area of the Lahore Division by devising policies and programs for improvement in housing, traffic, transport, education, water supply, sewerage, drainage, sold waste disposal and connected matters. Hence it can raise funds to meet the cost of planning. In this context, LDA is required to execute its planning through itself and government agencies, hence it uses the assistance of WASA and TEPA amongst others to execute its plans. However, nothing has been argued or filed in support of the cost incurred with reclassification or the anticipated cost for which the one time conversion fee is being charged. Nothing has been placed on record to show what if any, reclassification costs were incurred, especially since many parts of Gulberg were already classified as commercial areas under the master plan or as per List A and List B, which means that these areas were already providing facilities needed for a commercial area, and reclassification, at best, necessitated enhancement of the facilities. LDA has stated that it provides maintenance of infrastructure for the benefit of property owners in the area which includes repair works, expanding sewerage systems, roads, under and over passes and additional infrastructure. They have relied on a self created document which claims to reflect the cost incurred from 2009 to 2015 specifically on tube wells, sewerage, water supply drains and filtration plants. They have also relied on their own list of infrastructure development in the Gulberg area. These documents do not detail the cost incurred or even planned. It also does not explain the rational to pay a permanent fee for conversion of land use which land was already converted and the re-classification exercise has not changed the land use. Consequently they have failed to establish the extent of the cost incurred in the re-classification of the

Gulberg Scheme or any other scheme or road and have failed to show what further development is required on the declared commercial roads or segments of roads for which the conversion fee is required. They have also failed to justify a one time levy and its nexus with the conversion fee.

31. It is noted that under the repealed land use rules 2008 and 2009, LDA was required to keep a separate account for revenue collected from conversion of land use so that the revenue is spent on infrastructure development. LDA has not been able to show that it *ever* maintained such accounts and whether revenue from conversion fees have all been used for planning and development of the given areas from where fees were recovered. A valid concern that arises is that if LDA uses the conversion fee to develop a flyover or underpass or express way in some part of Lahore, which is not relevant to the area from where the conversion fee was recovered can that be referred to as adequate funds to meet the cost of expansion and development in any scheme or expansion of the scheme. As per the judgments of the august Supreme Court of Pakistan, a fee is extracted from a specific purpose and for providing privilege to particular individuals or a community or a specified area. The distinction between a fee and tax is that a tax is part of the common burden, but a fee is for a specific purpose. So the fee will be for a specified purpose which must co-relate to the expenses incurred. Reliance is placed on 1999 SCMR 1402 (*supra*), PLD 2011 SC 44 (*supra*) and 2014 SCMR 1630 (*supra*).

32. In terms of Section 28 of the LDA Act, LDA must declare its costs for the conversion, classification or reclassification and can then seek to recover its costs through a conversion fee, where the land use is converted. Whether the fee is regulatory or a license fee, it can only be recovered for conversion purposes to meet the declared cost of conversion. As conversion of land use is a benefit sought by the owner, hence a conversion fee can be levied to recover costs. Accordingly the requirement is that LDA declares its planning, development and expansion plans with the expected costs on an annual or bi-annual basis not only to meet the requirements of good governance and transparency but also to justify the adequacy of the costs incurred and its nexus with the fee sought to be recovered. The fees paid under Section 28 of the LDA Act are amounts paid by the public for purposes

relevant to the public. Hence they have a right to know where the money is being spent and what to expect from the LDA for the fees they have paid. However, in the cases before the Court, there has been no conversion of land use, as the roads have already been declared commercial and there is no declaration of the costs incurred the LDA for the fees sought to be recovered nor have they explained where conversion amounts have been spent. As the cases before the Court challenge specific demands for conversion fee under the 2014 Rules, the judgment is confined to the levy under the 2014 Rules and the LDA Act.

33. The issue becomes relevant when seen in the context of the LDA Act and the 2013 Amendment. Originally under the LDA Act, LDA Fund was to be established and the amounts deposited in the Fund were utilized by the Authority in connection with its functions under the LDA Act including payment of salaries and other emoluments. There were two heads within the Fund, Urban Development and Environment Sanitation in which amounts including collection from fees, rates and charges would be credited separately. With the 2013 Amendment, Section 27 was amended and 27(3) was inserted which provided that the LDA Fund shall be credited with all stated amounts including fees, rates and charges received by the Authority and that all these amounts with respect to services related to water supply, sewerage and drainage shall be credited in water supply and sanitation head and all other amounts under the Urban Development head. The amounts used under the water supply and sanitation head are to be used exclusively for the purposes of water supply and sanitation, sewerage and drainage and urban development to be used towards development of infrastructure. Similarly Section 28 was amended which allowed the Authority to raise funds to meet the *cost of planning, expansion, execution development, re-development, maintenance, zoning, classification, re-classification, augmentation, supervision, regulation and conversion of property presently or need in future scheme* and further LDA was allowed to impose a fee on change of land use owing to classification or re-classification. Under the original LDA Act, all rates and fees were to be charged with the consent of the Government and these rates, fees and charges were imposed to cover operating expenses, repayment and finance of any scheme or to provide for future expansion of a

scheme. The 2013 Amendment allows LDA to generate revenue through conversion fee without any government control. It also enables LDA to charge conversion fee after completing the re-classification process, even though the land use did not change. This means that in areas declared commercial land owners are made liable to pay conversion fee, simply on account of the reclassification process. The net result of which is that the areas declared commercial remain commercial. This means that essentially conversion fee has become a major source of revenue for the LDA to pay for the various different infrastructure projects it undertakes. So the 2013 Amendment expanded the power of the LDA to recover rates and fees without any intervention of the Government, for a wide variety of reasons without actually providing for any accountability in the manner as to where the funds are used. The basis of the rates prescribed under Rule 28 of the 2014 Rules is also not explained in terms of costs incurred by the LDA or even in terms of adequacy. This amount statedly is deposited in the LDA Fund and can be used for urban development which means that its open ended and not specified on what urban development is and how it is related to conversion of land usage. Further that fees for water supply and sanitation works are collected separately and also are a part of the cost for conversion of land use without specifically stipulating whether the conversion fee raised from a scheme is actually used within that particular scheme. Hence LDA's argument that the conversion fee is used for maintenance, development and expansion within a scheme is not evident from the manner in which it maintains its fund or from the manner in which it has undertaken the task of re-classification.

34. Another aspect of the matter is that even though a lot has been said with respect to the utilization of the conversion fees for development, expansion and maintenance, the fact that the fee is collected one time, on a permanent basis in itself suggests that the collected amount does not necessarily represent the cost incurred for the purposes of development, planning or expansion or even maintenance of any scheme. In this context, LDA was specifically asked to explain how they have budgeted future expansion and plans within the scheme in the context of the fee that is being charged at the rate of 20% of the value of the property. Learned counsel for the LDA has argued that the Gulberg Scheme is a re-

classification project where the land use was re-surveyed and re-planned to accommodate the growing commercial activity within Gulberg which originally was a residential area. However, given that LDA has been charging commercialization fee since 1990 under various different rules and polices, it does not explain the one time fee for areas already declared commercial. LDA has not disclosed as to what the cost of conversion has been since 2008 and how the charging of a one time fee fulfills that mandate for all times to come. It has also been brought to the attention of the Court that LDA charges other fees such as betterment fee, development fee and water and sanitation fee, meaning thereby that it is charging under different heads for specific purposes, which is part of maintenance and development. The Lahore Development Authority (Miscellaneous) Rules, 2014 ("**Misc. Rules 2014**") also sets out rates, fees and charges that the Authority can levy. These are as follows as per Rule 2 of the Misc. Rules, 2014:

Imposition of rates and fees: (1) The Authority may, by notification in the official Gazette, levy the rates, fees, charges, surcharge, penalties or fines in the area.

(2) In addition to rates, fees, charges, surcharge, penalties or fines specified in the Act or any other rules, the Authority may, in like manner, levy the following rates, fees, charges, surcharge or fines;

(a) transfer fee;
(b) placement of documents fee;
(c) permission to mortgage fee;
(d) power of attorney fee;
(e) copying fee;
(f) processing fee;
(g) no objection certificate fee;
(h) development charges;
(i) augmentation charges;
(j) water conservancy charges;
(k) emission charges;
(l) congestion charges;
(m) toll; and
(n) parking fee.

(3) The authority may, by notification in the official Gazette, increase or decrease the rates, fees, charges, surcharge, penalties or fines.

(4) For purposes of assessing the increase in the value of property for charging betterment fee in accordance with sections 23 and 24 for the Act, the approved assessor of the Authority shall assess such increase in the value of the property.

(5) The Authority may undertake development of infrastructure and may levy toll on such infrastructure and, for the purpose, the Authority may, in accordance with law, enter into a joint venture or concession agreement with private parties in accordance with law.

(6) The Authority may outsource or sublet the collection of rates, fees, charges, surcharge, penalties or fines.

(7) Where the owner of property or person liable to pay, defaults in payment of any rate, fee other charges, surcharge, penalty or fine, the Authority, Director General or the person so authorized in this regard may, subject to notice, take one or more of the following actions;

(a) withhold the transaction of the property of such person such as transfer or sanction of building plan till such time as the default continues;
(b) seal the property of such person;
(c) impose surcharge on the defaulted amount at a rate to be determined by the Authority; and
(d) declare the defaulted amount to be recoverable as arrears of land revenue.

Hence LDA collects various different fees and charges like development charges, augmentation charges which are also related to the same purpose as planning, development and expansion of a present or future scheme. Again I have found no explanation or justification for the levy of conversion fee to pay for services covered under the Misc. Rules, 2014.

35. In this context LDA supports the quantum of its fee on the ground that it is reasonably related to the estimated cost of expenditures incurred by the LDA and is likely to be incurred by the LDA for providing administrative and utility services in

the area. Learned counsel argued that in terms of the case law, it is not possible for the LDA to work out arithmetical equivalence of the amount of fee that should be reasonably charged and the only criteria or basis is that the fee charged should be related to the expenditure incurred. It is also argued that LDA provides many facilities with respect to infrastructure works, utility services, waste management and so on, on the basis of which redevelopment schemes will require constant upgradation over time. Hence the fee charged is neither unreasonable nor illegal as the Petitioners have been paying temporary commercialization fee for the same reasons. Reliance is placed on *Secunderabad Hyderabad Hotel Owners Association and others v. Hyderabad Municipal Corporation, Hyderabad and another* (**AIR 1999 SC 635**), *Shell Pakistan Limited, Karachi through Attorney v. Capital Development Authority through Chairman and 2 others* (**PLD 2015 Isl. 36**) and *Trade Serve International (Private) Limited and others v. Pakistan Electronic Media Regulatory Authority and others* (**PLD 2017 Lah. 563**). It is also argued that quantum of fee is a policy decision which is not subject to judicial review. Reliance is placed on *Pakcom Limited and others v. Federation of Pakistan and others* (**PLD 2011 SC 44**) and *Syeda Abida Hussain Imam and others v. The Province of Punjab through Secretary and others* (**2015 YLR 1522**). However as already reasoned above, there is no basis to justify the rates and there is no accountability for the money collected as fee and where it is spent. This is totally against good governance, which requires a public body to be transparent and declare its costs and use of the fees collected. Therefore for the fee to be levied to cover costs under Section 28 of the LDA Act, LDA has to declare the costs, the development and maintenance works required or undertaken to recover the costs. In this context, Section 28 of the LDA Act cannot be used as a ways and means of generating revenue, to undertake projects which are made under the garb of general development and improvement. LDA has a specific mandate to plan and coordinate with government agencies for preparing a master plan to develop, operate, maintain water supply, sewerage, drainage with WASA and to plan annually for development programs and maintain planning controls and building regulations. Hence the purpose of levying a conversion fee has to be such that LDA fulfills its mandate and

makes the necessary disclosures and declarations. Consequently the levy of conversion fee at the rate of 20% of the commercial value of the property is without any justification and against the requirements of Section 28 of the LDA Act.

On the issue of vires of the Challenged Provisions

36. LDA was established to provide a system of planning and development to improve the quality of life in the metropolitan area of Lahore which then became the Lahore Division. It was established to assist the Provincial Government and prepare schemes appropriate for urban development. The word "scheme" is defined in Section 2(w) of the LDA Act being *a project approved for urban development, redevelopment or renewal and includes larger area plan, areas specified and notified for specific use, traffic control plans, classification and reclassification plans, housing scheme or zoning scheme*, therefore the Authority plans and develop schemes and then implements them with the help of the government agencies. However, all this is done in aid of the Provincial Government and not to usurp the functions of the Local Government. This aspect was discussed by a learned Full Bench of this Court in *Ms. Imrana Tiwana etc. v. Province of Punjab etc*. (**PLD 2015 Lahore 522**) which concluded as follows:

> 95. LDA can prepare "schemes" under the LDA Act (section 13). "Scheme" means a project approved for urban development, redevelopment or renewal and includes larger area plan, areas specified and notified for specific use, traffic control plans, classification and reclassification plans, housing scheme or zoning scheme [section 3(w)]. The schemes are prepared and then executed by the LDA in the "Area," which means the Lahore Division [section 3(c)] subject to the approval of the Government. Section 13(5) specifically provides that a "Government Agency" (which includes a local government [section 3(m)(ii)]) shall not prepare a planning or development scheme within the Area except with the concurrence of LDA. Similarly, LDA has the power to prepare housing, building infrastructure services, commercial and semi-commercial projects (section 13A) or do land use classification (section14), make master plan (section 14A), or give direction to the local government to execute a scheme in consultation with the

Authority, or take over and maintain any of the works and services in that area, to provide amenity in relation to the land which in the opinion of the authority ought to be provided and to enforce regulations on behalf of the Authority (section 15). General power to execute Schemes (section 16). LDA can declare any locality within an area to be controlled area and issue such directions for the prevention of haphazard growth or encroachments and unauthorized construction in such area (section 18). Power to remove sources of pollution (section 20). Imposition of betterment fee (sections 23 and 24). LDA enjoys the power to impose rates, fees, surcharges or other charges and fines (section 28). Extension of time and cancellation of approved schemes (Sections 34A and 34B). Punishment for offences (section 35). Conversion of property to different use (section 38). LDA Act is to override other laws (section 46). All these powers usurp the responsibilities and authorities devolved to the local government under PLGA and offend the constitutional mandate of Article 140A.

96. For the above reasons, the powers and functions of LDA under sections 6, 13, 13A, 14, 15, 16, 18, 20, 23, 24, 28, 34A, 34B, 35, 38 and 46 of LDA Act, 1975 to the extent that they usurp, trump, encroach, dilute and abridge the powers, responsibility and authority devolved on to the elected representatives of the Local Government System under Article 140A through PLGA are therefore, declared ultra vires Articles 9, 14, 17 and 25 of the Constitution and further declared to be offensive to Articles 32, 37(i) and 140A of the Constitution.

97. LDA, however, does continue to be a development authority of the Provincial Government for the assistance of the Provincial Government but it cannot assume jurisdiction or interfere in the political, administrative and financial powers devolved on to the local government through PLGA under Article 140A. It matters less if LDA Act has undergone amendment after the promulgation of PLGA. The constitutional mandate to devolve and establish a local government system, once devolved, cannot be usurped through subsequent collateral legislation. The Provincial Legislature has the power to alter or withdraw the devolved powers subject to the principles of subsidiarity and federalism discussed above but till then the said powers are protected under the vertical separation of powers introduced by

Article 140A of the Constitution and no provincial or federal legislation can impair or impede the political, administrative and financial responsibility and authority of the elected representatives of the Local Government.

The august Supreme Court of Pakistan while hearing the appeal in the Imrana Tiwana Case decided as follows:-

54. The Province is under an obligation under Article 140A of the Constitution to establish, by law, a Local Government System and to devolve political, administrative and financial responsibility on the Local Government. Yet, in doing so it is not stripped bare of its executive and legislative authority under Articles 137 and 142 of the Constitution. The Provincial and the Local Governments are to act in a manner, which complements one another. The Constitution, therefore, envisages a process of participatory democracy, where the two governments act in harmony with one another to develop the Province. The authority of neither destroys the other. Article 140A cannot be used to make the provisions of Articles 137 and 142 either subordinate to it or otiose. One constitutional provision cannot, unless it is so specifically provided, override another and must be harmoniously construed together, as repeatedly held by this Court……..

55. The creation of a Local Government System, and the conferment upon the Local Government of certain political, administrative and financial responsibilities does not deprive the Province of authority over its citizens and deny it all role in the progress, prosperity and development of the Province. The creation of a Local Government System does not spell the end of the Provincial Government in the Province. To the contrary it strengthens the Provincial Government by entrenching democracy at grass root level.

56. That even after the insertion of Article 140A the Provincial Government would continue to have the authority to enact and amend statutes, make general or special laws with regard to Local Government and local authorities, enlarge or diminish the authority of Local Government and extend or curtail municipal boundaries. This power of amendment has, however, to be informed by the fact that if the Provincial Government oversteps its legislative or executive authority to make the Local Government powerless such exercise would fall foul of Article

140A of the Constitution. An excessive or abusive exercise of such authority would not be countenanced by this Court. It would be struck down.

74. The solution, therefore, lies in reading the provisions of the two statutes in harmony. The LDA Act, 1975 is to be regarded as an enabling statute. It allows LDA to act in support of and to complement the Local Government in the exercise of its functions and responsibilities. Where the Local Government is unable to act because of a lack of resources or capacity, or where the project is of such a nature that it spills over from the territory of one Local Government to another or where the size of the Project is beyond the financial capacity of the Local Government to execute; the LDA can step in and work with the Local Government. Economies of scale, spillovers and effectiveness are merely illustrative of the situations in which the LDA can act in the exercise of its functions to carry out developmental and other work and perform its statutory functions. These are not exhaustive. Life and time may throw up other situations and create circumstances which may warrant LDA action to be taken in consultation with the Local Government within the purview of PLGA, 2013. Closing the categories today will freeze growth and retard progress.

(**emphasis added**)

37. As per the Imrana Tiwana Case, the sections challenged before this Court being 4, 6, 13, 14, 14A, 18, 19, 28 and 37 of the LDA Act were upheld for not being ultra vires to the LDA Act or Constitution and the Court required that a harmonious interpretation be given such that functions of the LDA compliment and facilitate the Local Government. During the course of arguments, a lot was said with respect to the fact that the conversion fee collected by the LDA for Lahore in fact disables the Local Government from collecting revenue by way of conversion fee which revenue is relevant for the purposes of development and maintenance of the city. It was also argued that it impinges upon the financial autonomy of the Local Government as the LDA is to work in aid of the Provincial Government as well as the Local Government and cannot in fact use amounts collected under the garb of conversion fee for undertaking large infrastructure development projects which is the present

case, as per the contention of the Petitioners. However, during the course of arguments there has been no representation from the Local Government on account of the repeal of the Punjab Local Government Act, 2013 and the promulgation of the Punjab Local Government Act, 2019. Therefore this aspect of the matter has not been looked into in these cases with the help of the Local Government, therefore this question may be raised again in some other appropriate case by the Local Government. For the purposes of these cases, this issue stands decided by the august Supreme Court of Pakistan in the Imrana Tiwana Case which declared that the Challenged Provisions are not against the mandate of the LDA Act and the Constitution.

38. In view of the aforesaid, the instant Petition along with connected Petitions as detailed in Schedule A, are **allowed** in the following terms:-

(i) LDA cannot levy or recover conversion fee under Section 28 of the LDA Act read with Rule 28 of the 2014 Rules from roads or segment of roads declared commercial as per List A or otherwise converted for commercial use. The demand for a one time conversion fee is not justified in terms of Section 28 of the LDA Act and is against the mandate of the LDA Act. Consequently the demand notices raised and the public advertisement issued in newspapers both english and urdu, cannot form the basis to collect conversion fee from an area which is already declared commercial;

(ii) It is clarified that for the purposes of the Petitioners before this Court whose properties as per LDA's understanding do not fall in List A or in an area declared commercial or has not been declared commercial, LDA first issue notice to the Petitioner and grant a right of hearing to justify the demand for conversion fee based on land use classification;

(iii) For the purposes of Section 28 of the LDA Act where LDA seeks to raise adequate funds to meet the cost of planning, expansion, execution, development, re-development, maintenance, zoning, classification, re-classification, augmentation, supervision,

regulation and conversion of any property in any present or future scheme, it must declare the cost so incurred, which it seeks to recover in the form of a fee with full disclosure of all amounts spent on development and expansion projects and schemes to maintain good governance and transparency and to establish the need to meet the costs for the fee that it has imposed;

(iv) The vires of sections challenged before this Court being 4, 6, 13, 14, 14A, 18, 19, 28 and 37 of the LDA Act have already been upheld by the august Supreme Court of Pakistan in the Imrana Tiwana Case, hence to this extent prayer of the Petitioners cannot be granted.

(AYESHA A.MALIK)
JUDGE

Announced in an open Court on ***30.7.2021***.

JUDGE *JUDGE*

Approved for Reporting

*Allah Bakhsh**

Stereo. H C J D A 38.

Judgment Sheet

IN THE LAHORE HIGH COURT AT LAHORE
JUDICIAL DEPARTMENT

WP No.61452/2021

Khan Construction Company

Versus

Punjab Province through Secretary HUD and PHED Government of the Punjab, Lahore etc.

J U D G M E N T

Date of Hearing	**8.10.2021**
Petitioner By:	Mr. Raiz Karim Qureshi and Mr. Farrukh Ilyas Cheema, Advocates.
Respondents By:	Mr. Akhtar Javed, Additional Advocate General, Punjab along with Sadam Hussain, Assistant Director in the office of Respondent No.2 and Jawad Kalim Ullah, XEN, Public Health Engineering Division, Multan.

Ayesha A. Malik J: Through this Petition, the Petitioner has impugned the act of the Respondents disqualifying the Petitioner's pre-qualification technical bid for the construction of Tuff Tile Drain in UCs 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 63, 64, 65 and 66, District Multan.

2. The case of the Petitioner is that it is a contractor registered with Pakistan Engineering Council in category C-4 who responded to an advertisement calling for pre-qualification bids for the above mentioned public work. The Petitioner's case is that the technical bid was rejected on 30.9.2021 without specifying any reasons and without giving the Petitioner an opportunity to improve upon its technical bid. Learned counsel for the Petitioner argued that the Respondents have acted against the mandate of the Punjab Procurement Regulatory Authority Act, 2009 ("**Act**") and the rules made thereunder that is the Punjab Procurement Rules, 2014 ("**Rules**"). Learned counsel argued that the Petitioner has been disqualified in violation of the Act and the Rules in order to allow the favourites of the Respondents to get the tender. Learned counsel argued that the Petitioner is a licensed contractor who is entitled to be duly considered for its bids, both technical

and financial but the Respondents have failed to do so. Learned counsel has relied upon the order of this Court dated 5.10.2021 whereby the Respondents were ordered to open and consider the financial bid of the Petitioner subject to the outcome of this Writ Petition. Learned counsel argued that the Respondents have not considered its financial bid, hence strict action should be taken against the Respondents.

3. On behalf of the Respondents, learned Law Officer has raised several objections and has stated that the Petitioner has misled this Court on several grounds. He stated that in the first instance the subject matter of the tender is with reference to the construction of Tuff Tile Drain in UCs 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 63, 64, 65 and 66, District Multan. The Petitioner is a contractor from Multan. The bids were opened in Multan and all the relevant officers hail from Multan. He states that the Petitioner has deliberately concealed this fact and has failed to inform the Court that the bids were opened in Multan, hence this Court should have not entertained the instant Petition, as it was appropriate for the Petitioner to file this Petition before the Multan Bench. Learned Law Officer has also argued that alternate remedy under Rule 67 of the Rules was available to the Petitioner which the Petitioner has failed to avail. Finally learned Law Officer argued that the Petitioner is seeking relief which is beyond the mandate of the Act and the Rules. Learned Law Officer stated that prequalification process is clearly provided in Rule 17 of the Rules wherein the procuring agency will consider the prequalification documents on the basis of the evaluation criteria and determine whether the contractor is prequalified or not. In the event that a contractor is not prequalified, it is informed immediately and such a contractor may ask for the reasons from the procuring agency in terms of Rule 17(4) of the Rules. Therefore the Petitioner's contention that the reasons have not been given is incorrect as the reasons are provided for if the contractor asks for the same and in this case the Petitioner did ask for the reasons which were also communicated to it vide letter dated 7.10.2021. Learned Law Officer stated that even this fact has been withheld by the Petitioner. Learned Law Officer has also argued that in terms of Rule 38(2)(a) of the Rules *single stage two envelopes bidding* requires the bidder to

provide two envelopes marked as ‘financial proposal’ and ‘technical proposal’. The procuring agent first evaluates the technical proposal and if the contractor does not meet the evaluation criteria, it is rejected. The financial proposal can only be opened if the technical proposal has been accepted. Learned Law Officer stated that there is no requirement under the mandate of the law to discuss the technical evaluation or to provide reasons on the spot rather the Petitioner was required to ask for the reasons which it eventually did. Learned Law Officer argued that by misleading the Court, the Petitioner now seeks the implementation of order which is not possible under the mandate of the law as the relief sought by the Petitioner is beyond the scope of the Petitioner’s entitlement.

4. Heard and record perused. The basic dispute between the parties is with regard to the procedure followed by the Respondents for the *single stage two envelope tender notice* with respect to the bid for the construction of Tuff Tile Drain in UCs 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 63, 64, 65 and 66, District Multan. The Punjab Procurement Regulatory Authority Act, 2009 establishes the Procurement Regulatory Authority for regulating the procurement of goods, services and works in the public sector and for matters connected therewith. In terms of Section 26 of the Act, the Government may, by notification, make rules for carrying out the purposes of the Act. In terms of Section 27, subject to the provisions of the Act and the rules, the Authority may make regulations for giving effect to the provisions of the Act. The Punjab Procurement Rules, 2014 set out a detailed procedure to be followed with respect to the procurement.

5. In terms of Rule 17 of the Rules, the prequalification process requires the procuring agent to provide for all instructions for the submission of prequalification documents, to provide the evaluation criteria, list of documentary evidence required by contractors to demonstrate their respective qualifications and other information as per the criteria set out by the procuring agency. In terms of Rule 17(3) of the Rules, the procuring agent must promptly inform the contractor who has applied for prequalification as to whether or not it has been prequalified and only on the request of the applicant provide for a list of contractors who have been prequalified. Sub Section 4 provides that the procuring agent shall on the request of the bidder

communicate to the contractor, who has not been prequalified, the reasons for not prequalifying the contractor. Sub Section 5 requires that only prequalified contractors shall be entitled to participate in procurement proceedings. As per this Section, prequalification is required on the basis of the criteria prescribed by the procuring agent. The procuring agent is required to inform the contractors of whether or not they have been prequalified. Rule 17(3) merely requires that the contractor is informed as to whether it has been prequalified or not and therefore the procuring agent is not required under Rule 17 to provide for reasons of disqualification. In the event that a bidder wants to know the reasons, it can apply to the procuring agent for the reasons which the procuring agent shall then communicate to the said bidder. Rule 38 is relevant to the dispute. Rule 38(2) provides for the procedure for selection of contractors. As per Rule 38, there are three methods to select a contractor, either through single stage two envelope bidding or through two stage bidding or through two stage two envelope bidding. The procuring agent specifies the procedure for carrying out the bidding process and accordingly the relevant procedure is adopted. In this case, it is a single stage two envelope bidding process which selects the contractor.

6. As per Rule 38(2)(a), single stage two envelopes bidding process can be used for the procurement of goods where the bids are evaluated on technical and financial grounds. As per Rule 38(2)(a) of the Rules, the applicant shall provide two envelopes marked as financial proposal and technical proposal. The technical proposal shall be opened in the first instance and the financial proposal shall be retained unopened by the procuring agent. The procuring agent shall first evaluate the technical proposal and shall reject any proposal which does not conform to the specified requirements. Rule 38(2)(a) and (v) of the Rules specifically provides that during technical evaluation no amendment in the technical proposal shall be permitted. Rule 38(2)(a)(v)(vi) provides that after the evaluation and approval of the technical proposals, the financial proposals of the technically accepted bid shall be opened. So far as the financial proposals of the technically non-responsive bids are concerned, they remain unopened and will be returned to the applicant on the expiry of the grievance period or the decision on a complaint, if any, which can be filed by

the non-responsive bidder. Therefore in terms of the prescribed procedure, the applicant will provide two envelopes for bidding, one contains its technical bid and the other its financial bid. The procuring agent will first open the technical bid and immediately see whether the applicant meets the technical requirements on the basis of the criteria given. In the event that the applicant does not meet the requirements, the bid will be rejected there and then and the applicant is not given any opportunity to amend the technical proposal. Rule 38(2)(a)(iv) and (v) does not prescribe that any reasons could be given rejecting the technical bid. When read with Rule 17, with reference to prequalification of the contractor, it appears that at the stage of the prequalification, a bidder is merely to be informed whether it meets the prequalification requirements or not. In the event that the bidder is desirous to know the reasons, it must move an application seeking the reasons why it is not qualified. Important to note is that against this decision remedy is available to the bidder under Rule 67 which provides as follows:

67. <u>Redressal of grievances by the procuring agency</u>

(1) The procuring agency shall constitute a committee comprising of odd number of persons, with proper powers and authorizations, to address the complaints of bidders that may occur prior to the entry into force of the procurement contract.

(2) Any bidder feeling aggrieved by any act of the procuring agency after the submission of his bid may lodge a written complaint concerning his grievances not later than [ten days] after the announcement of the bid evaluation report.

(3) The committee shall investigate and decide upon the complaint within fifteen days of the receipt of the complaint.

(4) Mere fact of lodging of a complaint shall not warrant suspension of the procurement process.

7. Learned counsel for the Petitioner has repeatedly stated that since this is not submission of a bid as the bidding process has to be completed wherein technical and financial aspects have to be considered, hence remedy of Rule 67 is not available to it. However, this understanding of Rule 67 is totally misconceived. As per Rule 67, any bidder feeling aggrieved by any act of the procuring agent after submission of its bid may lodge a written complaint not later than 10 days after the announcement of the bid evaluation report. This means that where a bidder participates in a single stage two envelopes bidding procedure and is technically

disqualified, remedy under Rule 67 is available to such bidder to file its complaint not later than 10 days after it has asked for the reasons for rejection of his technical bid from the procuring agent.

8. In this regard, it is important to note that *single stage two envelope bidding process* is designed, such that the bidders submit two envelopes simultaneously, one showing the technical proposal and the second containing the financial proposal. The procuring agent first evaluates the technical proposal without reference to the financial proposal or the price and bidders who do not conform to the technical requirements as specified are rejected being deficient. The basic difference between the single stage two envelope bidding and the two stage bidding is that in the single stage bidding procuring agent is clear about its technical requirements and needs to evaluate price proposal of those bidders who are technically sound and meet the requirements. However, where it is two stage bidding process, in that case the bidders can be given an opportunity to meet the technical requirements which are prescribed under the Rules in terms of Rule 38(2)(b) and (c). In the two stage process, there is room to improve and discuss technical requirements whereas in the single stage, the technical requirements are specific and need to be met with.

9. In this case the tender notice clearly provides that the tender documents will be provided for the single stage two envelope bidding. The bidding shall be a single package consisting of the technical and financial proposal. The bidding took place in Multan at Raza Hall defunct Zila Council, Multan on 27.9.2021 at 2.00 PM and the technical bids were opened on the same day. The Petitioner participated and was informed on 30.9.2021 that its technical bid did not meet the criteria. The technical evaluation committee notified by the Chief Engineer (South), Punjab, PHE Department, unanimously did not qualify the Petitioner in its meeting held on 29.9.2021. As per the report filed, the Petitioner's technical bid was deficient in terms of experience, in terms of requirements of personnels and also in terms of its ability to establish its financial soundness. The Petitioner then applied on 7.10.2021 for the reasons for rejection of its technical bid and was informed of the same on the same day being 7.10.2021. Interestingly the Petition was filed on 4.10.2021 and on 5.10.2021 the Petitioner stated that it did not know the reasons as to why its

technical bid was rejected and therefore it should be given an opportunity to participate in the financial bidding process as its bid has been submitted.

10. The filing of the Petition and the arguments made by the Petitioner are totally misconceived and against the mandate of the law. The Petitioner was well aware of the fact that in terms of Rule 38(2)(a) read with Rule 17 of the Rules, the Petitioner had to apply to the procuring agent for the reasons why its proposal was rejected. The Petitioner did file its application and was communicated the reasons, yet in an attempt to have its financial bid considered, the Petitioner misrepresented itself before this Court and misstated the facts so that it could get an opportunity to have its financial bid considered notwithstanding the fact that it was technically deficient. During the course of arguments, it appears that there are two relevant facts which the Petitioner failed to mention even today to mislead this Court. In the first instance the Petitioner has insisted that the offices of the Respondents are at Lahore which are relevant to the dispute at hand being Respondent No.2, Chief Engineer (Sought), Punjab Public Health Engineering Department, Lahore and Respondent No.1, Secretary HUD and PHE Department, whereas the record shows that the bid was to take place in Multan and all communications between the Petitioner and the Public Health Engineering Department have been done through the Multan office. Hence the Petitioner filed this Petition and impleaded the Secretary, HUD and PHE Department, Lahore who is not relevant to the dispute at hand, simply so that its Petition should be fixed at Lahore. Although this Court may exercise constitutional jurisdiction at the Principal Seat in Lahore on all and any matters, the Petitioner is not at liberty to mislead the Court nor is the Petitioner at liberty to misstate the facts. The second factual misrepresentation by the Petitioner is with respect to the procedure adopted by the Respondents. The Petitioner participated in the single stage two envelope procedure for the bidding of construction of Tuff Tile Drain in various UCs of District Multan. The Petitioner therefore for the purposes of the prequalification of its technical bid is governed not only by the process set out under Rule 38(2)(a) of the Rules but is also governed by the dispute resolution mechanism provided under Rule 67. The Petitioner deliberately and with malafide intent has misled the Court by insisting that due

procedure was not followed whereas the record as produced by the learned Law Officer shows that the procedure was followed in terms of the Act and the Rules and that the Petitioner was technically deficient and could not have its financial proposal considered. During the course of arguments today, the Petitioner was aware of its technical deficiencies on the basis of which the Petitioner's technical proposal was rejected yet it failed to mention the same and it is only when confronted with the documents provided by the learned Law Officer, that this fact was admitted.

11. From the aforesaid, it appears that the Petitioner has used this Court for its own benefit in a manner which is not contemplated under the law but also against the concept of a single stage two envelope bidding process. At the very outset, the Petitioner was aware when providing its technical and financial proposal that this is a single stage bidding process which means that if the technical bid of the Petitioner is rejected, its financial bid cannot be considered. Moreover the Petitioner was aware that against the rejection of its technical bid, the Petitioner may ask for the reasons from the Respondents. During the pendency of the Petition, the Petitioner did apply for the reasons and was informed. The Petitioner' remedy was before the Grievance Committee yet by abusing the process of law, the Petitioner sought to have its financial proposal considered by filing this Petition. Even today learned counsel for the Petitioner has insisted that its financial bid be considered which is totally against the mandate of the law and the single stage two envelope bidding process. Hence the Petitioner is directed to pay cost in the sum of Rs.50,000/- for wasting the time of the Court and abusing the process of the Court. This amount shall be deposited with the Dispensary of the Lahore High Court Bar Association, within one week's time positively.

12. Under the circumstances, no case for interference is made out. The instant Petition is **dismissed**.

(AYESHA A.MALIK)
JUDGE

Approved for reporting
*A*llah Bakhsh*

Stereo. H C J D A 38.

Judgment Sheet

IN THE LAHORE HIGH COURT AT LAHORE
JUDICIAL DEPARTMENT

WP No.21602/2021

Pepsi Cola International (Private) Limited

Versus

Federation of Pakistan through Secretary Revenue Division, Islamabad etc.

J U D G M E N T

Date of Hearing	**13.10.2021**
Petitioner By:	Mr. Salman Akram Raja and Mr. Arslan Riaz, Advocates.
Respondents By:	Syed Zain ul Abidien Bokhari, Advocate

Ayesha A. Malik J: Through this Petition, the Petitioner has challenged the proceedings under Section 161(3) of the Income Tax Ordinance, 2001 ("**Ordinance**") pursuant to which notices dated 7.1.2021, 25.1.2021, 2.3.2021, 10.3.2021 and 25.3.2021 were issued by the Respondents and seeks a declaration that the stated notices be declared illegal and of no lawful authority.

2. The case of the Petitioner is that it has been issued show cause notices and reminders under Section 161 of the Ordinance with respect to the tax year 2014. The Respondents have also rejected the Petitioner's plea of Section 174(3) of the Ordinance vide notice dated 25.3.2021. Learned counsel for the Petitioner argued that the tax year 2014 came to an end on 31.12.2013 for the Petitioner company. As per the impugned notices, the Petitioner has been asked to provide documentary evidence of certain transactions and details of payments called for in the show cause notices. Learned counsel argued that in terms of Section 174(3) of the Ordinance, the taxpayer is to maintain accounts and documents for six years after the end of the tax year. States that six year period expired on 31.12.2019 for the Petitioner company with reference to the tax year 2014 and therefore the Petitioner in terms of Section 174(3) of the Ordinance is not required to maintain any accounts or documents which are now being asked for by the Respondents. In this regard,

learned counsel for the Petitioner has placed reliance on *Maple Leaf Cement Factory Ltd. v. The Federal Board of Revenue and others* (**2016 PTD 2074**) as well as *Habib Bank Ltd v. Federation of Pakistan through Secretary, Revenue Division and 5 others* (**2013 PTD 1659**).

3. Report and parawise comments have been filed on behalf of Respondents. Learned counsel argued that the provisions of Section 174(3) of the Ordinance do not bar proceedings initiated under Section 161 of the Ordinance. Learned counsel further argued that the issue in question with respect to the tax year 2014 is about failure to pay tax which can be investigated by the department at any given time. He argued that the limitation period to maintain the record is for the purposes of assessment or any other proceedings which does not include the incidence of recovery of tax. Learned counsel further argued that limitation under Section 174 of the Ordinance with reference to maintaining of documents and accounts does not mean or suggest that proceedings under Section 161 of the Ordinance cannot continue or that the said proceedings should be quashed. He has also placed reliance on 2016 PTD 2074 (*supra*) and *D.G. Khan Cement Co. Ltd. through Chief Financial Officer and others v. Federal Board of Revenue through Chairman and 5 others* (**2020 PTD 2111**).

4. Heard and record perused. The basic dispute of the Petitioner is with reference to the impugned notices and reminders issued by the Respondents under Section 161 of the Ordinance. In terms of the notices issued under Section 161(1A) of the Ordinance, the Respondents have sought from the Petitioner *documentary evidence* of three sets of transactions and party-wise detail of payments made. The Petitioner has provided an excel sheet of all payments made, however the Respondents seek *documentary evidence* for which they have issued the impugned notices along with reminders dated 7.1.2021, 25.1.2021, 2.3.2021, 10.3.2021 and 25.3.2021. The relevant tax year is 2014 and the period in question is from 1.1.2013 to 31.12.2013. The Petitioner informed the Respondents of their obligation to maintain the record for a period of six years under Section 174 of the Ordinance which matter was also disregarded by the Respondents vide notice dated 25.3.2021.

Hence they continued to pursue their request for documentary evidence by terming the objections raised by the Petitioner as unconvincing and not relevant.

5. Section 174 of the Ordinance is reproduced as under:

> 174. **Records**. -- (1) Unless otherwise authorised by the Commissioner, every taxpayer shall maintain in Pakistan such accounts, documents and records as may be prescribed.
>
> (2) The Commissioner may disallow [or reduce] a taxpayer's claim for a deduction if the taxpayer is unable, without reasonable [cause], to provide a receipt, or other record or evidence of the transaction or circumstances giving rise to the claim for the deduction.
>
> (3) The accounts and documents required to be maintained under this section shall be maintained for [six] years after the end of the tax year to which they relate [:]
>
> [Provided that where any proceeding is pending before any authority or court the taxpayer shall maintain the record till final decision of the proceedings:
>
> Explanation. – Pending proceedings include proceedings for assessment or amendment of assessment, appeal, revision, reference, petition or prosecution and any proceedings before an Alternative Dispute Resolution Committee.]
>
> [(4) For the purpose of this section, the expression "deduction" means any amount debited to trading account, manufacturing account, receipts and expenses account or profit and loss account.]
>
> [(5) The Commissioner may require any person to install and use an Electronic Tax Register of such type and description as may be prescribed for the purpose of storing and accessing information regarding any transaction that has a bearing on the tax liability of such person.]

In terms of this Section, a taxpayer is required to maintain documents and accounts for a period of six years after the end of the tax year to which they relate unless there are pending proceedings before the authority or court where the tax payer may be required to produce the accounts or documents. Pending proceedings mean proceedings for assessment or amendment on assessment, appeal, revision,

reference petition or prosecution as the case may be. In this case admittedly there is no pending proceeding. Instead the Petitioners were issued notices under Section 161 of the Ordinance wherein a person who fails to collect tax or deduct tax can be made liable to pay that tax and no recovery can be made unless they are not given an opportunity of being heard. In this case, the Petitioner has been asked to explain or demonstrate the deposit of tax with respect to the certain payments for which the Petitioner provided a summary of the payments made through an excel sheet. However the Respondents now seek documentary evidence against which the Petitioner has taken the plea of limitation under Section 174(3) of the Ordinance.

6. The matter in issue has been considered by the Hon'ble Sindh High Court in 2013 PTD 1659 (*supra*) wherein it has held that:

> 20. As noted above, the central issue raised is that of limitation. Are the notices, and impugned action, under section 161 barred by limitation?. The issue of limitation can arise in three ways: (a) where there is an express time bar, imposed by statute; (b) where such a bar can or is to be inferred from and on a proper reading and interpretation of the relevant provisions; or (c) where the action has been taken beyond a reasonable period of time. There is of course no express time limit within which action under section 161 must be taken, so the first possibility does not arise. The petitioners' case rested primarily on the second possibility; on a proper reading of the various provisions including in particular section 161 and 174, such a bar had or ought to be inferred. The third possibility was also canvassed but very much as a secondary submission, without prejudice to the main case. Clearly, the three possibilities are distinct. However, there is one point of commonality. If any one of them is found to exist or apply, then the impugned action cannot be taken at all beyond the period identified. This, after all, is what is meant by the action being barred by limitation.

The Court concluded that:

> 32. Having carefully considered the matter, and in light of the discussion in the foregoing paras, we are of the view that the rule laid down by the Supreme Court in Pakistan Mobile is applicable as much to the 2001 Ordinance as it was in respect of the 1979 Ordinance. Therefore, as held by the Supreme Court, there can be no period of limitation or time bar for action under and in terms of section.

34. To this question, our answer would be in the affirmative. In our view, section 161, on its proper interpretation and application, entails that even though there is no period of limitation, a point in time must eventually be reached such that if action is to be taken thereafter, this must be properly justified by the Commissioner. In other words, beyond the stipulated point in time, the onus would lie on the Commissioner to show why action is being taken belatedly and if he fails to discharge this onus, then the proceedings would be liable to be set aside. It is important to keep in mind that there is no limitation involved here. The Commissioner is not barred from taking action under section 161 after the stipulated point in time. But he does then carry the onus of justifying the delay in taking action. There may be a superficial similarity between what we say here and a rule that states that action must be taken within a reasonable period, but this is not so. There is a material difference. The rule of the reasonable period (as enunciated and applied, e.g., by the Delhi High Court in the cited decision or this Court in the cases of Said Ghani and Kamran Model Factory or endorsed in Agha's Supermarket is in the end a rule of limitation. Action beyond the period is barred. What we enunciate here raises no such bar.

36. For the foregoing reasons, we are of the view that such a time related limiting factor does exist in relation to the exercise of powers under section 161, although it is not of course, a bar of limitation as such. This brings us to the next question: what is the point in time, beyond which the Commissioner, if he is to act at all, must justify the taking of action? Where does the, dividing time line lie, beyond (but not before) which the Commissioner carries the onus that he must discharge? In our view, it is in answer to this question that section 174 becomes relevant. If the Commissioner takes action under section 161 for a failure to deduct tax, and the amount from which the deduction had to be made was relatable to the deducting authority's income (in the manner explained in para 29 above) then any such action taken beyond the period up to which the deducting authority had to maintain its books of account, etc. under section 174 would require proper justification. The onus would then be on the Commissioner to explain why action was being taken belatedly. If there is a proper justification, then the onus would stand discharged and the action would be sustainable in law (subject of course, to any other defences available to the deducting authority). If however, there is no proper justification, then the onus would not be discharged and the action would be liable to be set aside. The reason why the time fixed for purposes of section 174 provides the necessary dividing time line is as canvassed by learned counsel for the

petitioners. Beyond that time, in law and for purposes of the 2001 Ordinance, the deducting authority/taxpayer would not be under any obligation to maintain the books of account, etc. The opportunity of hearing envisaged by section 161(1A), which is mandatory, may well become illusory. But by reason of section 174, it is not for the deducting authority/taxpayer to show that this is so once the period stated in this section has elapsed. Rather, it would be for the Commissioner to justify his belated action. The onus would lie on him and not the other way around. It is pertinent to note that section 162 has no equivalent to subsection (1A) of section 161. This of course does not mean that the primary taxpayer is not to be given an opportunity of hearing. However, the strong language employed in subsection (1A) ("No recovery under subsection (1) shall be made ...") does suggest that what we have said herein above in relation to there being a time related limiting factor for action under section 161 may not be the case in relation to section 162. The later section may apply without any time related limiting factor. This would of course be understandable; after all, the basic liability is that of the primary taxpayer. However, we leave this point open for further consideration in an appropriate case.

7. The matter in issue has also been considered in 2016 PTD 2074 (*supra*) wherein it has been held by this Court as follows:

> 17. Although, in the judgment of the Sindh High Court, the exercise of statutory powers and the action taken under section 161 were declared unlawful, I will not go to the extent of declaring those actions as unlawful as, in my opinion, the provisions of section 161 and the soliciting of information under sections 165 and 177 of the Ordinance, 2001 may proceed on its own and the only power which can be placed is on the department to compel the petitioners to furnish records beyond a period of five years. However as can be seen, the Sindh High Court did not conclusively render a holding on whether a taxpayer was or was not obliged to provide the documents beyond a period of five years. By relying upon a concept of 'time related limiting factor' and by reading section 164 with section 161, it was held that 'justification had to be provided for the belated action'. What if the justification was in fact forthcoming? In my opinion, as adumbrated, the taxpayer is relieved of his obligation to maintain the record beyond a period of five years and to produce it upon notice to do so.

The matter is issue was also considered in 2020 PTD 2111 (*supra*) wherein the Court held:

> In view of above, both these petitions are allowed. However, it is made clear that the proceedings of audit of income tax under section 177 of the Ordinance may continue but the petitioners shall not be required by the department to produce the record.

8. As per the aforementioned judgments, it has been held that the taxpayer cannot be compelled to produce documents which the statute does not require it to maintain beyond six years in terms of Section 174(3) of the Ordinance. The judgment passed by the Hon'ble Sindh High Court 2013 PTD 1659 (*supra*) went a step further to hold that there is some obligation on the department when it initiates actions beyond the six year period and calls for documents and record which the taxpayer is not required to maintain under the law. The Court held that purpose of setting a time limit and maintaining accounts and documents is to ensure that proceedings under the Ordinance are held within time and where there is a delay, the obligation then rests on the Respondents being the relevant Commissioner to justify the cause of delay and the reasons for seeking documents beyond the six year period. In this regard I am of the opinion that there lies a burden on the department to justify delayed proceedings, especially in view of Section 174(3) of the Ordinance.

9. There is no cavil to the understanding that the proceedings under Section 161 of the Ordinance are independent proceedings for which no time limit has been prescribed. However, in terms of the notices issued to the Petitioner, the issue for the Respondents is the provision of documents for the tax year 2014 which demand is squarely hit by Section 174(3) of the Ordinance. The Petitioner has already provided the relevant information, however the same is not sufficient for the Respondents or they have expressed their dissatisfaction by the response of the Petitioner, hence they have repeatedly asked for documentary evidence. In this regard, it goes without saying that there is no obligation on the taxpayer to produce the accounts and documents beyond the six year period as they are not required under the law to maintain the same. Hence the repeated requests and reminders to produce the documents is without appreciation of Section 174(3) of the Ordinance.

As the matter has been decided by this Court and the Sindh High Court, it was incumbent upon the department to be mindful of the rulings of the Court with reference to Section 174(3) of the Ordinance.

10. The issue then remains, can the Respondents proceed under Section 161 of the Ordinance without the documentary evidence in question. To the mind of the Court, the burden lies on the Respondents as clearly the notices issued by the Respondents are delayed as they are with reference to the tax year 2014 and the proceedings started in 2021. The Petitioner taxpayer has provided them with the relevant details in the form of an excel sheet, however the Respondents seek details in the form of documentary proof which it cannot compel the taxpayer to provide as per Section 174(3) of the Ordinance. Therefore at best they can continue with their proceedings under Section 161 of the Ordinance subject to any other objections that the taxpayer may have but they cannot compel the Petitioners to produce documentary evidence. In the event that the Respondents are unable to conclude on a liability under Section 161 of the Ordinance, that is that there was failure to pay tax collected or deducted then the burden would lie on the Respondents to establish their case as opposed to relying on the Petitioner to produce documents before the Respondents. Therefore as held by the Hon'ble Sindh High Court in 2013 PTD 1659 (*supra*) even though the Commissioner is not barred from taking action under Section 161 beyond the six year period, they will have to justify the late action taken and determine the liability on the basis of the information provided if at all possible but cannot penalize the taxpayer for not producing any documentary evidence. In this regard, it is clarified that the Respondents have to discharge their burden before declaring any liability and cannot simply conclude that for want of documentary evidence and accounts, the taxpayer is rendered liable. Essentially the action under Section 161 of the Ordinance should have been taken at the right time and any delayed action means that the burden is on the Commissioner to justify the demand raised and the imposition of any liability.

11. Therefore to the extent of the repeated demands for production of documents in the impugned notices, the same are without any legal basis and against the mandate of the law. However, the proceedings under Section 161 of the

Ordinance are independent proceedings which may continue but it is for the department to make the most of the information provided to it and to pass speaking orders on the basis of which it will determine whether there is a failure to pay the tax collected or deducted without placing any burden on the taxpayer and its inability to produce the relevant documents.

12. Under the circumstances, the instant Petition is **accepted** in the above terms and the requirements for documentary evidence under the impugned notices dated 7.1.2021, 25.1.2021, 2.3.2021, 10.3.2021 and 25.3.2021 issued by the Respondents are set aside. It is clarified that the proceedings under Section 161 of the Ordinance may continue.

(AYESHA A.MALIK)
JUDGE

Approved for reporting

Allah Bakhsh*

Stereo. H C J D A 38.

Judgment Sheet

IN THE LAHORE HIGH COURT AT LAHORE
JUDICIAL DEPARTMENT

RFA No. 54274/2017

Meezan Bank Limited

Vs

Wapda First Sukuk Company Limited etc.

J U D G M E N T

Date of Hearing	**12.10.2020, 9.11.2020, 9.12.2020, 14.12.2020, 16.12.2020, 17.12.2020, 21.12.2020, 23.12.2020, 24.12.2020, 28.12.2020, 29.12.2020, 30.12.2020, 2.2.2021, 25.3.2021, 21.4.2021, 10.6.2021, 16.6.2021, 17.6.2021, 29.6.2021, 7.7.2021 and 16.9.2021.**
Appellants By:	Mr. Uzair Karamat Bhandari, Mian Muhammad Kashif and Mr. Abdul Muqtadir Khan, Advocates for the Appellant. Mian Sami ud Din, Advocate for Appellant in RFA No.54270/2017. Mr. Adil Bandial, Mr. Asad Hussain, Mr. Zubair Hussain, Mr. Zahir Abbas and Mr. Shahzad Ahmad Cheema, Advocates for Appellant in RFA No.50966/2017. Mr. Jawad Qureshi, Mr. Hashim Zafar, Syed Shahid Hussain and Mr. Shahid Rafiq Mayo, Advocates for Appellant in RFA No.67900/2017. Mr. A.W. Butt and Mr. Obaid Aslam, Advocates for Appellant in FAO No.181619/2017.
Respondents By:	Ms. Ayesha Hamid, Mr. Atta Mustafa Rizvi, Ms. Sahar Zareen Bandial and Raja Akbar Ali Mehboob, Advocates for Respondents No.1 and 2. Mr. Asad Javed, Mr. Sikandar Abbas Jajja and Mr. Farrukh Ilyas Cheema, Advocates for Respondent No.3.

Ayesha A. Malik J: This RFA along with connected RFAs No.54270/17, 50966/17, 67900/20 have been filed under Section 96 of the CPC wherein the

Appellants have impugned judgment and decree dated 14.4.2017 passed by the Civil Judge 1st Class, Lahore ("**Impugned Judgment**").

2. The Appellants include financial institutions being banking companies and a non-banking company as well as the Central Depository Company of Pakistan Limited ("**CDC**"). In this regard, it is noted that the CDC (RFA No.67900/2017) is only aggrieved to the extent of the decision on Issue No.14-H in the Impugned Judgment. The remaining Appellants have impugned the judgment and decree in its entirety praying therein that it be set aside and that they be declared the lawful owners with all rights of the disputed sukuks and as a consequence ijara rentals with accumulated mark up/profits be paid to them. In the alternative they pray that the Appellants be paid damages by Respondent No.1, Wapda First Sukuk Company Limited ("**Sukuk Company**") for the loss suffered not only with respect to the amounts paid by the Appellants for the disputed sukuks but also equivalent to the ijara rentals due to the Appellants.

3. The Respondent No.1 Sukuk Company is a public limited company wholly owned by Respondent No.2, Wapda. Respondent No.1 issued sukuk certificates for the purpose of raising money for the Mangla Dam Project which became the subject matter of a dispute between the parties. Respondent No.1, the Sukuk Company and Wapda filed an interpleader suit under Section 88 of the Civil Procedure Code, 1908 ("**CPC**") against the Appellants on 12.12.2009 praying therein that the court decide which of the defendants (Appellants before this Court and NFC) is the true and lawful owner of the disputed sukuk certificates. The Appellants each filed their written statement in the suit. Issues were framed. One of the parties, Bank Islami Pakistan Limited ("**Bank Islami**") was proceeded ex-parte on 21.5.2015. They are Respondent No.3 in the instant RFA and also have an ownership claim of 10000 sukuk certificates. The parties produced their respective evidence, documentary as well as oral, after which the trial court concluded through the Impugned Judgment that National Fertilizer Corporation Pakistan (Private) Limited ("**NFC**"), Respondent No.3 was the lawful owner of the disputed sukuk certificates and ijara rentals including the 7th ijara rental should be paid to NFC. Hence these appeals.

The dispute

4. The dispute between the parties relates to the ownership of sukuk certificates. The basic transaction documents giving rise to the sukuk certificates is a Purchase Agreement signed on 15.11.2005 wherein Respondent No.1 purchased from Respondent No.2, ten turbines installed at the Mangla Hydel Power Station for Rs.8,000,000,000 (Rupees eight billion) which became the trust assets. Though the Purchase Undertaking dated 15.11.2005, Respondent No.2 undertook to buy back the ten tribunes on maturity of the sukuk certificates. An Ijara Agreement was also executed between Respondents No.1 and 2 and Muslim Commercial Bank ("**MCB**") whereby the turbines were leased back to Respondent No.2, Wapda for which rental payments were to be paid semi annually. Under the Declaration of Trust, the Sukuk Company issued sukuk certificates to the public, as issuer and also took on the role of trustee for the trust assets. The rights of the certificate holders were set out in the Declaration of Trust, which included the right to receive Periodic Distribution Amounts ("**PDA**"), being the profit on the sukuk certificate, twice a year. Under the Agency Agreement, Wapda Bonds Cell was appointed as the Registrar, Transfer Agent and Replacement Agent with respect to the sukuk certificates. Wapda Bonds Cell is a part of Respondent No.2, Wapda and not a separate entity. NFC purchased 300 physical sukuk certificates, each certificate representing 500 sukuk units, of the value of Rs.750,000,000 (Rupees seven hundred and fifty million) on 24.01.2006 and subsequent thereof the Sukuk Company has been paying ijara rentals to NFC.

5. A dispute arose on the basis of letter dated 12.2.2009 (Ex.P24) when purportedly Deputy General Manager, Accounts of NFC stated that NFC had sold 72 sukuk certificates (being 36000 sukuk units) worth Rs.180,000,000 (Rupees one hundred and eighty million), out of its holding of Rs.750,000,000 (Rupees seven hundred and fifty million) to Swift Engineering Solutions ("**SES**") and consequently 72 sukuk certificates were transferred to SES. On the request of SES, Wapda Bonds Cell replaced the 72 sukuk certificates with 6 certificates representing 6000 sukuk units each on 14.3.2009. SES then sold its 6 sukuk certificates to Al-Meezan Investment Management Company Limited ("**AIMC**") for Rs.190,792,800 (Rupees one hundred and ninety million, seven hundred ninety two thousand and

eight hundred) and thereafter AIMC sold its sukuk certificates to Bank Islami. Other claimants are Soneri Bank Limited ("**SBL**") and Meezan Bank Limited ("**MBL**") who purchased sukuk units through the CDC and received ijara payments until the dispute arose.

6. In the meantime, in April 2009 NFC inquired as to why they had not received their full profit on their sukuk certificates, to which they were informed that vide letter dated 12.2.2009 (Ex.P24) NFC informed the Sukuk Company that have sold their sukuk certificates to SES. NFC denied all claims of having sold the sukuk certificates and they accordingly informed the Sukuk Company that they made no such sale. Wapda constituted a team of officers to inquire into the matter and also stopped future transfers by informing the CDC. A complaint was registered with the Federal Investigation Agency ("**FIA**") and FIR No.28/2009 dated 5.8.2009 was registered against SES along with employees of Wapda whereby criminal proceedings commenced, to inquire into the fraudulent sale. The FIA issued an interim report which finds that the transfer to SES was fraudulent as the real certificates are still in the possession of NFC.

Litigation between the Parties

7. In the meantime, the Appellants filed suits for declaration, permanent injunction and damages before the Sindh High Court, and NFC and Respondents No.1 and 2 filed suits in Lahore, the details of which are as under:

a) Suit No.1497/2009 filed by AIMC for declaration, injunction and damages filed on 22.10.2009 titled *Al-Meezan Investment Company etc. v. WAPDA First Sukuk Company etc.* praying therein that demand of refund of ijara rentals is illegal, hence Wapda should be restrained from taking any action which would adversely affect the rights of the Appellant in respect of ijara rentals and/or their ownership of sukuk certificates (Ex.D2-36);

b) Suit No.1269/2010 filed by SBL for declaration, mandatory injunction, recovery of monies and damages filed on 10.8.2010 titled *Soneri Bank Limited v. WAPDA First Sukuk Company etc.* praying therein that SBL is the owner of 4000 certificates and that Wapda be directed to pay ijara rentals and damages of Rs.4,000,000/- along with profit of 15% from the date of default or alternately (if the plaintiff is not declared rightful owner) then direct

UBL to return the consideration amount and UBL and CDC pay damages and profit at the rate of 15% along with costs of fund;

c) Suit No.726/2012 (previous Suit No.187/2009) filed by MBL for declaration, mandatory injunction and recovery filed on 26.12.2009 titled *Meezan Bank v. WAPDA First Sukuk Company etc.* praying therein that Appellant is the owner of 22000 sukuks and entitled for ijara payments and that Wapda be directed to pay PDA and other payable dues. Wapda be also directed to make donation to charity as required by clause 3.6 of ijara agreement dated 15.11.2005 along with cost of fund and cost of suit (Mark D6-B);

d) Suit No.40163/2015 filed by NFC before the civil court at Lahore against Wapda and the Sukuk Company for recovery of Rs.466,972,916/- along with loss of profits and damages on 21.10.2015 titled *National Fertilizer Corporation of Pakistan (Pvt.) Limited v. Wapda First Sukuk Company Limited etc.*, praying therein for recovery of Rs.466,972,916/- along with up to date profits at the rate of 13% on the above said amount till realization. NFC also prayed in the suit for recovery of the profits earned on the PDA/ijara rentals and dissolution distribution amount, earned either on account of the above amounts deposited by defendants No.1 and 2 into the civil court pursuant to their interpleader suit and invested by the court into a profit bearing scheme or earned by defendants No.1 and 2 during the time they utilize the above amount (not exhibited).

e) Suit No.15370/2020 filed by the Sukuk Company and Wapda before the Senior Civil Judge, Lahore for recovery on 20.4.2020 titled *Wapda First Sukuk Company Limited etc. v. Al-Meezan Investment Management Limited etc.*, against Al-Meezan Investment Management, praying for recovery of Rs.13,640,900/- plus mark up accruing at 20% on the principal amount of Rs.Rs.13,640,900/- from the date of payment of the said amount to the AIMC (defendant No.1) on 21.4.2009 till realization of full payment plus costs.

Interpleader Suit

8. Respondent No.1, Sukuk Company Limited filed an interpleader suit under Section 88 of the CPC on 12.12.2009 against all the Appellants including CDC praying therein that the court decide which of the defendants is the true and lawful

owner of the disputed sukuk certificates so that it can make the requisite payments to the owner. The defendants filed their written statements and on 21.5.2010 the suit was dismissed for being not maintainable. This order was challenged before this Court through RFA No.779/2010 which was allowed vide judgment dated 17.2.2015. This judgment of 17.2.2015 was challenged before the august Supreme Court of Pakistan whereby the appeal was dismissed and the suit was remanded vide order dated 10.10.2016. Thereafter a review was filed before the august Supreme Court of Pakistan by the CDC in which a clarification was issued on 21.8.2017, where after the review was disposed of.

9. Hearing before the trial court after the remand commenced on 3.4.2015 and Issues No.1 to 14 were framed on 19.1.2017 as follows:

1. Whether the Interpleader suit has been instituted with valid authorization? OPP
2. Whether forgery or fraud took place as alleged by the plaintiffs and defendant No. 1 and such forgery or fraud vitiated the transfer of the Sukuk (with the face value of Rs.180 Millions) to the defendant No.2, 3, 4 & 6? OPP & OPD-1
3. Whether the plaintiffs are stopped from denying independent title of defendant No. 2, 3, 4 & 6 to the Sukuk and Ijara thereon? OPD 2, 3, 4 & 6
4. If forgery or fraud took place, the plaintiffs are vicariously liable to the holders or Sukuk Certificate for such forgery or fraud committed by their employees, and the plaintiffs are liable to their negligence, for an amount equivalent to the value the Sukuk and the Ijara thereon? OPD 2, 3, 4 & 6
5. Whether the suit is barred under the provisions of Order XXXV Rule 1, 5 CPC? OPD 1, 2, 4, 5 & 6
6. Whether the suit is barred in terms of Section 10 and Section 88 CPC as the suit of defendant No. 2 & 5 was already pending adjudication before the Hon'ble Sindh High Court Sindh at the time of instituted of the instant suit? OPD 1, 2, 4, 5 & 6
7. Whether the plaintiffs have approached the court with unclean hands in order to avoid their obligations to pay Ijara Rentals to defendants? OPD 1, 2, 4 & 6
8. Whether the suit in hand is an attempt to deprive defendant No.1 from its entitlement to the Sukuk certificate and benefit? OPD-1
9. Whether the plaintiffs are barred from filing the instant suit because they are agents/trustees of defendant No.2? OPD 2 & 4

10. Whether the suit is incompetent for non-joinder of necessary parties? OPD 2 & 6

11. Whether the Sukuk certificate valuing Rs.180 Millions constitute the same debt, same money or other property being claimed by the defendant No.2 and those claiming title there-from? OPP

12. Whether the suit is barred in terms of the provisions section 88 CPC? OPD 4 & 5

13. Whether the defendant No.1 is an absolute owner of the Certificates of Rs.750,000,000/- including the certificate of Rs.180,000,000/- bearing serial No.512029 to 512100 and that the Certificates of Rs.180,000,000/- bearing serial No.512029 to 512100 are deemed to be never transferred to swift engineering solutions or to the defendant No.2 to 5 and that the defendant No.1 is exclusively and solely entitled to be paid all Ijara Rentals including the 8th Ijara rental? OPD-1

14. Whether the sale in favour of Swift Engineering Solutions and purported subsequent transfers/sale in favour of defendant No. 2 to 4 & 6 of the certificate of Rs.180,000,000/- are void ab initio unauthorized, fraudulent, illegal, unlawful and of no legal effect? OPD-1

15. Relief.

Thereafter eight additional issues were framed on 15.2.2017 being 14-A to 14-H as follows:

14-A. Which of the defendants is the true and lawful owner of the Sukuk certificate of the value of Rs.180 Million? OPD 1, 2, 4 & 6.

14-B. Whether the suit is not maintainable under law for seeking a decision from the court as to who is the true and lawful owner and to whom payments shall be made when the plaint itself discloses the knowledge of the plaintiffs as to the rightful claimant? OPD-1

14-C. Whether the plaintiffs have committed serious breach of the trust and contract and have failed to discharge their obligations, duties and responsibilities and are thus not entitled to obtain indemnity for themselves? OPD 1, 2, 4 & 6

14-D. Whether the plaintiffs have no right or cause to seek the equitable relief under section 88 and Order XXXV CPC as they themselves have committed fraud, breach of trust, negligence and default in discharging their solemn duties and obligations? OPD 1, 2, 4 & 6

14-E. Whether the plaintiff No.1 on March 09, 2009 confirmed to Global Securities Pakistan Limited (the “Broker”) that after completing all

the required formalities, it had transferred the six Jumbo physical certificate representing 36,000 Sukuk Certificate in the name of the answering defendant in its capacity as Trustee of Mezaan Islamic Income Fund? OPD-5

14-F. Whether the plaintiff No.1 on 13.03.2009 returned the six transfer deeds pertaining to 36,000 Sukuk Certificates verifying & confirming the holding of the said Sukuk Certificates in the name of the answering defendant in its capacity as Trustee of Mezaan Islamic Income Fund? OPD-5

14-G. Whether upon receipt of the duly verified transfer deeds, the answering defendant No.5 on 14.03.2009 made a deposit request to the plaintiff No.1 that the six physical certificate constituting 36,000 Sukuk certificate be converted into scripless form and be transferred in the CDC account of the Fund and whether this deposit request was subsequently approved by the plaintiff No.1? OPD-5

14-H. Whether there is a bar on the rectification of the Central Depository Register in light of section 11 of the CD Act?OPD-5.

10. After framing of issues parties were directed to produce their respective evidence in support of their respective claims. In order to prove their case, the plaintiffs (Respondents No.1 and 2) produced Masood Raza, Additional Director Wapda Bonds Cell and Accountant Sukuk Company as PW-1. The stated Respondents produced the following documents:

Sr.No.	Description of documents	Dated	Exhibits
1.	Authority Letter from WFSC	03.03.2017	Ex.P1
2.	Minutes of 13th Meeting showing Mr. Masood Raza as Chief Accountant	14.07.2009	Ex.P2
3.	Authority Letter from WAPDA	03.03.2017	Ex.P3
4.	Appointment Letter of Mr. Masood Raza as Director WAPDA Bond Cell	14.10.2006	Ex.P4
5.	Authority Letter Anwar Ul Haq Board Resolution of WFSC	01.12.2009	Ex.P5
6.	Minutes of Meeting (certified copy)	01.12.2009	Ex.P6
7.	Memorandum of association of plaintiff No.1		Ex.P7

8.	Articles of association plaintiff No.1		Ex.P8
9.	Certificate of incorporation	30.09.2005	Ex.P9
10.	Authority letter of Anwar Ul Haq No. 749/1997 @ Sr. 33 of list of reliance	01.07.1997	Ex.P10
11.	Office order posting DG (CPCC)	09.01.2006	Ex.P11
12.	Purchase agreement alongwith photocopy of personal guarantee	15.11.2005	Ex.P12
13.	Purchase undertaking	15.11.2005	Ex.P13
14.	Ijara agreement between plaintiff & WAPDA & MCB	15.11.2005	Ex.P14
15.	Agency agreement	15.11.2005	Ex.P15
16.	Declaration of Trust	15.11.2005	Ex.P16
17.	Citigroup's letter alongwith list of invertors & list of investors opting for the physic Sukuk certificate	24.01.2006	Ex.P17
18.	List of eligible Sukuk holders for the periods April and October 2007, 2008 & 2009 1. 19.04.2008 Ex.P18 (11 pages) 2. 19.10.2007 Ex.P19 (11 pages) 3. 19.04.2007 Ex.P20 (10 pages) 4. 18.10.2008 Ex.P21 (11 pages) 5. 21.04.2009 Ex.P22 (12 pages) 6. 20.10.2009 Ex.P23 (09 pages)		Ex.P-18 to Ex.P-23
19.	NFC's letter to Director Finance Bond Cell WAPDA to transfer the Certificates	12.02.2009	Ex.P24
20.	SES letter by Akhtar Saleem CFO	13.02.2009	Ex.P25
21.	Cancelled physical Sukuk from No. 512029 to 512100		Ex.P25/1 to Ex.P25/72
22.	Al Meezan Investment Management saying it had purchased Certificates from Swift	04.03.2009	Ex.P26

23.	6 Certificates surrendered by Al Meezan from serial No. 512390 to 512395		Ex.P26/1 to Ex.P26/6
24.	6 transfer deeds by Al Meezan/Swift		Ex.P26/7 to Ex.P26/12
25.	SES letter by Akhtar Saleem CFO to WFSCL	06.03.2009	Ex.P27
26.	WFSC letter about transfer	09.03.2009	Ex.P28
27.	WFSC letter informing about transfer	20.02.2009	Ex.P29
28.	CDC fax about verification of 6 certificate	12.03.2009	Ex.P30
29.	Letter CDC to WSFC regarding transfer of 6 certificate (3 page of annexures)	14.03.2009	Ex.P31
30.	WSFC to CDC about use to Global Terminal	17.03.2009	Ex.P32
31.	NFC letter about 7th Ijara payment (alongwith photo copies of 2 enclosures, letters from Citibank dated 22.04.2009 and 22.10.2008)	24.04.2009	Ex.P33
32.	NFC to WFSC	25.04.2009	Ex.P34
33.	WFSC to NFC	27.04.2009	Ex.P35
34.	NFC to WFSC about 8th Ijara payment letter # A/C 1925	26.11.2009	Ex.P36
35.	NFC to WFSC about 8th Ijara payment letter # A/C 1926	26.11.2009	Ex.P37
36.	NFC to WFSC about 8th Ijara payment letter # A/C 1527	23.10.2009	Ex.P38
37.	NFC to Manager Citibank Letter No. 1530	23.10.2009	Ex.P39
38.	NFC to WFSC about 8th Ijara payment	10.11.2009	Ex.P40
39.	Letter from WFSC to CDC for closure of WAPDA First Sukuk Transfer Books	25.03.2009	Ex.P41
40.	Letter from WFSC to Citibank	24.04.2009	Ex.P42
41.	Legal Notice Ijaz & Ijaz	25.11.2009	Ex.P43

11. Respondent No.3, NFC produced Muhammad Sageer Khan, Deputy General Manager Account, NFC as D1-DW1 and Faiz Ali Bokhari as D1-DW2. Respondent No.3 produced the following documents in evidence:-

Sr. No.	Description of documents	Dated	Exhibits
1.	NFC's Board Resolution Authorizing	26.03.2017	Ex.D1-1
2.	Certificate of incorporation	11.08.1973	Ex.D1-2
3.	Memorandum of association		Ex.D1-3
4.	Articles of association		Ex.D1-4
5.	Citi Bank's letter alongwith cheque dated 22.04.2009 (but cheque not exhibited)	22.04.2009	Ex.D1-5
6.	NFC's letter to Citi Bank upon receiving Ijara Rental on Rs.570 m as opposed to Rs.570m	24.04.2009	Ex.D1-6
7.	NFC's letter to WAPDA denying letter for transfer of any Certificates	28.04.2009	Ex.D1-7
8.	WAPDA's letter to WAPDA top NFC: Formation of Fact Finding Committee	29.04.2009	Ex.D1-8
9.	NFC's letter to WAPDA provided one original physical Sukuk certificate	05.05.2009	Ex.D1-9
10.	WAPDA's office order establishing Fact Finding Committee	29.04.2009	Ex.D1-10
11.	Fact Finding Committee Report	08.05.2009	Ex.D1-11
12.	WAPDA's letter to NFC: seeking an undertaking for 7th Ijara Payment	13.07.2009	Ex.D1-12
13.	NFC's reply to WAPDA: gave an undertaking "subject: PROVISIONAL PAYMENT OF SUKUK CERTIFICATES"	29.07.2009	Ex.D1-13
14.	WAPDA's letter to NFC 7th Ijara Rs. 180m received by NFC from WAPDA, alongwith pay order	28.08.2009	Ex.D1-14
15.	WAPDA minutes of Authority Meeting held on June 22.2010 in respect of payment of 8th and 9th Ijara on undertaking	02.07.2010	Ex.D1-15
16.	NFC's undertaking to WAPDA "Subject: PROVISIONAL PAYMENT OF SUKUK	20.07.2010	Ex.D1-16

	CERTIFICATES"		
17.	FIA letter to NFC asked NFC for original 72 certificate for forensic analysis	12.11.2009	Ex.D1-17
18.	NFC's receiving regarding receipt: of original 72 certificate from FIA	17.11.2009	Ex.D1-18
19.	FIA of receiving 72 Sukuk from NFC	10.12.2009	Ex.D1-19
20.	FIA letter to NFC no objection to return back 72 Sukuk Certificates	12.12.2009	Ex.D1-20
21.	NFC's petition under section 516-A Cr.PC for the custody of (Superdari) of the original Sukuk certificate		Ex.D1-21
22.	Copy of FIA forensic report	26.11.2009	Ex.D1-22
23.	Original 72 certificate of NFC		Ex.D1-23/1 to Ex.D1-23/72
24.	Guarantee of President of Pakistan	13.12.2005	Ex.D1-24
25.	Challan	18.10.2010	Ex.D1-25
26.	Challan Interim	08.03.2010	Ex.D1-26
27.	Challan Interim	24.11.2010	Ex.D1-27
28.	Challan supplementary	03.12.2010	Ex.D1-28
29.	Attested copy of Statement of Anwar Ul Haq		Ex.D1-29
30.	Attested copy of Statement of Hammad Rasool		Ex.D1-30
31.	Attested copy of Statement of Munir Shah		Ex.D1-31
32.	Judgment of Special Judge (Central), Lahore	13.09.2013	Ex.D1-32
33.	NFC's extract of Board: Resolution by Circulation	11.02.1975	Ex.D1-33
34.	NFC's delegation of power	22.02.2002	Ex.D1-

			34
35.	NFC's letter to WFSC regarding 7th Ijara Rental	29.04.2009	Ex.D1-35
36.	NFC's letter to WAPDA	04.05.2009	Ex.D1-36
37.	NFC's letter WFSC regarding 7th Ijara Rental	08.05.2009	Ex.D1-37
38.	NFC's letter to WFSC regarding provisional payment of Sukuk Certificate	05.08.2010	Ex.D1-38
39.	NFC's letter to WFSC regarding provisional payment of Sukuk Certificate	16.08.2010	Ex.D1-39

12. Respondent No.7, AIMC produced Syed Awais Wasti Company Secretary/Chief Finance Officer AIMC as D2-DW1. Respondent No.7 produced the following documents in evidence:

Sr. No.	Description of documents	Dated	Exhibits
1.	Internal Notings of WAPDA		Ex.D2-1
2.	Register of physical Sukuk Certificates (ownership)		Ex.D2-2
3.	FIR No.28/2009 attested copy	05.08.2009	Ex.D2-3
4.	Audit accounts + auditor's report for 2015 (13 pages)	18.09.2009	Ex.D2-4
5.	WAPDA letter No. GMFP/6615-18 (to CDC Stop further transfer @ page serial No. 31)	29.04.2009	Ex.D2-5
6.	CDC letter to WAPDA	06.05.2009	Ex.D2-6
7.	Al Meezan letter No. Amim 09/267	09.05.2009	Ex.D2-7
8.	WSFC letter to Al Meezan No. WSFC 2159/61	09.09.2009	Ex.D2-8
9.	WAPDA regulations: new SOP's for scrutiny/transfer of Sukuk	09.05.2009	Ex.D2-9
10.	Cover letter No. 1611 alongwith letter December, 2009 and audit report refraud	13.12.2009	Ex.D2-10
11.	Masood Raza's statement as PW-2 before Special Judge (Central), Lahore (page 18)		Ex.D2-11
12.	Syed Fiaz Ali Bokhari's statement as PW-16 before Special Judge (Central), Lahore		Ex.D2-12
13.	Receipt Global		Ex.D2-13
14.	Letter from Al Meezan Investment	05.03.2009	Ex.D2-14

	Management to Trustee, Meezan Islamic Income Fund		
15.	Receipt Global		Ex.D2-15
16.	Letter from Swift Engineering to CDC Trustee	13.03.2009	Ex.D2-16
17.	Letter from Al Meezan Investment Management to Trustee, Meezan Islamic Income Fund	13.03.2009	Ex.D2-17
18.	MCB Bank's statement of Account		Ex.D2-18
19.	CDC's account balance report		Ex.D2-19
20.	Citi Bank's letter to Al Meezan Investment Management	22.04.2009	Ex.D2-20
21.	Letter from Al Meezan Investment Management to WFSC	29.09.2009	Ex.D2-21
22.	Letter from Al Meezan Investment Management to trustee, Meezan Islamic Income Fund	18.05.2009	Ex.D2-22
23.	Letter from Invest & Finance Security Ltd. to CDC Trustee	18.05.2009	Ex.D2-23
24.	Letter from Al Meezan Investment Management to trustee, Meezan Islamic Income Fund	23.06.2009	Ex.D2-24
25.	Letter from Invest & Finance Security Ltd. to CDC Trustee	23.06.2009	Ex.D2-25
26.	Letter from Al Meezan Investment Management Trustee, Meezan Islamic Income Fund	23.06.2009	Ex.D2-26
27.	Letter from Invest & Finance Security Ltd. to CDC Trustee	23.06.2009	Ex.D2-27
28.	Habib Metropolitan Bank's statement of Account		Ex.D2-28
29.	Bank Al Falah's statement of account		Ex.D2-29
30.	Civil Review No.2016 in CA 104-L/2015 filed by Al Meezan Investment Management		Ex.D2-30
31.	Memorandum and Article of Association of Al Meezan Investment Management		Ex.D2-31
32.	Sub-Power of Attorney		Ex.D2-32
33.	Power of Attorney		Ex.D2-33
34.	Al Meezan Investment Management. Extract of meeting dated 24.01.2011		Ex.D2-34

35.	Trust Deed of Meezan Islamic Income Fund and between Al Meezan Investment Management		Ex.D2-35
36.	Suit No.1497 titled "Al Meezan Management Vs. WFSC and others" before Sindh High Court.		Ex.D2-36

13. Respondent No.5, SBL produced Qaisar Samdani AVP and Credit Incharge, SBL, Clifton Branch Karachi as D4-DW1. Respondent No.5 produced the following documents in evidence:

Sr. No.	Description of documents	Dated	Exhibits
1.	CDC's Activity Report		Ex.D4-1
2.	Authority letter in favouir of Qaisar Hamdani		Ex.D4-2
3.	GPA		Ex.D4-3
4.	Letter from UBL Al Amin	18.09.2009	Ex.D4-4
5.	Advice of outright sale transaction	28.09.2009	Ex.D4-5
6.	Receipt RTG-suit		Ex.D4-6
7.	Letter dated 02.11.2009	02.11.2009	Ex.D4-7
8.	Letter from WAPDA	03.11.2009	Ex.D4-8
9.	Letter dated 25.11.2009	25.11.2009	Ex.D4-9
10.	CDC's letter	11.12.2009	Ex.D4-10
11.	Letter of Citi Bank		Ex.D4-11
12.	Letter of Citi Bank		Ex.D4-12
13.	Suit titled "Soneri Bank Vs. WFSC etc."	10.08.2010	Ex.D4-13

14. Respondent No.6 produced Muhammad Khurram Manager Legal Compliance CDC Karachi as D5-DW1. Respondent No.6 produced the following documents in evidence:-

Sr. No.	Description of documents	Dated	Exhibits
1.	CDC letter CDC/CS/LC-MNK/238/09 to First Sukuk Company (Company with	25.09.2009	Ex.D5-1

	regulation 13.7.1A)		
2.	CDC letter CDC/CS/LC-MNK/258/09 to First Sukuk Company (reason/order for letter dated 29.04.2009 till awaited)	06.11.2009	Ex.D5-2
3.	CDC letter CDC/CS/LC-MNK/277/09 to First Sukuk Company (reasons provided as far)	12.12.2009	Ex.D5-3
4.	CDC letter CDC/CS/LC-MNK/021/10 to First Sukuk Company (rectify the discrepancy)	19.10.2010	Ex.D5-4
5.	CDC letter CDC/CS/LC-MNK/029/10 to First Sukuk Company (reasons for notice re stoppage of transaction)	04.02.2010	Ex.D5-5
6.	CDC letter CDC/CS/LC-MNK/277/10 to First Sukuk Company (no action by First Sukuk Company)	23.12.2010	Ex.D5-6
7.	CDC letter CDC/CS/LC-MNK/012/11 to First Sukuk Company (no power to stop transaction)	07.02.2011	Ex.D5-7
8.	Authority letter for the witness		Ex.D5-8
9.	Board resolution of CDC	10.04.2017	Ex.D5-9
10.	Copy of letter for verification of transfer deeds from WFSC	13.04.2009	Mark-D5-A
11.	Copy of letter for refund of Ijara Rental payment	02.10.2009	Mark-D5-B

15. The Appellant MBL produced Nasir Mehmood Vice President Legal Affairs, MBL as D6-DW-1. The Appellant produced the following documents in evidence:-

Sr. No.	**Description of documents**	**Dated**	**Exhibits**
1.	CDC statement		Ex.D6-1
2.	CDC statement		Ex.D6-2
3.	Special Power of Attorney		Ex.D6-3
4.	Memorandum and Article of Association		Ex.D6-4
5.	Letter from Investment & Finance Securities Ltd.	23.06.2009	Ex.D6-5

6.	CDC Report		Ex.D6-6
7.	RTGS regarding payment of Rs. 60,532,200/-	02.11.2009	Ex.D6-7
8.	Letter from Investment & Finance Securities Ltd.	29.06.2009	Ex.D6-8
9.	RTGS regarding payment of Rs. 49,814,750/-		Ex.D6-9
10.	Meezan Bank's letter to WFSC	30.10.2009	Ex.D6-10
11.	Attested copy of Sindh High Court suit of Meezan Bank		Ex.D6-11
12.	Copy of GPA		Mark-D6-A
13.	Office copy of plaint titled "Meezan Bank Vs. WFSC etc.		Mark-D6-B

16. Respondent No.4, Bank Islami was also a party in the interpleader suit as they claim ownership of 10000 sukuk certificates. However after remand from the High Court on 17.2.2015, they failed to appear before the trial court and were proceeded ex-parte on 21.5.2015. Against this order, they filed an application under Order 9 Rule 13 read with Section 12(2) CPC for suspension of the Impugned Judgment. Through order dated 13.10.2017 the application of suspension of the Impugned Judgment was dismissed on account of the pendency of the instant appeal along with connected RFAs before this Court. This order dated 13.10.2017 has been impugned in FAO No.181619/2018 wherein the Appellant Bank seeks suspension of the Impugned Judgment till the final decision on the main application filed by the Appellant under Order 9 Rule 13 read with Section 12(2) CPC. Hence they have not filed any claim in the interpleader suit and for the purposes of the FAO, it has become infructuous and hence has been dismissed vide a separate order of even date.

The facts of the dispute

17. (i) In the year 2005, Respondent No.2, Wapda launched a scheme for raising money through sukuk certificates. Several agreements were

executed between Wapda, the Sukuk Company as well as with MCB and Jahangir Siddiqui and Company Limited. The transaction was such that a Purchase Agreement (Ex.P12) was executed wherein the Sukuk Company purchased from Wapda, 10 hydel power generation units (turbines) installed at Mangla hydel power station for Rs.8,000,000,000 (Rupees eight billion);

(ii) These hydel power generation units were leased back to Wapda by the Sukuk Company under the Ijara Agreement (Ex.P14) wherein the rentals were to be paid twice a year on the 22nd of April and 22nd of October of each year until the maturity date;

(iii) A Declaration of Trust (Ex.P16) was executed by the Sukuk Company wherein it assumed the role of the trustee for the trust assets for the benefit of the certificate holders. The rights of the certificate holders were submitted in the Declaration of Trust which includes the right to receive payment of the PDA. The profit on the Sukuk was to be paid *inter alia* on the basis of the rent paid by Wapda for the lease of the turbines under the Agency Agreement (Ex.P15);

(iv) An Agency Agreement was executed between the Sukuk Company and Wapda which appointed the Wapda Bonds Cell as the Registrar, the transfer agent and replacement agent with respect to the sukuk certificates. Citibank was appointed as the paying agent and Jahangir Siddiqui and Company was the reference agent. Wapda Bonds Cell also acted as the mercantile agent responsible for the buying and selling of physical sukuk certificates which meant that the physical sukuk certificates had to be bought and sold through the Wapda Bonds Cell;

(v) Subsequently the sukuk units were transferred in book entry form through the CDC which meant that the subsequent sales were not of physical certificates but of sukuk units through the CDC;

(vi) The relevant regulations were the Wapda Sukuk Certificates (1st Issue) Regulations, 2005 issued by the Government of Pakistan on 28.11.2005;

(vii) NFC was one of the initial subscribers as it purchased 300 physical certificates valuing Rs.750,000,000 (Rupees seven hundred and fifty million) (Ex.P17). Letter issued by Citibank to Wapda Bonds Cell provides that 300 sukuk certificates were despatched to the NFC amongst others;

(viii) Payments were made to the subscribers without any dispute upto the sixth ijara payment (Ex.P18 to Ex.P23) being letters issued by the Sukuk Company to Citibank regarding the payments of ijara rentals;

(ix) On 12.2.2009 (Ex.P24) a letter was issued to Wapda Bonds Cell by Faiz Ali Bokhari, Deputy General Manager (Accounts), NFC that NFC has no objection in transferring 72 sukuk certificates to SES. Hence Wapda Bonds Cell should verify the transfer deeds regarding the physical certificates. These sukuk certificates were also exhibited being 72 certificates along with transfer deeds presented to Wapda Bonds Cell for verification (Ex.P25/1 to Ex.P25/72);

(x) On 20.2.2009 the Sukuk Company issued a letter to SES stating therein that against 72 certificates that were issued to them, 6 new physical certificates having denomination of Rs.30 Million each has been issued (Ex.P29). Consequently 72 certificates were replaced by 6 new physical certificates of equal value. The physical certificates were exhibited as Ex.P26/1 to Ex.P26/6;

(xi) Letter dated 4.3.2009 (Ex.P26) was issued by AIMC to the Sukuk Company wherein it claimed that they have purchased 6 sukuk certificates from SES and required processing of transfer of the same;

(xii) On 6.3.2009 a letter was issued by SES confirming the sale in favour of AIMC (Ex.P.27). The transfer deeds were verified and approved by the Sukuk Company on 7.3.2009 (Ex.P.26/7 to P26/12);

(xiii) On 9.3.2009 the Sukuk Company issued a letter to Global Securities Pakistan Limited ("**Global Securities**"), confirming the transfer in favour of Respondent No.7 (Ex.P28). On 12.3.2009 CDC sought verification of the transfer deeds from the Sukuk Company (Ex.P30);

(xiv) On 14.3.2009 CDC confirmed that 6 sukuk certificates transferred by SES to Respondent No.7 have been verified and confirmed (Ex.P31) and required that the physical certificates be transferred to the Central Depository System ("**CDS**");

(xv) On 24.4.2009 NFC issued a letter to the Sukuk Company with reference to the payment of the 7th ijara rentals stating therein that they had not been paid complete rental owed to them on their investment of Rs.750,000,000 (Rupees seven hundred and fifty million). Hence NFC communicated to the Sukuk Company that they had not received the full ijara payment (Ex.P.33). This letter was issued by Faiz Ali Bokhari, Deputy General Manager (Accounts), NFC;

(xvi) On 25.4.2009 NFC communicated to Wapda that they have been informed that certificate valuing Rs.180,000,000 (Rupees one hundred and eighty million) have been transferred from NFC as per the books maintained by Wapda whereas NFC had not made any such transfer and they still retain their investment of Rs.750,000,000 (Rupees seven hundred and fifty million) (Ex.P.34). This letter was issued by Faiz Ali Bokhari, Deputy General Manager (Accounts), NFC;

(xvii) On 27.4.2009 the Sukuk Company informed NFC that NFC had transferred 72 certificates to SES for Rs.180,000,000 (Rupees one

hundred and eighty million) after fulfilling all codal formalities and that 72 original certificates along with duly signed transfer deeds were transferred to SES (Ex.P35).

18. On the basis of these facts a dispute arose with reference to the ownership of NFC's certificates worth Rs.180,000,000 (Rupees one hundred and eighty million). Subsequent thereof, sukuk certificates of various denominations were sold to Respondent No.7, AIMC and then to Investment and Finance Security Limited ("**IFSL**") (Ex.D-2/22 to Ex.D-2/29). They then sold some certificates to MBL (Ex.D6/5 to Ex.D6/9). SBL and Bank Islami also purchased sukuk certificates from the market around this time. The Appellants are claimants with reference to the sukuk certificates who seek their entitlement to the principal and rental payments on the sukuks. Respondent NFC is also claimant in whose favour the Impugned Judgment has been passed who seeks the principal and rental payments on the sukuks certificates. Hence the interpleader suit was filed by the Sukuk Company and Wapda. Currently the Appellants and NFC before the Court claim to be the owners of sukuk units in the following amounts:

Meezan Bank Limited	22000
Al Meezan Investment Management Company Limited	Nil
Soneri Bank Limited	4000
NFC	36000

Arguments of Appellant in RFA No.54274/17, MBL

19. Learned counsel for MBL argued that MBL acquired good title to the disputed sukuks because NFC and the Sukuk Company along with Wapda failed to establish a case of fraud and forgery and the Impugned Judgment failed to take into consideration the plea of bonafide purchaser raised by MBL. Learned counsel argued that there is no independent evidence of fraud or forgery and that there is no forensic analysis to establish that letter dated 12.2.2009 (Ex.P24) was fake or that the signatures were forged. Learned counsel argued that burden of proof is on the person denying signatures and claiming fraud and forgery to establish the same which burden has not been discharged. He further argued that SES was not made a

party in the suit and yet the Impugned Judgment has declared SES to be a fake entity without any evidence on this issue whatsoever. He further argued that the Impugned Judgment has totally failed to consider the evidence of MBL in favour of its transfer which establishes that the Wapda Bonds Cell and the CDC recognize and acknowledged the transfers in favour of MBL. He further argued that the effect and process of transfer on the CDC was not taken into consideration nor the concept of trading in the CDS as prescribed under the Central Depositories Act, 1997 ("**CD Act**"). Learned counsel argued that it was not the case of NFC or the Sukuk Company that MBL had played any part in the fraud or had knowledge of the fraud. Under the circumstances, the case of MBL as bonafide purchaser was not considered. Learned counsel further argued that the Impugned Judgment has relied upon a decision of the criminal court which is not relevant in civil proceedings. Learned counsel places reliance on Section 31 of the Securities and Exchange Ordinance, 1969 which protects title of a person who acquires title on the floor of the stock exchange for being bonafide purchaser. Learned counsel argued that the interpleader suit filed by Wapda is simply to avoid any responsibility as fraud admittedly was committed by their own employees against which Wapda has not taken any action. Learned counsel argued that Wapda is vicariously liable for the action of its employees. Hence if this Court were to decide in favour of NFC then MBL in the alternative seeks damages for the loss suffered by it for not being paid the PDA and for the transaction amount paid by it as well as ijara rentals due to it.

Arguments of Appellant in RFA No.50966/17, SBL

20. Learned counsel for the Appellant adopted the arguments advanced by the learned counsel for the Appellant MBL in RFA No.54274/2017. Learned counsel further added that the Impugned Judgment ignored the transaction documents, their sanctity and their contractual relevance in favour of the Appellant, SBL. He argued that the entries of transfer and title are available in electronic form on the CDS which aspect of the matter was also ignored. He argued that admittedly the employees of Wapda were involved in the fraud and in order to avoid any liability, they have filed an interpleader suit claiming therein that the only dispute relevant is as to who is the lawful owner of the sukuk certificates and not of any loss or

compensation to the Appellants. He argued that the Appellant being a bonafide purchaser, having good title on the CDS, having no knowledge of any fraud is the authentic owner of 4000 sukuk certificates which aspect of the matter has not been considered.

Arguments of Appellant in RFA No.54270/17-AIMC

21. Learned counsel for the Appellant adopted the arguments advanced by the learned counsel for the Appellant in RFA No.54274/2017. Learned counsel states that the Appellant manages amongst others Meezan Islamic Income Fund ("**MIIF**") which is a collective investment scheme in accordance with the provisions of the trust deed of that fund. CDC is the trustee of MIIF. They not only act as the regulator of the sukuk certificates but also as the trustee of MIIF. The Appellant through the CDC purchased 6 sukuk certificates from the SES through Global Securities (the Broker). Payment for these sukuks was made by the Appellant into the account of SES maintained with MCB Bank Limited, Main Market Gulberg Branch, Lahore (Ex. D2-15, D2-16). A total of Rs.190,792,800/- was paid by the Appellant to SES for the 36000 sukuk units with the face value of Rs.180,000,000 (Rupees one hundred and eighty million). Vide letter dated 4.3.2009 (Ex.P26), the AIMC requested the Sukuk Company to transfer 6 physical sukuk certificates (Ex.P26/1 to Ex.P26/6) against 36000 sukuk units issued to it in the name of the CDC, Trustee MIIF. This request was complied with after completing all codal formalities and the 6 sukuk certificates were transferred in favour of the Appellant. This transfer testifies to the fact that Wapda Bonds Cell verified the transaction. Subsequently the Appellant received ijara rentals (Ex.D2-20). However on 29.4.2009 Wapda sent a letter whereby it requested the CDC to stop any further transfer of ijaras in favour of the Appellant. The Appellant questioned the stoppage of ijara payment, however they were not informed. Thereafter on 18.5.2009 and 23.6.2009, the Appellant sold 6 sukuk certificates to IFSL (Ex.D2-22 to Ex.D2-29) for a total consideration of Rs.181,570,600/- and therefore the ijara amount was ultimately passed on to the subsequent buyer. The Appellant is now aggrieved by the Impugned Judgment to the extent of demand for the refund of ijara rentals paid

to it. Learned counsel argued that the Appellant had no notice of the fraud nor was it aware of any forgery and was a bonafide purchaser without notice whose case was not duly considered in the Impugned Judgment. Learned counsel argued that the Impugned Judgment has wrongfully applied the principle that fraud *vitiates the most solemn proceedings*. Learned counsel argued that as per the Special Audit Report (Ex.D2-10), the Sukuk Company and Wapda were grossly negligent with respect to the issuance of the sukuks for failure to make the rules at the right time and for the fraud committed by their employees. He argued that interpleader suit is merely a device used to transfer the loss caused by Wapda and the Sukuk company on to either NFC or subsequent buyers like the Appellant. Hence the Appellant also seeks a declaration that it was the lawful owner of 36000 sukuks and that it had lawfully received the ijara payments.

Arguments of Appellant in RFA No.67900/17-CDC

22. The Appellant is the CDC which is aggrieved by the findings rendered in Issue No.14-H. Learned counsel stated that Section 11 of the CD Act has been wrongfully interpreted as the protection under Section 11 is applicable in all cases including fraud. Learned counsel argued that fraud has not been established and the CDC being the Central Depository Company is not concerned with whom the court concludes to be the lawful owner of the sukuks. However, its concern and grievance is with respect to the findings rendered while interpreting Section 11 of the CD Act. Hence the Appellant prays for setting aside the findings on issue No.14-H in the Impugned Judgment.

Arguments of Respondents No.1 and 2 - Wapda and the Sukuk Company

23. Learned counsel on behalf of Respondents No.1 and 2 has raised an objection with respect to the scope of the interpleader suit. She stated that an interpleader suit is filed under Section 88 of the CPC on the basis whereof two or more persons have claims that are adverse between one another on the same debt or money or property from another person, who has no interest in that claim, then the interpleader suit will decide, only to the extent as to whom the payment should be

given to and it cannot award damages or compensation in the manner argued by the Appellants. Learned counsel argued that in this regard admittedly the Appellants have all filed civil suits which are still pending where they have raised their claim for damages and compensation. Hence this Court in the interpleader suit cannot decide on the issue of damages or compensation. She further argued that in order to award damages or compensation, the Court has to consider evidence and in this case there is no evidence on this issue. Hence she has raised objections with regard to the alternative prayer made by the Appellants. She argued that interpleader suit is distinct form of *lis* available to any applicant who is in possession of *res* in which they have no interest in the claim and where it is unclear as to whose claim is genuine. Therefore the Appellants cannot raise their own claim for compensation or damages in the interpleader suit.

24. With reference to the case of the Appellants on fraud and bonafide purchaser, learned counsel argued that the issue of fraud was made out against SES to whom it is suggested that sukuk certificates were sold. She argued that NFC tendered in evidence the original 72 sukuk certificates as Ex.D1-23/1 to D1-23/72. Since NFC holds the original certificates, the issue of fraud is patently clear and the transfer so alleged is fake. She further argued that fraud vitiates the most solemn proceedings and any subsequent transfers made after the fraudulent transfer to SES are illegal and as such do not create title in favour of any of the Appellants. She argued that it is settled law that the seller can only pass title of property as good as his own title. Hence all subsequent transfers whether physical or in book entry form in the CDS stand vitiated.

25. On the issue of Wapda's liability, she argued that the question of vicarious liability only arises in case of negligence, where there is proof of the same and proof of cause of action and damages. For the Appellants to claim damages or compensation, they would first have to show that there is breach of duty and that they suffered damages on account of the breach of duty. She argued that the party claiming damages must specifically prove damages. In this regard, she stated that there was no issue with respect to damages and the Appellants did not lead any evidence on damages. Wapda has also filed a suit against AIMC. She stated that

Wapda has filed suit No.15370/2020 being a suit for recovery in which it has prayed for recovery of Rs.13,640,900 plus mark up which is pending. She further argued that if at all there is a case of negligence against Wapda and its employees, the same will be dealt with in accordance with law. However that does not justify or substantiate the claim of the Appellants to be compensated in the event that NFC is found to be the true and lawful owner of the sukuk certificates.

Arguments of Respondent No.3, NFC

26. Learned counsel for the NFC argued that the Impugned Judgment is in favour of NFC. The fundamental issue of fraud has been decided in favour of NFC. That NFC still has in its possession the original 72 sukuk certificates, meaning thereby that the alleged transfer to SES as depicted in letter dated 12.2.2009 is totally without basis. Learned counsel argued that the Appellants have failed to make out a case of ownership and title as fraud vitiates all actions and decisions. That NFC has discharged its burden through oral and documentary evidence to show that fraud was made out, hence the sale in favour of SES is illegal and void and all subsequent transfers become void as it is based on fraud. Learned counsel also argued that the argument of bonafide purchaser is not relevant to the dispute in hand as they are barred under law to claim good title, given that no title was ever passed in favour of SES. He argued that protection to a bonafide purchaser cannot be given to transferees with defective title. He supported the contention of counsel for Wapda on the scope of interpleader suit and argued that even if this Court finds that a case of fraud is made out in favour of NFC, the Appellants would not be entitled to any compensation or damages in the interpleader suit. He stated that in this regard their own suits are pending before the learned Sindh High Court. Learned counsel stated that NFC has already filed suit No.40163/2015 before the civil court at Lahore against Wapda and the Sukuk Company wherein they have sought up to date profits as earned on the PDA/ijara rentals or in the alternative to be paid to them as damages.

27. The issues raised before this Court from the Impugned Judgment fall into three broad categories: the element of fraud and its effect on the transaction; title and who is the owner of the sukuk certificates and finally the nature and scope of

the interpleader suit and the jurisdiction to grant relief therein. We note that on the issue of maintainability of the interpleader suit has been dealt with in Issues No.6, 12 and 14-B. Vide judgment dated 21.5.2010, the trial court held that the interpleader suit was not maintainable. This decision was challenged by the Appellants but ultimately, the issue of maintainability of the interpleader suit was decided by the august Supreme Court of Pakistan in *Al-Meezan Investment Management Company Limited and 2 others v. WAPDA First Sukuk Company Limited, Lahore and others* (**PLD 2017 SC 1**) holding the interpleader suit to be maintainable notwithstanding the fact that at the time, one suit was pending before the Sindh High Court as filed by AIMC. Hence we proceed with these RFAs on the basis of the issues of fraud, title and the relief to be granted in the interpleader suit.

The issue of fraud and its effect on the transaction

28. The trial court framed issues No.2 and 14 on the question as to whether there was fraud and forgery in the sale transaction of 72 sukuk certificates from NFC to SES and the effect of the fraud, if any. The burden to prove Issue No.2 with reference to proving fraud and forgery was on the plaintiff Wapda, the Sukuk Company and NFC whereas the burden to prove fraud with reference to the sale in favour of SES being Issue No.14 was on NFC. These issues decide the basic dispute between the parties which decided the outcome of the interpleader suit. The Impugned Judgment has essentially decided Issue No.14 and concluded that SES was a fake entity and that Ex.P24, the letter issued by NFC's D1-DW2 informing Wapda Bonds Cell of the sale of 72 sukuk certificates valuing Rs.180,000,000 in favour of SES, was a forged and fabricated document as per the evidence and the record. The Impugned Judgment further concluded that *undisputedly, the SES was fake body therefore it was the duty of the defendant No.2 (AIMC) to prove that the letter dated 12.02.2009 Ex.P24 was validly issued by the defendant No.1 (NFC) and that the letter dated 13.2.2009 Ex.P25 along with 72 Sukuk Certificates as Ex.P25/1 to Ex.P25/72 were genuine.* So the Impugned Judgment concluded that AIMC was the beneficiary of the fraud, hence had to prove the genuineness of the transaction in favour of SES, with reference to the disputed 72 sukuk certificates. On the issue of fraud, the Impugned Judgment finds that fraud is admitted by

defendant No.2, AIMC and has placed reliance on the criminal proceedings and judgment by the Special Judge Central, Lahore (Ex.D1-32) along with the forensic report of the 72 sukuk certificates (Ex.D1-22). Consequently on the issue of fraud, the Impugned Judgment finds that the 72 sukuk certificates transferred in the name of SES on the basis of Ex.P24 was fake and fraudulent and that all subsequent transfers to defendants No.2, 3 and 6 (Appellants before this Court) were consequently illegal and void. The Impugned Judgment declared NFC to be the lawful owner of the disputed 72 sukuk certificates and therefore entitled to the payment of ijara rentals.

29. The Appellants have challenged the Impugned Judgment with reference to Issues No.2 and 14 on several grounds, essentially being that there was no evidence on the basis of which the Court concluded that SES was a fake entity and that the transfer from NFC to SES was fraudulent. They argued that there was no independent evidence of fraud or forgery and that reliance on the criminal proceedings and judgment was not relevant for the purposes of the civil suit. In this regard, reliance has been placed on *Muhammad Khurshid v. the State* (**PLD 1963 SC 157**) and *Ghulam Rasool v. Muhammad Waris Bismil* (**1995 SCMR 500**). They also argued that the disputed letter dated 12.2.2009 (Ex.P24) issued by NFC was never established to be a fraudulent or a forged document before the trial court as there was no forensic analysis of the signature on the letter and the burden to establish that this was a forged letter was placed on the author of the letter, who did not discharge his burden in accordance with law. Reliance is placed on *Land Acquisition Collector, Sargodha and another v. Muhammad Sultan and another* (**PLD 2014 SC 696**) and *Allah Dino and 2 others v. Mohammad Umar and 2 others* (**1974 SCMR 411**).

30. One of their main arguments made was that as per the record, employees of the Wapda Bonds Cell were party to the fraud and that the NFC failed to establish that it was not party to the fraud or had no knowledge of the fraud. Hence if at all there was any fraud at best it made the transaction voidable and it did not vitiate the transfers in favour of the Appellants. The Appellants have also argued their case of bonafide purchaser stating that the Impugned Judgment failed to consider their plea

of bonafide purchaser and has wrongfully concluded that fraud has vitiated the transactions subsequent to the transfer to SES, such that title did not pass on to the Appellants as it never passed on to SES. It is their contention that the Impugned Judgment did not consider the record and the significance of the transaction documents nor did it consider the argument of bonafide purchaser in its true perspective as per the cases relied upon, hence failed to decide the issue as per law.

31. On behalf of Wapda, the Sukuk Company and NFC, the Impugned Judgment was defended as it was argued that the issue of fraud was established in favour of NFC. Consequently NFC was declared the owner of the disputed sukuk certificates as NFC specifically denied the execution of Ex.P24 and the sale of the sukuk certificates, the transfer deeds (Ex.P25/1 to Ex.P25/72 and Ex.P26/1 to Ex.P26/12) including the surrender of 72 sukuk certificates (Ex.P25/1 to Ex.P25/72) by SES for issuance of 6 sukuk certificates in their place. NFC has relied upon the original 72 sukuk certificates (Ex.D1-23/1 to Ex.D1-23/72) which it states are still in its possession, hence the question of sale in favour of SES does not arise. They have essentially argued that as the sale in favour of SES was fraudulent, then all subsequent transfers are void as SES could not transfer valid title in favour of any of the Appellants. They further argued that once their witness Faiz Ali Bokhari, D1-DW2 appeared and denied the execution of Ex.P24, thereafter the burden shifted on the Appellants to establish that the transfer to SES was not fraudulent. Learned counsel for Respondents No.1 and 2 has relied upon *Talib Hussain and others v. Member, Board of Revenue and others* (**2003 SCMR 549**), *Abdul Hameed through L.Rs and others v. Shamasuddin and others* (**PLD 2008 SC 140**), *Reddaway v. Banham* (**[1896] AC 199**) and *Lazarus Estates Ltd v. Beasley* (**[1956] 1 Q.B.702**) to establish the point that fraud vitiates all transactions and on the effect of fraud on a transaction Learned counsel for NFC has relied upon the following judgments in support of their contention that fraud vitiates the most solemn of proceedings and that the burden to prove the transaction shifts on the beneficiary of that transaction that is *Lal Din and another v. Muhammad Ibrahim* (**1993 SCMR 710**), *Government of Sindh through the Chief Secretary and others v. Khalil Ahmed and others* (**1994 SCMR 782**), 2003 SCMR 549 (*supra*), *Baja through L.Rs and others v. Mst.*

Bakhan and others (**2015 SCMR 1704**) and *Administrator Municipal Corporation, Peshawar v. Taimoor Hussain Amin and others* (**PLD 2020 SC 249**).

32. In order to appreciate the arguments made with reference to fraud and its effect, the relevant facts based on the evidence are as follows:

(i) 72 physical sukuk certificates owned by NFC valued at Rs.180,000,000/-;

(ii) Letter dated 12.2.2009 (Ex.P24) was issued by Faiz Ali Bokhari, Deputy General Manager (Accounts) NFC (D1-DW2) to the Director Finance, Wapda Bonds Cell, Lahore which provides that NFC has sold 72 physical sukuks in favour of SES having serial Number from 512029 to 512100 amounting to Rs.180 Million. Further provides that NFC has no objection in transferring these physical certificates in favour of SES;

(iii) Internal noting on file (Ex.D2-1) shows SES inquired about the procedure for transfer of the 72 sukuks to SES in the form of physical certificates having serial No. from 512029 to 512100 amounting to Rs.180 Million. It was requested to verify the transfer deeds regarding the physical certificates from Serial No. from 512029 to 512100;

(iv) On 13.2.2009 a letter was issued by Akhtar Saleem, Chief Financial Officer, SES to the Director Finance, Wadpa Bonds Cell, Lahore (Ex.P25) requesting for transfer of the physical sukuk certificates from Serial No. 512029 to 512100 to SES's name and to issue 6 new physical certificates in the denomination of Rs.30 Million each. The 72 sukuk certificates were presented by SES to Wapda Bonds Cell (Ex.P25/1 to Ex.P25/72);

(v) On 20.2.2009 (Ex.P29), a letter was issued by Masood Raza, Deputy Director Finance, Sukuk Company (PW-1) to Akhtar Saleem, Chief Financial Officer, SES enclosing therewith 6 new physical sukuk certificates having denomination of Rs.30 Million (Ex.P26/1 to Ex.P26/6);

(vi) Entry in the Register of Certificates Holders (Ex.D2-2) maintained by Wapda Bonds Cell which shows the transfer in favour of SES. Letter dated 4.3.2009 (Ex.P26) issued by AIMC to Masood Raza, Deputy Director Finance, Sukuk Company (PW-1) stating that they have purchased 72 sukuk certificates of the Sukuk Company;

(vii) Letter dated 4.3.2009 by Global Securities, Broker of AIMC to CDC Trustee, MIIF confirming purchase from SES (Ex.D2-13);

(viii) Letter dated 5.3.2009 (Ex.D2-14) from AIMC to Trustee, MIIF, Karachi, seeking transfer of 72 sukuk certificates amounting to Rs.180,000,000/- in value. The letter also states that initially the sukuks will be physically transferred in the name of CDC Trustee Meezan Islamic Fund ("**CDC Trustee MIIF**") and then will be lodged with CDC into the Central Depository System (CDS);

(ix) Letter dated 13.3.2009 from SES to CDC Trustee (Ex.D2-16) confirming purchase of sukuk certificates as on 18.3.2009, transfer on the CDC (Ex.D2-19).

33. Respondents No.1 and 2 produced only one witness namely Masood Raza, Additional Director Wapda Bonds Cell and Accountant Sukuk Company as PW-1 and exhibited 43 documents which included correspondence and the transfer deeds of the sukuk certificates. PW-1 admitted to having received letter dated 12.2.2009 (Ex.P24) by NFC and letter dated 13.02.2009 (Ex.P25) issued by Akhtar Saleem, Chief Financial Officer, SES to the Director Finance, Wadpa Bonds Cell, Lahore. He explained the verification process followed by Wapda Bonds Cell when NFC sold 72 sukuk certificates to SES. He admitted that the 72 certificates were returned by SES against which 6 new certificates were issued to SES vide Ex.P29 by Wapda Bonds Cell. He admitted to the issuance of the sukuk certificates under his signatures (Ex.P26/1 to Ex.P26/6). He deposed on the verification process and security measures adopted by Respondents No.1 and 2 to transfer the sukuk certificates physically. Hence Respondents No.1 and 2 admitted to the transfer from NFC to SES and also admitted to having replaced 72 sukuks with 6 sukuk certificates after due verification. PW-1 does not state that these transactions were fraudulent or that SES was a fake entity. In fact in his cross-examination he states no knowledge of SES being a fake entity:

> مجھے یاد نہ ہے کہ SESکس کی ملکیت ہے۔ مجھے علم نہ ہے کہ SES ایک fake body تھی۔ SES کی طرف سے ہمیں جو لیٹرز Ex.P27, Ex.P25 موصول ہوئے وہ اختر سلیم (CFO) کی طرف سے محکمہ کو لکھے گئے ۔ مجھے علم نہ ہے کہ آیا اختر سلیم (CFO) یا کوئی دیگر شخص بطور نمائندہ SES کبھی سکوک سیکشن میں اپنے حق میں منتقلی کے لیے آیا۔

34. Respondent No.3, NFC produced Muhammad Sageer Khan, Deputy General Manager Account, NFC as D1-DW1 and Faiz Ali Bokhari as D1-DW2 and

exhibited 39 documents which included the original 72 sukuk certificates Ex.D1-23/1 to Ex.D1-23/72. So far as the two witnesses are concerned, they produced no evidence to establish that SES was a fake entity. D1-DW1 in his evidence stated that NFC never sold its 72 sukuk certificates and the fraud came to light during the fact finding inquiry by Respondents No.1 and 2. He stated that since NFC has the original certificates, they had no knowledge of the fraud and it is only when the FIA commenced proceedings on Wapda's complaint that this matter was brought to their attention. In his evidence D1-DW1 stated that Ex.P24 was fake as were the transfer deeds in favour of SES (Ex.P25/1 to Ex.P25/72). He also admits that NFC never carried out any forensic analysis of Ex.P24 nor was any internal fact finding committee established to look into the matter. The second witness namely Faiz Ali Bokhari appeared as D1-DW2. He made a categoric statement that he did not execute Ex.P24 nor did NFC sell 72 sukuk certificates to SES. He also admits that he never had his signatures on Ex.P24 checked by a handwriting expert. Therefore in terms of the witnesses produced by NFC, they denied execution of Ex.P24 and the sale in favour of SES.

35. Respondent No.7, AIMC produced Syed Awais Wasti, Company Secretary/Chief Finance Officer as D2-DW1 as their witness and 36 documents were exhibited. D2-DW1 stated that he had no knowledge of any fraud and that they purchased 6 sukuk certificates from SES in 2009 through Global Securities and went through the verification process set out by Wapda Bonds Cell. He also stated that the sale in favour of AIMC was verified by the broker, Global Securities as well as CDC Trustee, MIIF. So far as Respondent No.5 SBL is concerned, they produced Qaisar Samdani AVP and Credit Incharge SBL, Clifton Branch Karachi as D4-DW1 as their witness and 13 documents were exhibited. Respondent No.6 CDC produced Muhammad Khurram Manager Legal Compliance CDC Karachi as D5-DW1 as their witness and 11 documents were exhibited in support of the sale of sukuk certificates in their favour which was essentially through the CDS and not a physical sale. They also relied on the verification process to show that they were bonafide purchasers of their sukuk certificates.

36. Essentially the dispute between the parties with reference to issues of fraud and forgery is whether the sale in favour of SES by NFC was a valid and legal sale or whether it was a sale based on fraud and forgery as NFC claims that Ex.P24 was not executed by Faiz Ali Bokhari as D1-DW2. Subsequent to the sale in favour of SES, AIMC purchased sukuk certificates and thereafter the other Appellants before this Court also purchased sukuk certificates. Hence the dispute essentially in the interpleader suit was who is the lawful owner of the sukuk certificates that is whether NFC is still the owner of the 72 disputed sukuk certificates which it claims they never sold to SES or whether the Appellants are lawful owners of their sukuk certificates which they claim they bought in accordance with law with no knowledge of fraud and forgery. In this regard, we note that all parties produced documentary as well as oral evidence which had to be appreciated in its entirety in order to determine the issues set out by the trial court. We have examined the Impugned Judgment with reference to Issues No.2 and 14 and find that the trial court failed to appreciate the evidence in its entirety. In fact we note that for the purposes of determining fraud and forgery, the trial court failed to discuss the evidence produced by Wapda in particular as well as the evidence produced by NFC and the subsequent purchasers. The Impugned Judgment has not discussed Ex.P24, Ex.P25, Ex.P26 and Ex.P29 in its entirety and has not discussed the consequence of the verification process undertaken by the Wapda Bonds Cell or the issuance of 6 sukuk certificates against 72 sukuk certificates originally issued. We find that the evidence on this issue was relevant because the entire case of NFC is that Ex.P24 was never executed by Faiz Ali Bokhari, D1-DW2. He made a categoric statement that he did not execute Ex.P24. However, this statement had to be seen in conjunction with the evidence on record. The Appellants have relied on the Register of Certificates Holders (Ex.D2-2) maintained by Wapda Bonds Cell to establish the transfer in favour of SES and from SES to AIMC. They also rely on their internal noting (Ex.D2-1) to establish the issuance of 6 new sukuk certificates to SES. We have examined Ex.D2-1 and find that it discusses the procedure to be followed for the transfer of sukuk certificates in favour of SES in great detail. This is relevant as it shows the procedure adopted by Wapda Bonds Cell to transfer the sukuk

certificates from NFC to SES and the re-issuance of 6 new certificates to SES. We have also examined Ex.D2-2 which is the Register of Certificate Holders maintained by Wapda Bonds Cell. We note that there is an entry in favour of NFC in the Register of Certificates Holders on 5.1.2006 as owners of certificates having Serial No.012029 to 012328 and thereafter another entry showing transfer of sukuk certificates in favour of SES on 17.2.2009 being Serial No.512029 to 512100 and thereafter re-transfer of 6 sukuk certificates in favour of SES on 18.2.2009 from Serial No.012390 to 012395. The entries in the Register of Certificates Holders maintained by Respondents No.1 and 2 is not denied nor is its genuineness denied by PW-1. NFC has also not questioned its genuineness nor have they stated that the entries are fraudulent. Furthermore the subsequent transfer in favour of AIMC is also reflected in Ex.D2-2 and the payments made to SES are shown in Ex.D2-18. These transfers and payments were verified and accepted by Wapda Bonds Cell for whom Ex.D2-2 represents the names of title holders of the sukuk certificates. Hence for the purposes of title and ownership, Respondents No.1 and 2 have relied on Ex.D2-2 as it mentions each certificate holder as owner of the sukuk certificates. These entries are neither denied nor questioned by Respondents No.1 and 2 or even by NFC. In fact PW-1 states that Wapda was neither negligent nor did it play fraud in these transfers:

1- اس میں ہماری کوئی negligence نہ ہے-
2- سکروٹنی میں غفلت نہ ہو سکتی ہے-
3- جو فراڈ ہوا و ہ واپڈا کے ساتھ ہوا جو کہ سائنٹیفک اور clever طریقے سے کیا گیا جس کا نقصان واپڈا کو ہوا-

In his evidence PW-1 categorically states that Wapda did not commit fraud. This is significant and relevant because for the purposes of the trial court and the evidence before it, the transfer in favour of SES has not been denied by Respondents No.1 and 2 nor have they stated that the transfers to SES and from SES were fraudulent. In fact PW-1 has relied on the internal notings and Register of Certificate Holders as well as the numerous correspondence with SES to establish that a valid transfer of physical sukuk certificates was made in favour of SES.

37. One of the most relevant set of facts in this case is that initially 300 sukuk certificates were physically transferred in favour of NFC, which is evident from the

entries in the Register of Certificate Holders (Ex.D2-2). Thereafter, 72 physical certificates were transferred to SES, which is again evident from Ex.D2-2. For the purposes of the physical transfer, the witness PW-1 admits to the process undertaken for the transfer and the verification of the transfer. This is all detailed in the internal notings of Respondents No.1 and 2. This verification process of the 72 sukuk certificates took place several times with reference to SES, that is when it bought the 72 certificates from NFC and again when it substituted 72 certificates with 6 certificates and again when AIMC purchased 6 sukuk certificates from SES. In fact independent of the Wapda Bonds Cell verifications of the transfers made by SES, the broker, Global Securities and the CDC also confirmed the transfers after verifying the same which goes to the fact that SES bought and sold sukuk certificates. Ex.D2-13 being correspondence of Global Securities, the broker with MIIF, the CDC Trustee, confirming the purchase by AIMC of sukuk certificates from SES. Ex.P27 is a letter issued by SES to Respondents No.1 and 2 dated 6.3.2009 which encloses the 6 certificates and transfer deeds sold to AIMC. The transfer deeds (Ex.P26/1 to P.26/12) reflect the sale in favour of AIMC from SES, which is also reflected in the internal noting by Wapda and the Register of Certificate Holders (Ex.D2-1 and Ex.D2-2). The witness PW-1 vide letter dated 9.3.2009, Ex.P28 confirmed the sale in favour of AIMC from SES, after due verification. The witness confirmed that he issued Ex.P28 and that he verified the transaction. Hence PW-1 does not deny corresponding with SES and there is no evidence to assert or show that the correspondence with SES is fake or fraudulent. Further PW-1 states that all required approvals were taken to verify and confirm the transfers and that they were duly carried out. Accordingly he does not allege fraud in his evidence. Furthermore independent of Respondents No.1 and 2 and NFC, the CDC Trustee MIIF also verified the sale in favour of AIMC from SES as did the broker Global Securities vide Ex.D2-15 which finds mention in Respondents No.1 and 2 records, (Ex.D2-1) and which is admitted by PW-1. Finally, the 6 sukuk certificates were transferred to the CDS on 17.3.2009 (Ex.P32 and Ex.D2-19), which fact is also not denied. Payments made by AIMC to SES were also produced in evidence, Ex.D2-18 and confirmed by Syed Awais Wasti Company

Secretary/Chief Finance Officer AIMC as D2-DW1 and Muhammad Khurram Manager Legal Compliance CDC Karachi as D5-DW1. These payments are not denied or contested by PW-1 or by D1-DW1, D1-DW2. So Respondents No.1 and 2 have repeatedly verified the transfer to and from SES as have Global Securities and CDC and the issue of fraud or it being a fake entity is not in the evidence of Respondents No.1 and 2 and NFC.

38. On the issue of SES being a fake entity, the trial court concluded that SES is a fake entity yet interestingly there is no evidence on this issue nor was any document or witness relied on. The trial court has relied on the decision of Special Judge Central, Lahore (Ex.D1-32) and a forensic report (Ex.D1-22) to conclude that SES was a fake entity. We note that on this issue, there was no independent evidence before the trial court to conclude that SES was a fake entity. In this regard, it appears that the trial court accepted Respondents No.1 and 2 and NFC's version based on Ex.D1-22 and Ex.D1-32 without due appraisal of the evidence before it. What is also important to note is that SES was neither a party in the suit nor was SES called as a witness by any of the parties. So without any evidence from SES or against SES, the trial court concluded that it was a fake entity. Furthermore there is nothing in Faiz Ali Bokhari's D1-DW2 evidence to suggest that SES was a fake entity. He merely denies the execution of Ex.P24, however he does not state that SES is a fake entity. We find that NFC did not provide any evidence with reference to SES to establish that it did not exist and that it was a fake entity. So far as PW-1 is concerned, he denies any knowledge of SES being a fake entity. In this regard, neither Respondents No.1 and 2 nor NFC were able to explain Ex.D2-1 and Ex.D2-2 with reference to entries showing payments received by SES from AIMC nor did they adduce evidence to establish SES as a fake entity nor did they rely on Ex.D1-32 to endorse the decision of Special Judge (Central) Lahore.

39. The issue of fraud and forgery came to the knowledge of Respondents No.1 and 2 on 24.4.2009 (Ex.P33) when NFC wrote to Respondents No.1 and 2 that they had not been paid the full amount of the 7th ijara rentals payment as per the value of the 300 sukuk certificates. They again wrote on 25.4.2009 (Ex.P34) that they did not sell any certificates to SES. Respondents No.1 and 2 informed NFC of the sale

in favour of SES vide letter dated 27.4.2009 (Ex.P35) and NFC claimed that it never sold any certificate to SES vide letter dated 28.4.2009 (Ex.D1-7). Thereafter Respondents No.1 and 2 formed a fact finding committee on 29.4.2009 which issued its report on 8.5.2009 (Ex.D1-11). It is in this Report that discrepancies are pointed out with the procedure followed for the sale of transfer of the sukuk certificates by Wapda Bonds Cell.

40. As per the fact finding report dated 8.5.2009 (Ex.D1-11), the employees of Wapda Bonds Cell were questioned regarding 72 sukuk certificates, its transfer to SES and also the issuance of 6 new sukuk certificates to SES. A comparison of the original certificates retained by NFC with the ones stated to have been transferred by NFC to SES was made, which revealed some discrepancies. Importantly, the fact finding committee concluded that employees of the Wapda Bonds Cell were negligent and did not comply with its contractual duties. Further that a forensic analysis should be carried out of the 72 sukuk certificates and related documents on the basis of which the sale by NFC to SES was made. On 5.8.2009 FIR No.28/2009 was registered by the FIA (Ex.D2-3) under Sections 409, 419, 420, 467, 468, 471, 109 of the Pakistan Penal Code, 1908 ("**PPC**") read with Section 5(2)47 of the Prevention of Corruption Act, 1947 ("**PCA**") for investigating the fraudulent transfer to SES on a complaint by Anwar ul Haq, General Manager Finance, Wapda. Interim challan was submitted in the FIR Ex.D1-26 and Ex.D1-27, on 8.3.2010 (Ex.D1-25) and supplementary challan on 3.12.2010 (Ex.D1-28). The allegation in the FIR was that 72 sukuks were prepared and used fraudulently causing loss to Wapda. It was not Wapda's case that SES was a fake entity. This matter was brought up during the criminal investigation while finding that Mohammad Fajid, the account holder for SES, was allegedly impersonated for opening SES accounts, but we note that even during the investigation by the FIA, he was never called as a witness nor was any investigation made on this issue of impersonation. Furthermore the Special Judge Central Lahore relied on the use of a PCO fax machine to establish that SES was a fake entity. Most importantly the investigation primarily involved Wapda Bonds Cell employees and Faiz Ali Bokhari who was also questioned. However Ex.P24 and Ex.D2-2 were not

considered. Even the correspondence with SES in its entirety was not considered. Ultimately, Special Judge Central, Lahore rendered his judgment (Ex.D1-32) and convicted some employees of Wapda Bonds Cell without actually giving any finding on the fraud. The Impugned Judgment has placed reliance on the criminal court's judgment as well as on the forensic report obtained with reference to the 72 sukuk certificates (Ex.D1-22) which finds that 72 sukuk certificates issued in favour of SES are fake certificates. What emerges from the Special Judge Central's judgment (Ex.D1-32) is that some officers of the Wapda Bonds Cell have been held responsible for forging and fabricating 72 sukuk certificates, which were statedly sold by NFC to SES. However there is no evidence on the forgery of Ex.P24. We also find that the offences under Sections 409, 419, 420, 468 and 471 of Pakistan Penal Code, 1908 were investigated by the FIA which are for offences committed by public servants being employees of Wapda, depriving it of a huge sum of money. So the judgment of Special Judge Central, Lahore essentially decides that Wapda was defrauded by some of its employees.

41. In a civil case where fraud is alleged, the general rule is that the person who pleads fraud must establish fraud. So the burden is on the person alleging fraud. The requirement of law is that the alleged fraud must be detailed, such that the person alleging fraud must set out all the details of the fraud that was committed with clarity and certainty. This is because the allegation of fraud is a serious allegation with significant consequences. Fraud is a term with wide connotations and cannot be construed within a strict definition. It has to be appreciated within the set of facts it is alleged in and it has to be asserted through evidence. Although fraud in general is a false representation or concealment of material facts made to induce a person to act upon it, the injured party has to provide the details of the fraud, has to show how they were deceived and the loss they have suffered so that its context can be assessed and the loss if any ascertained. In *Taj Muhammad Khan through L.Rs and another v. Mst. Munawar Jan and 2 others* (**2009 SCMR 598**), the august Supreme Court of Pakistan held that the ingredients of fraud have to be narrated and stated by the person alleging it. In *Ghulam Shabbir v. Mst. Nur Begum and others* (**PLD 1977 SC 75**) the august Supreme Court of Pakistan held that the person alleging fraud has

to provide details of the fraud and has to provide clear and cogent evidence of the fraud. In *Mst. Sahib Noor v. Haji Ahmad* (**1988 SCMR 1703**) the august Supreme Court of Pakistan has held that fraud must be described fully in the pleadings and the person alleging fraud must establish that a fake representation was made, that the representation was untrue and that the injured party acted on the untrue representation. Order VI Rule 4 CPC provides that in all cases in which fraud has been alleged, particulars have to be stated in the pleading. In a case of fraud, the pleadings have to clearly spell out a case of fraud. Further we find that when a deed is fraudulent it is a void transaction but if it is a voidable transaction then the court has to decide the matter accordingly. We also find that this case required the court to ascertain first and foremost whether fraud was proved from the evidence and then whether the fraud rendered the transaction void or voidable, which was fundamental to this case.

42. In this context, the standard of proof in civil cases is on the balance of probabilities that is what fact is more likely to have happened based on the evidence. This means every fact becomes relevant, its falsity is relevant, the deceitor's intent is relevant and the injury is relevant. The court will first ascertain the facts and once the facts are established decide whether they amount to fraud. Reliance is placed on *Abdul Wahid v. Mst. Zamrut* (**PLD 1967 SC 153**). In *Zaheer Ahmed Qureshi through Legal Heirs v. Syed Iftikhar Hussain Shah* (**1999 SCMR 2605**) the august Supreme Court of Pakistan has held that both parties lead their evidence in respect of an issue, then the issue is to be decided on the basis of the evidence produced and placing onus to produce on one or the other party looses significance as the issue has to be decided on the preponderance of evidence. In *Zakaullah Khan v. Muhammad Aslam and another* (**1991 SCMR 2126**) the august Supreme Court of Pakistan has held as follows:

> The circumstances of each case must determine whether a prudent man ought to act upon the supposition that the facts exist from which a liability is to be inferred. What circumstances will constitute proof can never be the subject of a general definition. But one thing is clear that in Civil cases what is required or considered sufficient is preponderance of probability, while, in Criminal cases, owing to the serious consequences of an erroneous

> condemnation both to the accused and the society, the persuasion of guilt must amount to such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt, Parket, B. in R. v. Sterne cited in "Best on Evidence", 11th Edition, page 34, In the Queen v. Madhub Chander Giril (1873) 21 W.R.Cr.13)

The august Supreme Court of Pakistan further held that:

> In ordinary Civil cases, a Judge of fact must find for the party in whose favour there is a preponderance of proof, although the evidence be not entirely free from doubt. In Criminal cases, no weight of preponderant evidence is sufficient, short of that which excludes all reasonable doubt. The party accused is entitled to the benefit of the legal presumption in favour of innocence, and in doubtful cases that may suffice to turn the scale in his favour.

Therefore as per the dicta of the august Supreme Court of Pakistan it is mandatory for the court in a civil trial to look at the entire evidence and decide the case on the basis of the evidence before it. Hence the overall appreciation of evidence is relevant and the burden of proof looses significance as that is relevant only to set out who is to adduce evidence. Also relevant is that the civil courts need to determine what facts are 'proved' or 'disproved' because it is on the basis of the facts that a case of fraud is to be established. This has been highlighted in *Mst. Bakht Bibi v. Muhammad Aslam Khan and others* (**2016 MLD 1411**). In the instant case, the trial court neglected to ascertain what facts are proved and whether on the basis of the proven facts, a case of fraud is made out.

43. The Qanun-e-Shahadat Order, 1984 provides for the rules of evidence on the basis of which the relevancy of facts, of proof, production and effect of evidence is made out. Essentially the person asserting a fact has to prove that fact, and a fact is proved when a court either believes it to exist or considers its existence to be probable, such that a prudent man ought to believe its existence. The balance of probabilities in civil cases gives the court the ability to determine whether a fact has occurred or is likely to have occurred. Hence the trial court tries to ascertain the factual truth from the evidence before it in its entirety. This is why the august Supreme Court of Pakistan has held that placing burden on one or the other party

looses significance as the issue has to be decided on the preponderance of evidence. In a recent judgment, *Messrs Sazco (Pvt.) Ltd. v. Askari Commercial Bank Limited* (**2021 SCMR 558**), the august Supreme Court of Pakistan has held that fraud requires strict proof and the onus to prove fraud remains on the asserter who must assert fraud through clear and cogent evidence. This means that the evidence adduced has to not only be proven but must also be relevant. Relevance has the tendency to make a fact more or less probable, for the purposes of evidence, otherwise the evidence cannot be fully appreciated. We find that the basic rules of evidence and appreciation of the same have not been followed by the trial court especially since this case relies a great deal on documentary and oral evidence which had to be considered in its entirety.

44. In this regard, the Respondent NFC has relied a great deal on cases to establish that it had satisfied the burden to prove fraud by denying the execution of Ex.P24, hence they argue that the burden shifted on to AIMC who was a beneficiary of the transactions in dispute. Even the Impugned Judgment has repeatedly held that the burden shifted on AIMC and the other subsequent buyers to establish the genuineness of Ex.P24 and the sale of the 72 sukuk certificates. NFC has relied on a host of cases wherein it has been held that it is the duty and obligation of the beneficiary of a transaction or document to prove the same. We have examined these cases and find that they are not relevant for the dispute at hand. The cases relied on deal with obligations *inter se* parties based on an agreement to sell (2015 SCMR 1), mutation (2010 SCMR 1370), (2010 SCMR 1358), sale deed (2010 SCMR 1351), gift (2005 SCMR 236). In these cases the beneficiary of the transaction was asked to establish the *genuineness of the transaction* being cases where the plaintiff asserted fraud and based on the plaintiff's evidence, the burden shifted to the beneficiary. In the cases before us, an interpleader suit was filed by Respondents No.1 and 2 to ascertain who is the owner of the 72 disputed sukuks. Respondents No.1 and 2 do not allege fraud in the suit. They claim they came to know of the forged letter when NFC informed them vide Ex.P33. NFC claims that it did not execute Ex.P24, hence it has discharged its burden to allege fraud and that AIMC had to establish the genuineness of Ex.P24 and the sale transactions in its

favour. This assertion is incorrect as there is no set of facts or documents on the basis of which NFC has proved its assertion that Ex.P24 was not executed by D1-DW2. We note that the signatures of D1-DW2 were not compared with other signatures of D1-DW2 on letters produced in evidence nor was an expert consulted or any forensic made of Ex.P24 to establish that it was a forged document. Even the trial court of its own accord did not attempt to compare the letter head or contents or signatures of Ex.P24 with admitted documents of D1-DW2. In this regard, the cases relied upon by NFC as *S.M. Zahir v. Pirzada Syed Fazal Ali Ajmeri* (**1974 SCMR 490**), *Ghulam Rasool and others v. Sardar-ul-Hassan and another* (**1997 SCMR 976**) and *Muslim Commercial Bank Ltd. through General Attorney and another v. Amir Hussain and another* (**1996 SCMR 464**) do not support their contention, as in these cases the court made a comparison itself from admitted documents before concluding on fraud. AIMC established the transactions in its favour which issues have been decided in its favour (Issues No.14-E, 14-F and 14-G). Hence AIMC established its case of being the owner of 72 sukuk certificates. Furthermore, in these cases the relationship between the parties is tripartite, that is the buyer, the seller and Respondents No.1 and 2 who have a contractual obligation to the certificate holders on the basis of Ijara Agreement (Ex.P14) and Declaration of Trust (Ex.P16). Therefore the contractual obligations had to be considered. Furthermore AIMC and the other Appellants are subsequent purchasers and if at all a case of fraud was asserted, their plea of bonafide purchaser with no knowledge of the fraud had to be examined based on the evidence adduced. Hence the reliance on the cases by NFC and Respondents No.1 and 2 do not support their case.

45. In this context, Respondents No. 1 and 2 assert fraud came to their knowledge from letter dated 24.4.2009 (Ex.P33) when NFC wrote to Respondents No. 1 and 2 with reference to the 7th ijara payment and it not being paid as per the required value of their sukuk certificates. Respondents No. 1 and 2's only witness PW-1 does not give any particulars of the fraud or deceit rather exhibits all the relevant letters, transfer deeds, registers etc. to establish the procedure followed by Wapda Bonds Cell for the transfers made in favour of SES and the subsequent buyers. PW-1 does not rely on Ex.D1-32 to assert a case of fraud. In fact he affirms

that Respondents No.1 and 2 took all necessary care and precaution while verifying the transfer of the sukuk certificates from NFC to SES, from SES to AIMC and subsequent thereof. During examination in chief PW-1 deposed that:

اس میں ہماری کوئی negligence **نہ ہے۔**

He also deposed during his cross-examination:

سکروٹنی میں غفلت نہ ہوسکتی ہے۔

Therefore we find that Respondents No. 1 and 2 failed to establish a case of fraud or forgery. So far as NFC is concerned, they relied upon the forensic report of the 72 sukuk certificates (Ex.D1-22) which cannot be relied upon because the author of the report was never examined in court. For the purposes of the trial court, the author of the report had to appear in court as a witness and had to be subjected to cross examination. Without this, the evidence is inadmissible as this fact has not been proven. Reliance is placed on **PLD 2014 SC 696** (*supra*) and **1974 SCMR 411**(*supra*). So far as the judgment in the criminal case (Ex.D1-32), this also could not form the basis of a decision for the trial court, especially since the Impugned Judgment failed to examine the total evidence before it. Reliance is placed on **PLD 1963 SC 157**(*supra*) and **1995 SCMR 500**(*supra*) wherein the august Supreme Court of Pakistan has held that a court has to judge upon the facts in its case, established by evidence and cannot rely on the findings in some other case. The august Supreme Court of Pakistan also held that the findings in a criminal case are not binding on a civil court because the findings in a criminal case are not relevant for a civil dispute which has to be decided on the preponderance of probabilities. Reliance is placed on *Mst. Mehrun Nisa v. Zainul Abidin and 5 others* (**1995 SCMR 1139**). Once again the emphasis in these cited cases is on the balance of probabilities and appreciation of the entire evidence before the court. Therefore we find that reliance on the criminal judgment in totality is misconceived and against the law. The only other aspect of NFC's case of fraud is that they have in their possession the original sukuks Ex.D1-23/1 to Ex.D1-23/72. However these were never examined in evidence nor were Ex.P25/1 to Ex.P25/72 or Ex.P26/1 to Ex.P26/6 examined for being fraudulent or fabricated. Hence to this extent their entire case is that they have in their possession Ex.D1-23/1 to Ex.D1-23/72 which

they claim were the original sukuk certificates issued by Wapda Bonds Cell in their favour yet they did not attempt to have these examined during evidence to compare them with the so called fraudulent sukuk certificates.

46. We have examined the record and the evidence and find that for the purposes of establishing clearly that fraud and forgery took place NFC had to establish its case of forgery of Ex.P24 and also had to establish its case that the certificates issued to SES were not the original certificates. Respondents No.1 and 2 have placed heavy reliance on the statement of PW-1, however, he provides no evidence or details of the fraud and is not able to explain how fraud or the forgery was committed by the employees of Wapda Bonds Cell. In fact he does not depose on the issue of fraud as he claims that the sale to SES by NFC was genuine and if at all there is fraud it was against Respondents No.1 and 2 and not by them. The emphasis placed on Ex.P24 being the letter issued by Faiz Ali Bokhari (D1-DW2) dated 12.2.2009 instructing Wapda Bonds Cell to transfer 72 sukuk certificates in favour of SES was denied by D1-DW2 yet there was no forensic examination of the said letter and there was no comparison of the signatures by a handwriting expert. The author of the letter Faiz Ali Bokhari (D1-DW2) merely stated that he did not write the said letter and did not sign the same but he gave no other evidence to establish that Ex.P24 was a forged document. Interestingly while Respondents No.1 and 2 formed an internal fact finding committee to ascertain who amongst its employees were responsible for carrying out the forgery and the fraud yet NFC never conducted any internal inquiry with reference to Ex.P24 nor did they submit any independent evidence to establish that the letter Ex.P24 was a forged and fabricated letter. This fact is admitted by their witness D1-DW1 and D1-DW2. We also note that Ex.P24 was not discussed in the judgment rendered by the Special Judge Central, Lahore nor was any finding given with reference to the signatures and its forgery as alleged by NFC. As already stated the evidence on the transfer deeds and the noting on its back side showing the transfer from NFC to SES and then from SES to AIMC is not denied by PW-1 (Ex.P25-1 to Ex.P25-72 and Ex.P26-1 to Ex.P26-6). The Register of Certificate Holders (Ex.D2-2) which testifies to the transfer taking place is not denied. NFC did not have its original 72

sukuk certificates examined in evidence by the trial court nor was any independent forensic report called for or relied upon in the proceedings before the trial court with reference to the forged sukuk certificates being Ex.P25-1 to Ex.P25-72 or the subsequent 6 sukuks being Ex.P26/1 to Ex.P26/6. Hence there is no evidence in the trial court on the forgery and fraud of the sukuk certificates or any evidence to establish that the certificates issued to SES were fraudulently made and the ones in NFC's possession are genuine. Also NFC did not produce any bank statement or account statement to show that at the relevant time, it never received any payment from SES. So if there was any fraud the trial court failed to ascertain the beneficiary of the fraud and forgery. Furthermore the Impugned Judgment has relied totally on the findings given in the forensic report (Ex.D1-22) issued with reference to the sukuk certificates which as we have already held it could not have. We find that since the transfer from NFC to SES was made through physical sukuk certificates, the evidence of Respondents No.1 and 2 was vital as they carried out the entire transaction and were responsible for the physical verification of the sukuk certificates. As they admit to the transaction and do not allege fraud, they cannot assert that a case of fraud has been established.

47. We have also examined the evidence of NFC through the D1-DW1 and D1-DW2 as well as the documentary evidence with reference to the issue of fraud and forgery. Even if the trial court were to rely on the judgment of Special Judge Central, Lahore (Ex.D1-32) at best a case of criminal breach of trust of public servants and negligence is made out against the employees of Wapda and the Sukuk Company. This means that even if the trial court were to give some consideration to Ex.D1-32, it had to balance the evidence produced by the Appellants, particularly with reference to the transfer of the sukuk certificates to the subsequent buyers and their plea of bona fide purchasers. Also the transfer into the CDS and the effect thereof should have been duly considered. Most importantly, the transaction documents and the relationship of the parties under the transaction documents should have been considered. The Purchase Agreement (Ex.P12) shows that the Sukuk Company is the purchaser of turbines from Wapda who is the seller. Along with this Purchase Agreement, a Purchase Undertaking (Ex.P13) was issued by

Wapda whereby it provided an irrevocable undertaking in respect of the turbines to the Sukuk Company. The Sukuk Company entered into an Ijara Agreement (Ex.P14) with Wapda and MCB as the delegatee. As per this Agreement, rental payments had to be paid by Wapda, semi-annually to the investor in the sukuks issued by the Sukuk Company pursuant to the Declaration of Trust (Ex.P16). The parties also executed an Agency Agreement (Ex.P15) with Jahangir Siddiqui and Company Limited as the reference agent, where Wapda Bonds Cell is the Registrar, Transfer Agent and Replacement Agent for the sukuk certificates. As per this agreement, Wapda Bonds Cell, which is not a separate entity but part of Respondent No.2, was appointed as the Registrar and Transfer Agent in respect of the sukuk certificates and as Replacement Agent of the certificates. The duty of the Registrar that is Wapda Bonds Cell was to register all transfers, receive documents in relation to or effecting the title of any certificate and maintain proper record of the details of the documents and certificates, and prepare a list of certificate holders amongst others. As the Transfer Agent, Wapda Bonds Cell was required to implement the regulations set out in the Agreement for the transfer of certificates. The Agreement provided that Wapda Bonds Cell can make regulations for the purposes of the transfer of the sukuk certificates and that it can also issue replacement of the certificates and cancel certificates. As per the Agency Agreement, the owner of the certificate should be clearly reflected in the Register of Holders of Certificates. This document essentially sets out the rights of the certificate holders and the obligations cast upon the trustee with reference to the rights of the certificate holders. Admittedly, Respondents No.1 and 2 did not issue any regulations until 9.5.2009 for transfer of the sukuk certificates, when Wapda issued the SOP's for transfer of the certificates through its notification dated 9.5.2009 (Ex.D2-9) which means that for the purposes of the disputed transfer from NFC to SES and for SES to AIMC, the relevant process for transfer is contained in the internal noting of Respondents No.1 and 2 Ex.D2-1 and reflected in Ex.D2-2. We therefore find that the transaction documents creates several obligations on the part of Respondents No.1 and 2 to maintain, verify and transfer the sukuk certificates and it offers certain guarantees and warranties to certificate holders. Significantly the name in the Register of

Certificate Holders is the name of the owner of the sukuk certificates which document is not challenged or denied.

48. The other relevant factor which was not considered was the concept of trading through the CDC system. As per the record and the evidence before us the initial sale in favour of NFC was through physical sukuk certificates, the sale from NFC to SES was also on the basis of physical sukuk certificates, however the sale in favour of AIMC from SES was not only in the form of physical certificates but it was also registered on the CDS and subsequent thereof the sales were through the CDC. The Appellants provided evidence in respect to their contention that they had no knowledge of the fraud, were not party to the fraud as the sukuk certificates were purchased through the CDS in book entry form. Hence they argued that the effect and process had to be considered. We find that these facts and the evidence relied upon were also relevant because the issue of fraud is between Respondents No.1 and 2, NFC and SES. The Appellants are all subsequent purchasers who as per the evidence of Respondents No.1 and 2 and NFC were not involved in the fraud or forgery. Furthermore, for the purposes of the transfer in favour of the Appellants, the CD Act and the Central Depository Company of Pakistan Limited Regulations ("**Regulations**") had to be taken into consideration. PW-1 recognizes this fact and acknowledges it in his evidence that once the trade began through the CDC, their rules and regulations were applicable and Wapda's SOPs were no longer relevant. This means that the sale in favour of AIMC and the subsequent buyers, being the Appellants before this Court had to be seen in the context of the CD Act and the Regulations and their rights had to be determined accordingly.

49. What transpires from the above is as follows:

(a) Wapda did not prove fraud or forgery with reference to the sale in favour of SES by NFC;

(b) NFC did not prove fraud or forgery with reference to the sale in favour of SES by NFC;

(c) NFC did not prove that Ex.P24 is a forged document nor did it prove that D1-DW2, Faiz Ali Bokhari did not execute Ex.P24;

(d) The record shows the transfers in favour of SES and by SES were verified and confirmed on the basis of Ex.D2-1 and Ex.D2-2 and the evidence of PW-1;

(e) Consequently Issues No.2 and 14 are decided such that no fraud or forgery took place with respect to the transfer of 72 sukuk certificates in favour of SES and therefore the subsequent transfers were not vitiated.

Title

50. Issues related to title that is who is the lawful owner of the disputed sukuk certificates have been decided through Issues No.3, 8, 13, 14-A and 14-E, 14F and 14G. Amongst these the relevant issues are Issue No.3, 13 and 14-A which are with reference to the title of the Appellants and the title of NFC. The burden to prove Issue No.13 was on NFC. The Impugned Judgment concluded that since the original 72 sukuk certificates were produced in evidence as Ex.D1-23/1 to Ex.D1-23/72 and since the sukuk certificates surrendered by SES being Ex.P25/1 to Ex.P25/72 are forged and fraudulent, consequently no valid transfer was made in favour of the Appellants, hence NFC is the true and lawful owner of the 72 sukuk certificates. With reference to Issue No.3, the burden was placed on the Appellants and the Impugned Judgment concluded that since the 72 sukuk certificates (Ex.P25/1 to Ex.P25/72) were transferred in favour of SES fraudulently, hence the transferees stepped into the shoes of SES and do not have valid title in their favour. The Impugned Judgment concluded that the issuance of 6 new sukuk certificates (Ex.P26/1 to Ex.P26/6) in substitution of the 72 sukuk certificates does not create a new debt, hence it cannot be said that the Appellants are the owners of any sukuk certificate. Issue No.14-A was consequently decided against the Appellants and in favour of NFC.

51. The Impugned Judgment has relied upon its finding on Issue No.2 and 14 with reference to fraud while deciding in favour of NFC but again it has not considered the evidence of the Appellants or the evidence produced by Respondents No.1 and 2. In this regard, PW-1 has not denied the sale in favour of SES by NFC

and the sale in favour of AIMC. We have already given details of the evidence in favour of the transfer where reliance has been placed on Ex.D2-1, the internal noting of Wapda Bonds Cell and Ex.D2-2 being the Register of Certificate Holders. We have also relied upon the repeated verifications made by Wapda Bonds Cell confirming the transfers in favour of SES (Ex.P25 and Ex.P29). PW-1 also does not deny that he issued letter dated 20.2.2009 (Ex.P29) for issuance of 6 sukuk certificates against 72 sukuk certificates originally issued to SES. The 72 sukuk certificates were presented by SES to Wapda Bond Cell (Ex.P25/1 to Ex.P25/72) and Wapda Bonds Cell issued 6 new physical certificates valuing Rs.180,000,000 (Ex.P26/1 to Ex.P26/6) in place of 72 sukuk certificates. This transfer is duly noted in Ex.D2-1 and registered in Ex.D2-2 and accepted by PW-1. From the evidence we note that it is an admitted position that at the time of issuing 6 new sukuk certificates, Wapda Bonds Cell carried out its verifications and verified the transfer in favour of SES. The Impugned Judgment in Issue No.11 held this exchange to be part of the same debt, which is not questioned by the Appellants before us. SES then sold its 6 sukuk certificates to AIMC which is evident in letter dated 4.3.2009 (Ex.P26) by AIMC to the Sukuk Company intimating the purchase of 6 sukuk certificates from SES. This sale was carried out by Global Securities, the broker of AIMC who wrote to the CDC Trustee, MIIF and confirmed the purchase in favour of SES (Ex.D2-13 and Ex.D2-15). Thereafter AIMC issued letter dated 5.3.2009 to CDC Trustee, MIIF issuing instructions for the purchase of 6 sukuk certificates (Ex.D2-14). Subsequently letter dated 13.3.2009 from SES to CDC regarding purchase of 6 sukuk certificates by AIMC (Ex.D2-16) and thereafter letter dated 13.3.2009 (Ex.D2-17) confirming the purchase. In this regard, we note that this evidence has not been denied or questioned by NFC. In fact the correspondence issued by SES has also not been challenged or questioned for being fraudulent or by a fake entity. The payment made by AIMC to SES was produced in evidence as Ex.D2-18 which shows payment of Rs.190,792,800/- on 16.3.2009 and entries in favour of AIMC in the Register of Certificate Holders in place of NFC. This fact is verified and confirmed by PW-1 confirming the same through his evidence:

یہ درست ہے کہ جبSES نے 72 فزیکل سکوک سرٹیفیکیٹس حاصل کئےSES نے اُن کو پہلے واپڈا بانڈ سیل میں Surrender کیا پھر 6 نئے سرٹیفیکیٹس اُن کو جاری ہوئے۔
یہ درست ہے کہ جو 6نئے سکوک سرٹیفیکیٹس فزیکلSES کو جاری کیے گئے۔ وہ اصل تھے اور جعلی نہ تھے۔ یہ درست ہے کہ یہی6 نئے فزیکل سکوک سرٹیفیکیٹس المیزان کو جاری کیے گئے یہ درست ہے کہ Ex.P-26/1 تا-Ex.P 26/6وہی سرٹیفیکیٹس ہیں جو واپڈ بانڈ سیل نےSES کو جاری کیے اور بعد ازان المیزان کو ٹرانسفر ہوئے۔
یہ درست ہے کہ Ex.P26/1 تا Ex.P6/26پر میرے دستخط بطور گواہ نمبر 1 ہیں۔
یہ درست ہے کہ عظمیٰ صغیر صاحبہ کے دستخط بطور authorized person بھی موجود ہیں۔
یہ درست ہے کہ Ex.P26/1 تا Ex.P26/6 المیزان کو منتقل ہوئے تو اُن کی پشت پر میں نے دستخط کئے اِسی طرح ان کی پشت پر مِس عظمیٰ صغیر کے بھی دستخط ہیں۔
یہ بھی درست ہے کہ بعد ازاں یہی سکوک سرٹیفیکیٹس CDS (سنٹرل ڈیپازٹری سسٹم) بک انٹری Form میں بحق CDCٹرسی، میزان اسلامک انکم فنڈ منتقل ہو گئے۔
یہ درست ہے کہ Ex.P26/1 تا Ex.P26/6 فرسٹ سکوک کمپنی کے جاری کردہ ہیں۔ یہ درست ہے کہ NFC کی چٹھی مورخہ 24-04-09 ، Ex.P33 سےپہلے فرسٹ سکوک کمپنی کو یہ علم تھا کہ یہ Validly (Ex.P26/1 تا Ex.P26/6) جارہی ہوئے۔

This sale in favour of AIMC of 6 sukuk certificates was then transferred to the CDS. Again PW-1 verifies and testifies to this fact in his evidence as does D2-DW1. In continuation of this transaction, ijara payments were made to AIMC (Ex.D2-20) which was also confirmed by PW1 in his evidence. D2-DW1, the witness of AIMC also testifies to the facts of verification, payment and transfer on the CDS. He suggests no knowledge of the fraud and states AIMC to be the owner of the 6 sukuk certificates. In this context, Issue No.14-E was framed with reference to the confirmation to Global Securities of the transfer of 6 sukuk certificates in the name of AIMC, which the court concluded in favour of AIMC holding that this transfer did take place. Issue No.14-F was framed regarding 6 transfer deeds pertaining to 72 sukuk certificates verifying and confirming AIMC as the owner of the sukuks, which the court decided in favour of AIMC. Furthermore Issue No.14-G was framed pertaining to the verification of transfer deeds and that six physical certificate replacing 72 sukuk certificates be converted into scripless form and be

transferred in the CDC account. We note that this issue was also decided in favour of AIMC, based on the evidence. Hence for the purposes of the sale from SES to AIMC, we find that the same stands established from the record and decided in favour of AIMC.

52. AIMC sold its 6 sukuk certificates (representing 36000 units) to IFSL in the open market on 18.5.2009 and 23.6.2009. In this regard the evidence produced by AIMC was Ex.D2-22 to Ex.D2-27 which basically includes letter dated 18.5.2009 from AMIC to CDC Trustee-MIIF (Ex.D2-22) regarding the sale of sukuk through three transactions being 10000, 12000 and 14000 sukuk units, letter dated 18.5.2009 (Ex.D2-23) from IFSL to CDC Trustee, MIIF regarding the purchase of 10000 sukuks, letter dated 23.6.2009 (Ex.D2-24) from AIMC to CDC Trustee MIIF regarding sale of 12000 sukuks, letter dated 23.6.2009 (Ex.D2-25) from IFSL to CDC Trustee MIIF regarding purchase of 12000 sukuks and letter dated 23.6.2009 (Ex.D2-26) from AIMC to CDC Trustee, MIIF confirming sale of 14000 sukuks. Sale consideration received by the CDC Trustee, MIIF in its accounts were exhibited as Ex.D2-28 and Ex.D2-29. This evidence stands proven and is neither denied nor questioned by Respondents No.1 and 2 and NFC. Presently AIMC is not the owner of any sukuk certificate.

53. Thereafter IFSL sold its 22000 sukuks in favour of MBL through the CDC which is evident from letter dated 23.6.2009 issued by IFSL to MBL for the confirmation of the sale of 12000 sukuks (Ex.D6-5). The second transaction was through the CDC as is evident from letter dated 23.6.2019 from Al Falah Securities (Private) Limited to MBL (Ex.D6-6) confirming purchase of 10000 sukuks, MBL produced RTGs message dated 24.6.2009 (Ex.D6-7) for Rs.60,532,200/-, RTGs message dated 29.6.2009 (Ex.D6-9) for Rs.49,814,750/-. In this regard MBL made payment in the amount of Rs.110,346,950/- and thereafter entry of MBL in the Register of Certificate Holders was also made. Furthermore entry was also made in the CDC record regarding MBL. Its witness D6-DW1 also testified in favour of the purchase having no knowledge of the fraud. He testified to the purchase, the verification and payment and asserts MBL to be the owner of the sukuk certificates. Presently MBL is the owner of 22000 sukuks.

54. Thereafter SBL being Appellant in RFA No.50966/2017 purchased 4000 sukuks and received ijara payments until the dispute arose. On 18.9.2009 UBL offered 4000 sukuks originally issued by the Sukuk Company having face value of Rs.20,000,000 to SBL which were available in electronic/scripting form on the CDC system. On 28.9.2009 SBL agreed to purchase the sukuks and subsequently the said sale was confirmed by the broker and the CDC on 29.9.2009. SBL has relied upon Ex.D4-1 being CDC's Activity Report dated 29.9.2009 showing ownership of SBL of the sukuk certificates on the CDC system as a purchaser from UBL Amin, letter dated 18.9.2009 (Ex.D4-4) from UBL Amin to SBL offering outright sale of the sukuk certificates, letter dated 28.9.2009 (Ex.D4-5) acceptance of letter dated 18.9.2009 issued by UBL Ameen communicating its acceptance of UBL Ameen's offer. Ex.D4-6 is Rts/X System Report demonstrating confirmation of transaction between SBL and the UBL Ameen regarding sukuk certificates. Its witness D4-DW1 also testified in favour of the purchase in its favour having no knowledge of the fraud. He testifies to the purchase, verification and payment and asserts SBL to be the owner of the sukuk certificates. Presently SBL is the owner of 4000 sukuk certificates. Bank Islami was proceeded against ex-parte by the trial court vide order dated 21.5.2015. Presently Bank Islami claims ownership of 10000 sukuk certificates.

55. The evidence which goes to the root of the issue of title is Ex.D2-2, the Register of Certificate Holders. The Register of Certificate Holders records the Appellants as owners and is not denied by PW-1 or DW1-D1 or DW1-D2 being the witnesses of NFC. The Declaration of Trust (Ex.P16) executed by the Sukuk Company provides that a certificate holder is one whose name is in the Register, thereby certifying to the title. Hence the Register of Certificate Holders is the document of title, which is binding on all parties as it names the owner of the sukuk certificate. As per the terms and conditions of the certificates contained in the Declaration of Trust (Ex.P16), title to the certificates passes only by transferer in the CDS and registration in the Register of Certificate Holders kept by the issuer, the Sukuk Company. As per this document, the registered holder of a certificate is the absolute owner of the sukuk certificates for all purposes. Then there is the Agency

Agreement (Ex.P15) wherein clause 19.4 also provides that each registered holder of a sukuk certificate is the absolute owner of the sukuk certificates. As the Register of Certificate Holders is admitted by PW-1 and each registered owner is also accepted by PW-1, this Register testifies to the title of the owners registered in it.

56. From the evidence adduced by PW-1, it is clear that PW-1 accepts all the transfers and states that every transfer is a valid transfer certifying their ownership. Furthermore PW-1 has not questioned any transfer of sukuk certificates or units nor alleged any to be fraudulent. In the same way neither has NFC denied the title in the Register of Certificate Holders. Therefore on the basis of the transaction documents for all intents and purposes since the Appellants are all registered in the Register of Certificate Holders they are the lawful owners of their sukuk certificates. Issues No.3, 8, 13, 13A and 14A are decided such that the Appellants are the lawful owners of their sukuk certificates entitled to all ijara payments and NFC is not the owner of the 72 sukuk certificates under dispute.

Section 11 of the CD Act and its effect

57. Connected with the issue of title, is the effect of the trade through the CDC and its impact on the rights of certificate holders. In this regard, CDC, Respondent No.6 has filed RFA No.67900/2017 limited with respect to Issue No.14-H which is *whether there is a bar on the rectification of the Central Depository Register in light of section 11 of the CD Act*. The Impugned Judgment concluded that Section 11 of the CD Act cannot override fraud, if it is established as it is settled law that fraud vitiates the most solemn of proceedings and any structure built on a foundation of fraud will fall like a house of cards. The court concluded on the basis of its findings on Issue No.14 that the sukuk certificates in favour of SES were fraudulent. Hence the entire transaction and subsequent transactions are fraudulent and Section 11 of the CD Act does not protect these transactions.

58. Learned counsel for Respondent CDC stated that the CDC is the Central Depository registered with the Securities and Exchange Commission of Pakistan ("**SECP**") which operates as a central depository system for securities under the CD Act and the Regulations framed thereunder. It is a Non-Banking Finance Company ("**NBFC**") which provides services as a trustee to various NBFCs including AIMC.

Learned counsel argued that interpretation of Section 11 of the CD Act as given in the Impugned Judgment is contrary to the basic mandate of the law and that the trial court has not given due consideration to the effect of Section 11 of the CD Act and the role of the CDC. Learned counsel argued that the CDC's role in the sale/purchase of the sukuk certificates was that of trustee and it has acted in accordance with the instructions of the AIMC as per clause 9 of the Trust Deed. Learned counsel further argued that transfers on the CDC are not in physical form but through a book entry system. He explained that CDS was established in accordance with the Regulations wherein accounts are opened and maintained with the Central Depository by the account holder so as to record the title of the account holder to book entry securities entered in their accounts. Transfers on the CDC are affected electronically and Section 6 and 7 of the CD Act regulates the transfers under the book entry system and its effect. He further explained that Section 11 of the CD Act clearly provides that where an account holder does not give its consent to transfer of any book entry security from or to his account or where the name of account holder is fraudulently entered or omitted from the CDS, the aggrieved party can apply to the court for relief and can be awarded damages but they cannot order for the rectification of the Central Depository Register. Learned counsel explained that Central Depository Register is a computerized electronic register in respect of book entry securities which evidences the name of the holders of the securities. These names are protected by virtue of Section 11 of the CD Act, particularly in the case of fraud and therefore the finding that fraud vitiates the most solemn of proceedings with reference to the entry in the CDS is totally without basis. Respondent No.6, CDC produced one witness namely Muhammad Khurram son of Muhammad Zikar, Manager Legal Compliance CDC, Karachi as D5-DW1 and relied on Ex.D5-1 to Ex.D5-9 and Mark D5-A and Mark D5-B to show the transactions made through the CDS and its correspondence with the Sukuk Company with reference to the rectification of the entries in the CDS as well as stoppage of transaction through the CDS.

59. We have examined the documents and the evidence deposed by D5-DW1 and find that the transfers on the CDS are regulated by the CD Act and the

Regulations. Important to note is that the registration of book entry transfers on the CDS are not denied by PW-1 nor were they questioned by the witnesses of D1-DW1 and D1-DW2. The initial transfers were in physical form from NFC to SES and from SES to AIMC. However, the physical certificates were converted into electronic scripless form and entered on the CDS in the account of the CDC trustee with reference to the transfer in favour of AIMC. As per the CD Act, the Central Depository Register is a computerized electronic register maintained by the Central Depository in respect of book entry securities. A transfer of the book entry security made under the CD Act is a valid and effective transfer of title of the securities represented by the book entry securities in terms of Section 6 of the CD Act. Section 11 of the CD Act reads as follows:

> **Bar on rectification of central depository register**. Notwithstanding anything contained in section 152 of the Companies Ordinance, 1984 (XLVII of 1984), if
>
> (a) an account-holder or a sub-account holder did not consent to a transfer of any book-entry securities from, or to, his account or sub account, as the case may be; or
>
> (b) The name of any account-holder or sub-account holder is fraudulently or without sufficient cause entered in, or omitted from, the central depository register,
>
> The aggrieved party may apply to the court for relief and the court may award damages to the aggrieved party but shall not order rectification of the central depository register.

The purpose of Section 11 of the CD Act is essentially to allow the smooth transfer of securities on a reliable and regulated system, such that it not only protects the transaction but also the title of the security holders. PW-1 admits to this fact and also admits that the transfer in favour of AIMC or the other Appellants and admits that subsequent sales were all verified from the CDC. Hence again Respondents No.1 and 2 have not denied the ownership rights of the Appellants as reflected on the CDS:

> یہ درست ہے کہ فزیکل سکوک سرٹیفیکیٹس کے اوپر Transaction Document لاگو ہوتے ہیں جبکہ CDC سسٹم پر CDC کی ریگولیشن اور قانون لاگو ہوتے ہیں۔
> سوال منجانب کونسل مدعا علیہم 6! کیا جب CDC کے اندر سکوک ایک شخص سے دوسرے کو منتقل ہو تے ہیں تو اس منتقلی کی اطلاع فرسٹ سکوک کمپنی یا واپڈا بانڈسیل کو آتی ہے؟

جوا ب منجانب PW-1 : میرے علم کے مطابق CDC یہ اطلاع نہیں دیتی۔
یہ درست ہے کہ مدعا علیہم نمبر 6 نے مذکورہ -/22,000 سکوک CDC پر خریدے تھے۔ ازخود کہا کہ یہ خرید واپڈا کی Involvement کے بغیر خریدے تھے۔
یہ درست ہے کہ فزیکل سرٹیفیکیٹس کے CDS سسٹم پر آنے کے بعد واپڈا بانڈ سیل کے قواعد و ضوابط لاگو نہ ہوتے ہیں۔ یہ درست ہے کہ CDS سسٹم پر آنے کے بعد Sale Purchase سے متعلق CDC کے قواعدو ضوابط لاگو ہوتے ہیں۔
یہ درست ہے کہ قواعد و ضوابط کے تحت کسی بھی Subsequent ٹرانسفری کے لیے ضروری نہ تھا کہ وہ الیکٹرانک فارم یا بک انٹری کی صورت میں سکوک سرٹیفیکیٹس لینے سے پہلے سکوک کمپنی سے Verify کرتا۔

So far as the interpretation of Section 11 of the CD Act is concerned, the Impugned Judgment has relied upon the judgment of the august Supreme Court of Pakistan, in this case, in review being C.M.A. No.3443-L/2016 in C.R.P. Nil/2016 in C.A No.104-L/2015 and C.R.P. 71-L/2016 in C.A 104-L/2015 dated 21.8.2017 where the august Supreme Court of Pakistan clarified its order in PLD 2017 SC 1 (*supra*) that the interpretation given is peculiar to the set of facts of this case and that the observation made shall not affect the authority of the CDC or the finality of its record. In this regard we find that the CDC is the only securities depository in Pakistan, established for handling electronic transactions, in book entry form. This means that the system issues and transfers securities electronically where the physical existence of the security does not have any relevance. Section 11 of the CD Act prohibits any rectification on the CD Register and requires the aggrieved party to approach the court for relief in the form of damages. However the CD Register cannot be ordered to be rectified. Clearly this means that even in a case of fraud at best, the aggrieved party can seek damages but cannot seek rectification of the CD Register. The sanctity attached to the register which depicts title is clearly protected under the CD Act and is fundamental to investor trust, for the CDC to function effectively. So far as the decision of the august Supreme Court of Pakistan is concerned in the review, the stance of the CDC was accepted. Hence we find that the matter in issue has also been decided by the august Supreme Court of Pakistan in favour of the CDC. Furthermore since we have relied on the CDS for the purposes of title and ownership, the findings in the Impugned Judgment on issue

No.14-H are totally without basis. Therefore Issue No.14-H is decided in favour of CDC, such that statutory protection under Section 11 of the CD Act is available to the transactions on the CDC, even in cases of fraud.

The scope of an Interpleader Suit

60. The objection raised by the counsel for Wapda is with respect to the scope of the interpleader suit. This objection has been partially discussed in issue No.4, 14-C being, *If forgery or fraud took place, the plaintiffs are vicariously liable to the holders or Sukuk Certificate for such forgery or fraud committed by their employees, and the plaintiffs are liable to their negligence, for an amount equivalent to the value the Sukuk and the Ijara thereon?* and *Whether the plaintiffs have committed serious breach of the trust and contract and have failed to discharge their obligations, duties and responsibilities and are thus not entitled to obtain indemnity for themselves?*.

61. As per the contention of the counsel for Respondents No.1 and 2, the interpleader suit in terms of Section 88 of the CPC will decide the question of ownership of the disputed sukuk certificates and the alternative relief that the Appellants seek in the form of damages and compensation cannot be granted in the interpleader suit. On the other hand, the Appellants contend that the dispute has to be decided in its entirety before this Court in the RFAs as Respondents No.1 and 2 have to be made responsible for payments due to the Appellants in the form of the principal amount, ijara payments and mark up, the court not declare in their favour. They argue that the scope of interpleader suit has to be construed liberally so as to ensure that the Appellants are not deprived of their right to raise claims against Wapda and the Sukuk Company. Under the circumstances, it is necessary to examine the scope of an interpleader suit and whether the alternative prayer for damages and compensation for the Appellants can be adjudged in the interpleader suit. The Impugned Judgment finds that Wapda and the Sukuk Company are not liable for the transfer in favour of SES because they had no knowledge of the fraud and acted in good faith on the instructions of NFC. The Impugned Judgment finds Wapda and the Sukuk Company to be victim of fraud, hence not liable for breach of trust or negligence.

62. Section 88 read with Order XXXV of the CPC provides for the interpleader suit in the following terms:

Section 88 CPC

Where inter-pleader suit may be instituted.—Where two or more persons claim adversely to one another the same debt, sum of money or other property, movable or immovable, from another person, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining indemnity for himself;

Provided that where any suit is pending in which the rights of all parties can properly be decided, no such suit of interpleader shall be instituted.

Order XXXV CPC

1. Plaint in interpleader suits. In every suit of interpleader the plaint shall, in addition to other statements necessary for plaints, state—(a) that the plaintiff claims no interest in the subject matter in dispute other than for charges or costs;

(b) the claims made by the defendants severally; and ,

(c) that there is no collusion between the plaintiff and any of the defendants.

2. Payment of thing claimed into court.—where the thing claimed is capable of being paid into Court or placed in the custody of the court the plaintiff may be required to so pay or place it before he can be entitled to any order in the suit.

3. Procedure where defendant is suing plaintiff,-- where any of the defendants in an interpleader suit is actually suing the plaintiff in respect of the subject matter of such suit, the Court in which the suit against the plaintiff is pending shall, on being informed by the court in which the interpleader suit has been instituted, stay the proceedings as against him; and his costs in the suit so stayed may be provided for in such suit; but if and in so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader suit.

4. Procedure at first hearing.-(l) At the first hearing the Court may--

(a) declare that the plaintiff is discharged from all liability to the defendants in respects of the thing claimed, award him his costs, and dismiss

him from the suit; or

b) if it thinks that justice or convenience so require, retain all parties until the final disposal of the suit.

(2) Where the Court finds that the admissions of the parties or other evidence enable it to do so, it may adjudicate the title to the thing claimed.

(3) Where the admissions of the parties do not enable the Court so to adjudicate it may direct--

(a) that an issue or issues between the parties be framed and tried, and

(b) that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff and shall proceed to try the suit in the ordinary manner.

5. Agent and tenants may not institute interpleader suit. Nothing in this Order shall be deemed to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or the landlords.

63. As per this Section, where there are rival claimants with respect to the same debt against the same person, which person being the stakeholder claims no interest in the debt other than for charges or cost, who is ready to pay or deliver the debt to the rival claimants then such a person can institute a suit of interpleader against all claimants for the purposes of obtaining a decision as to whom the payment or delivery must be made to. The interpleader suit therefore is filed by a person to determine the rightful owner of a debt or property amongst rival claimants so as to avoid multiplicity of litigation and conflicting judgments. It is a joinder device whereby all those who claim any interest in the same debt or property are joined in one action within which they may assert their claim against the debt or property. In terms of the requirements of Section 88 CPC, the rival claimants must all seek a claim against the same debt, against the same person who claims no interest in the debt and is willing to make payment or delivery of the debt or property to the lawful claimant. So the party which is confronted with conflicting claims from rival claimants does not itself have any claim in the debt and may in good faith interplead various different claimants so as to ensure that conflicting rights or claims against the same property or debt are decisively determined in one case, such that to whom the debt has to be paid. It is imperative that the party faced with the rival claimants

must not have any interest in the debt itself and must be willing to discharge its liability in totality towards those seeking the debt. Hence the purpose of the interpleader suit is not only to avoid multiple litigation but also to protect the stakeholder from conflicting claims to the same debt or property. The logic being that when all actions are joined together then all claims are adjudged with respect to the same debt or property in the same suit to determine who is entitled to the same debt or property. This avoids the expenditures and inconvenience of multiple cases which may also result in conflicting orders and adverse rulings by different courts.

64. In this regard, it is important to note that in the instant case, the interpleader suit was originally filed on 12.12.2009 but was rejected by the trial court vide order dated 21.5.2010 on the ground that interpleader suit is not maintainable. Wapda then filed an appeal being RFA No.779/2010 before the Lahore High Court, Lahore which concluded that the interpleader suit was maintainable vide its judgment dated 17.2.2015 in *WAPDA First Sukuk Company through Director/Company Secretary and another v. National Fertilizer Corporation of Pakistan (Pvt.) Ltd. through Chief Executive and 4 others* (**2015 CLC 934**). Against this judgment, the Appellants went to the august Supreme Court of Pakistan in PLD 2017 SC 1 (*supra*) which also concluded that the interpleader suit was maintainable and a direction was given to the civil court to proceed with the interpleader suit on a day to day basis and decide the same as soon as possible. Against this judgment, a review was filed by the CDC with reference to their own grievance which was decided on 21.8.2017. The august Supreme Court of Pakistan in PLD 2017 SC 1(*supra*) held that the law of interpleader may have its origins in equity but since it has been codified in the CPC, equity must yield to law. The august Supreme Court of Pakistan also held that there are certain condition precedents which are required to be satisfied before an interpleader suit can be filed. First there must be rival claimants, second it must be for the same debt, sum of money or property movable or immovable claimed by two or more claimants and third the person from whom the debt, sum of money etc. is being claimed must have no interest in the debt or property. The august Supreme Court of Pakistan further held that interpleader suit brings all claimants of the disputed sukuk certificates before the civil court at Lahore and it is in this

interpleader suit that it can be definitively decided as to who is the true and original owner of the disputed sukuk certificates. Hence the august Supreme Court of Pakistan concluded that the suit was lawful and all claimants should be joined and made party to the interpleader suit. Hence for the purposes of Issues No.6,12 and 14-B the decision of the august Supreme Court of Pakistan prevailed that the interpleader suit is maintainable.

65. The question that arises is whether the alternative prayers of the Appellants can be granted in the interpleader suit. Although we have concluded that no case of fraud or forgery was made out, meaning that the Appellants are entitled to payment of ijara on their sukuk certificates. The issues pertaining to the scope of an interpleader has to be considered as it was part of the Impugned Judgment and was argued at great length before us. Furthermore it is significant to give finality to the dispute related to the transfer of 72 sukuk certificates. As has already been stated, the Appellants' essentially each claim to be the owners of sukuk certificates either presently or at some point in time and therefore state that if the appeals are decided against them, they should be compensated by Wapda and the Sukuk Company in the form of ijara payments due and the principal amount paid for the sukuk certificates. Learned counsel for the Appellants argued that the Impugned Judgment found NFC to be the true and lawful owner of the disputed sukuk certificates yet failed to address the claims of the Appellants. They argue that the Appellants are entitled to be compensated for the amounts they have paid towards the purchase of the sukuk certificates and for the rentals they have been deprived of as they had no knowledge of the fraud played with reference to the sukuk certificates.

66. Historically an interpleader suit has been as equitable proceeding to determine adverse claims to the same debt or property. The concept of the interpleader suit is that rival claimants litigate against each other with reference to their conflicting claims over the same debt or property. The person facing the compelling claims will eventually discharge its liability towards the lawful claimant. The issue before the Court is whether the discharge of liability includes any other liability which arises out of allegations of negligence, breach of trust or fiduciary duties or on account of further liability, related to the capacity or duties of

the person facing the claims. So to put it succinctly the issue is whether the Appellants can have their claim of compensation and damages against Wapda and Sukuk Company decided in the interpleader suit. In support of their contentions Respondents No.1 and 2 have relied upon *Halsbury Laws of England, Vol.47 (2014)/2, para.89* which narrates as under:

> Subject to certain restrictions as to the nature of the claims made against the person desiring to interplead, the former Court of Chancery extended the remedy of interpleader to all cases to which in conscience it ought to extend, namely where a person not interested was exposed to conflicting claims, whether an action or suit had been begun by any claimant or only a claim made. Thus it applied to cases where two or more persons severally claimed delivery of the same property, payment of the same debt or rendering of the same duty, under different titles or in separate interests, from another person, and the latter did not know to which of the claimants he ought to deliver the property, pay the debt or render the duty.

Respondents No.1 and 2 have also relied upon the Law of Interpleader as Administered by the English, American, Canadian and Australian Courts (RJ MacLennan, 1901 pub. Carswell:

> Interpleader defined.-Interpleader is a legal proceeding devised to enable a person of whom the same debt, duty or thing, is claimed adversely by two or more parties, to compel them to litigate the right or title between themselves, and thereby to relieve him from the suits which have been or otherwise might be brought against him.
>
> The object in interpleader.- The supreme object' of an interpleader proceeding is to protect a person when he stands in the situation of a stakeholder not knowing to whom to pay the money or to deliver the property, so that he shall not be vexed by contending claimants, whose contention is not in reality with him but with each other, when a recovery against him by one party will not be a protection against the claim of the other.
>
> Principles of interpleader in equity.-The essential principles of interpleader in equity, may be summarized in a paragraph as follows: The jurisdiction of courts of equity to grant relief by interpleader is properly applied to cases where two or more persons, in some manner of privity, severally claim the same debt, duty or property, under different titles or in separate interests, from another person, who not claiming any title or interest therein himself, and not having incurred any independent liability to either of the claimants,

> and not knowing to which of them he ought of right to render the debt or duty claimed, or to deliver the property in his custody, and being unwilling to take the risk of deciding between the claimants, is either molested by an action or actions brought against him, or fears that he may suffer injury from the conflicting claims of the parties.

Consequently they argue that the scope of an interpleader suit is set out in Section 88 CPC for obtaining a decision as to the person to whom the payment or delivery shall be made. Similarly, Order XXXV Rule 4(2) CPC states that in an interpleader suit, the Court may adjudicate the title to the thing claimed. Hence they argue that the scope of an interpleader suit, as set out in Section 88 and Order XXXV CPC is clearly limited to determining which claimant is entitled to the thing claimed (in this case being the disputed sukuk certificates and the final encashment value) and the payments due (the Ijara rentals). They argue that there is no provision in the CPC for expanding the scope of an interpleader suit to include damages, compensation or the claims of the Appellants. Respondents No.1 and 2 have relied on the following judgments in support of their claim *National Insurance Co. Ltd. v Antony T George and Ors* (**Ker HC 1989**) which held as under:

> The only two purposes of an interpleader suit as S. 88 C.P.C. indicates are (1) Obtaining a decision as to the person to whom the payment or delivery shall be made and (2) Obtaining indemnity for the plaintiff. The purpose is not settlement of any disputed issues as between plaintiff and defendants or any of them though in some cases an ordinary trial with all the parties may become necessary as Order 35 Rule 4(2) and (3) indicate."

Jagdish Chandra and Ors v Krishna Mohan Aggrawal and Ors (**All HC 2020**) which held as under:

> To interplead means to litigate with each other to settle a point concerning a third party. Section 88 of the C.P.C. enacts that two or more persons claiming adversely to one another, the same debt, sum of money or other property, movable or immovable property from a person who does not claim any interest therein except the charges and costs incurred by him and is ready to pay or deliver the same to the rightful claimant may file an interpleader suit.
>
> The object of the aforesaid is to get claims of rival defendants adjudicated. It is the process where the plaintiff calls upon the rival claimants to appear

before the Court and get their respective claims decided. The decision of the Court in an interpleader suit affords indemnity to the plaintiff on the payment of money or delivery of property to the person whose claim has been upheld by the Court.

Respondents No.1 and 2 also relied on extracts [*pp.11 RJ, MacLennan (1901)* which opined as under:

> Same thing must be claimed.- The' same thing, debt, or duty, must be claimed by both or all of the parties against whom the relief is demanded. When the subject in dispute has a bodily existence, no difficulty can arise on the ground of identity; but where the subject is a chose in action, which has no bodily existence, it becomes necessary to determine what constitutes identity. Where the claims made are of different amounts, they can never be identical, but where they are the same in amount, that circumstance goes far to determine their identity. The amount may not be sufficient of itself, for the amount may be the same, and the debts different. The claims must refer to the same subject matter, and not to collateral demands arising out of the right immediately in dispute interpleader was never intended to apply to different claims, merely because they originate out of one transaction; so interpleader was refused to a person who had had a house built for himself, and admitted a sum due, when the architect sued for the contract price, the contractor employed by the architect and who had been dismissed claimed the price of his contract or damages for dismissal, while claims were also made by an assignee of the contractor, and by artisans. It has been decided in Mississippi, that it does not matter, that the claims are upon an open account for the value of the property, so long as each claimant claims the same amount. When one person claims the subject matter or its proceeds, from the applicant for relief, and a second claims unliquidated damages for conversion, or for breach of warranty, or for negligence in selling, or for not accepting a bill of exchange for the price, interpleader will not lie, be-cause the parties do not claim the same thing, the claim of the person seeking damages is against the applicant personally and not against the fund or property in his hands. Nor will interpleader lie, when both claimants claim damages against the person seeking to interplead.
>
> [pp.81 RJ, MacLennan (1901)
>
> Evidence restricted to subject in dispute.-The evidence must, be limited to the property which was the subject of the interpleader. The contest proceeds between the claimants to the specific property involved, and as to that property alone. To permit outside issues, and matters affecting the

claimants, but not connected with the subject of the action, would confound the action and lead to confusion.

[pp.281 RJ, MacLennan (1901)]

67. The Appellants have relied on *American Jurisprudence, Second Edition, Volume 45* to show the shift in understanding interpleader suits and their scope such that the strict requirements of interpleader are no longer relevant, that is to say that a court can permit interpleader action even where the rival claimants assert the stakeholders liability, so long as there is a connection to the stakeholders capacity and the debt. Hence if the proceedings create a genuine issue of fact as to the liability of the claimants other than to title of the debt or property, the stakeholder seeking interpleader can be made liable in the interpleader suit. They have relied upon several cases of different jurisdiction to substantiate their point on the extent to which relief can be given in an interpleader suit. Reliance was placed on *Dakota Livestock Company and Farmers Union Marketing & Processing Association v. Gary Keim et. al* (**552 F.2d 1302 (1977**), a decision rendered by the United States Court of Appeals, Eighth Circuit to urge the point that the party seeking compensation from a stakeholder in an interpleader action if not seeking to be paid out of the particular fund which was in dispute, the interpleader suit will not preclude the court from determining the claim of the parties. The court found that the claimants' assertion against the stakeholder was an independent liability with a nexus to the basic dispute, hence it can be decided in the interpleader suit. In this case the Dakota Livestock Company and Farmers Union Marketing and Processing Association appealed before the United States Court of Appeals, Eighth Circuit against the decision of the District Court dismissing their interpleader action against various creditors. The Appellate Court held that the rights of the claimants can be protected adequately within the framework of the interpleader action as provided under the statute.

In *Odell Dick v. The First International Bank of Birmingham, a National Banking Association* (**334 So 2d 922 (1976**) the Court of Civil Appeals of Alabama held that:

> independent liability can be looked into in an interpleader suit after settlement of the claimants' dispute to avoid multiple litigation where a genuine issue of fact is created as to the liability of the stakeholder. In this case the Bank filed an interpleader suit against certain depositors. One of the depositors alleged that the Bank was in breach of its duty to depositors, being an independent liability from the Banks claims, as the claimant Odell Dick claimed the entire amount plus compensation. The court maintained the interpleader suit and remanded the unit for a proper determination in the suit by the trial court.

In *Hebel v. Ebersole* (**543, F.2d 14 (1976**) the court held that:

> independent stakeholder liability is asserted, however, need not vitiate a suit in interpleader as long as the necessary adversity between the interpleader parties exists in some fashion.

In *Syed Shamshul Haque v. Sitram Singh* (**AIR 1978 Patna 151**), the court in a case where money was due from harvested crops that the trial court had to try the suit in the ordinary manner and decide all relevant questions substantially in issue between the parties. The Court concluded that:

> the findings of this interpleader suit are to operate as res judicata. It is difficult to hold that it is open to the civil court, where such suits are filed to decide only the question of possession and to exercise a power similar to the power conferred on a Magistrate under the CPC while disposing of a property which has been used for commission of an offence. In our view it was incumbent upon the trial court to decide the suit in an ordinary manner recording findings of the issues.

In *Raja Bhagwali Baksh Singh v. The Civil Judge* (**AIR 1961 All. 559**) the high court held that:

> under sub rule (3) of Rule 4 of Order XXXV, which applies to interpleader suits, there is clear direction that once the suit has proceeded on trial, it shall be tried like any other suit in the ordinary manner. Order VI of the Code is applicable to suits and there is no reason why it should not be applicable to a suit which had its beginning as an interpleader suit.
>
> If the pleadings placed by the several claimants to the property, the subject matter of the interpleader suit, should claim that there is some further property which is part of the estate but has somehow or the other being omitted from it and should also be brought within the suit, there is no reason why it cannot be done so. Neither Section 88 CPC nor Order XXXV

has required to the contrary. On the other hand, the later has enjoyed that the suit shall proceed in the ordinary manner.

68. In terms of the cases cited, it is clear that the person filing the suit being the stakeholder should be neutral so far as the rival claims to the debt or property are concerned for which the parties have been interpleaded. However claims that are incidental to the title dispute must be addressed because if they are not decided in the interpleader suit, one consequence of the decision in the interpleader suit is that it will discharge the stakeholder of all liabilities towards the debt or property and the decision will operate as *res judicata* against all claims. This is detriment to the rights of the claimants. It also means that multiple cases can be filed with reference to allegations of negligence, breach of fiduciary duty and capacity which may lead to decisions in various claims which are inconsistent with one another. Furthermore the stakeholder cannot use the interpleader suit to protect itself from any liability, meaning that a valid interpleader action cannot be a shield for the stakeholder from counter claims, where the stakeholder is not free from blame with reference to the disputed claimants.

69. In this context while reading Section 88 of the CPC, the words "for the purposes of obtaining a decision" means that an interpleader suit shall be filed where a person fears multiple claims for the same debt or money or property so as to ensure that ownership or title is decided in one suit, where all parties are interpleaded. So the person filing the suit has some obligation to discharge with reference to the debt, money or property and needs to know whom to discharge it against. This being the primary purpose of the suit will not restrict a decision on liabilities that are related to the title dispute. There is nothing in Section 88 CPC which prevents a decision on claims against the person filing the suit which are related to its obligation to pay the debt, money or property. Section 88 CPC does not create special jurisdiction in which the interpleader suit is to be heard, it merely sets out the procedure to be followed in such cases. The true origin of this jurisdiction is in equity, where the plaintiff comes to court claiming no interest in the debt, money or property, against several claimants so as to rid itself of the

controversy in one suit. Interpleader relief is discretionary subject to the plaintiff meeting the basic conditions that is it has no interest in the debt, money or property, has not colluded with any claimant and is willing to make the payment or transfer. Therefore it is a power that the court has while deciding cases of this nature. Accordingly there is no bar in Section 88 of the CPC with respect to consequential relief sought by the claimants, nor do the words "for the purposes of obtaining a decision" in Section 88 CPC limit the jurisdiction of the court to decide connected issues. In fact it is vital to determine interrelated issues, because otherwise they continue to perpetuate the adversity between the parties being relevant to the title issue. We have examined the cases cited by the Respondents and find that the cases relied upon by the Respondents do not limit the extent to which relief can be granted in an interpleader suit by the Court. The cases relied upon set out the requirements to file an interpleader suit and the procedure to be adopted, but do not limit the jurisdiction to grant relief. In fact the literature suggests that the decision of the Court in an interpleader suit shall indemnify the plaintiff on the payment of money or delivery of property against claimants and that if other suits are filed they must be stayed. This goes to the point that if the claimants claims are not decided in the interpleader suit, they will be adversely affected and even if the plaintiff claims it does not seek indemnification the decision will operate as *res judicata* between the parties.

70. We are persuaded by various judgments from other jurisdiction, which show the liberal approach to interpreting interpleader suits so as to ensure that the entire controversy is decided upon in the suit to avoid multiple litigation *on the question of the extent to which relief can be given*. In *Johnston v. Sunwest Bank of Grant County* (**116 N. M. 422, 863 P.2d 1043 (1993**) the court held that a stakeholder cannot be granted immunity from liability of damages that are related to the reasons for interpleading the parties. The court found that *the purpose of interpleader is to avoid multiple litigation, and to protect disinterested stakeholders against conflicting claims to property or a fraud. It allows a party against whom two or more persons are making a claim to bring an action joining as defendants all such claimants for the purpose of adjudicating whether he is liable to anyone.* The

Court further held that *Interpleader is remedial in nature, and interpleader statutes are to be liberally construed*. The Court further held that *Further, while interpleader relieves a petitioner from any necessity to litigate ownership of a fraud, it does not relieve the petitioner from defending itself from negligence allegations, even if the same funds are involved*. The Supreme Court of the United States in *Republic of the Philippines, et al., v. Jerry S. Pimentel, Temporary Administrator of the Estate of Mariano J. Pimentel, Deceased, et al*. (**128 S.Ct.2180 (2008**) held that *the purpose of the interpleader device is to allow "a party who fears being exposed to the vexation of defending multiple claims to a limited fund or property that is under his control a procedure to settle the controversy and satisfy his obligation in a single proceedings". Accordingly, the interpleader allows a stakeholder who "admits it is liable to one of the claimants, but fears the prospect of multiple liability to file suit, deposit the property with the court, and withdraw from the proceedings." Metro Life Ins. Co. v. Price, 501 F.3d 271, 275 (3d Cir. 2007). The result is that the competing claimants are left to litigate between themselves" while the stakeholder is discharged from any further liability with respect to the subject of the dispute*. The court further held that *the typical interpleader action proceeds in two distinct stages. During the first stage, the court determines whether the interpleader complaint was properly brought and whether to discharge the stakeholder from further liability to the claimants. During the second stage, the court determines the respective rights of the claimants to the interpleaded funds*. The court further held that *under the old interpleader practice, if a claimant alleged that the stakeholder was independently liable to him or her, the stakeholder would lose its right to bring the interpleader action. The modern approach, however, is that, where a claimant brings an independent counterclaim against the stakeholder, the stakeholder is kept in the litigation to defend against the counterclaim, rather than being dismissed after depositing the disputed funds with the court.* In *Travelers Ins. Co. v. Montoya* (**566 P.2d 105 (1977**), the Court of Appeals of New Mexico held that a counter claim should be considered in an interpleader suit, especially since the stakeholder had filed the suit. In the same way in *Christina Louise ROBERTSON, Executrix of the Estate of Marian Winski v. La*

LINDA, INC. and John Z. Winski (**548 So.2d 1308 (1989**), the Supreme Court of Mississippi has also allowed a counter claim to be adjudicated upon in an interpleader suit as it arose out of the same transaction which is subject matter of the interpleader suit.

71. After hearing the parties and examining the case law, we find that the scope of an interpleader suit must be liberally construed while the person filing the suit must be neutral to the outcome of the suit, that is to whom the debt or property is to be transferred. So for clarity the person filing the interpleader suit should have no claim in the debt or property. That does not mean that the claimants' contention with reference to the role of the stakeholder, the person filing the suit, should not be considered or any liability of the stakeholder not be considered if it is directly linked to the transaction of the debt or property. The typical interpleader is an innocent stakeholder, who is subject to competing claims, however where the claims of the defendants are inextricably interrelated it has to be adjudged in the same suit. The relevant ingredient to file the interpleader suit is that the plaintiff/stakeholder be neutral to or disinterested in the payment of the debt or property. However if the plaintiff/stakeholder has incurred a liability against the claimant(s), which has nexus to its obligations and capacity, then such claims should be finally decided in the interpleader suit. The trial court cannot discharge the plaintiff/stakeholder from further liability in order to sustain the interpleader suit as this would give an undue advantage to the plaintiff filing the suit, where there is potential for claims for damages. No doubt there are conflicting claims for the same debt or property, however the plaintiff cannot escape the outcome of its liability simply by electing to file an interpleader suit. Hence the interpleader suit will not discharge the plaintiff from allegations of negligence, fraud or on fiduciary duty which go to the duties and obligations and capacity of the plaintiff and gives rise to a counter claim of damages and loss.

72. We are also of the opinion that Order XXXV Rule 3 and 4 of the CPC sets out the procedure to be followed where there is potential of a counter claim. Order XXXV Rule 3 CPC provides that where any defendant in the interpleader suit is suing the plaintiff in respect of the subject matter in the interpleader suit that suit of

the defendants shall be stayed and his cost in the stayed suit may be provided for in the interpleader suit, meaning that the interpleader suit shall proceed and the defendants suit has to stop. As the rules provide that the suit of the defendants be stayed and the defendants can claim its costs in the interpleader suit, it means that the defendants can raise their claim in the interpleader suit as to be able to recover its costs. So long as the defendants claim emanates out of the same debt, money or property over which ownership is in dispute and is related to the capacity or obligations of the plaintiff in the interpleader suit, including allegations of negligence and breach of duty, there is no reason why it cannot be taken up in the interpleader suit. Consequently, where the interpleader suit relieves the plaintiff from defending itself against rival claims it does not relieve the plaintiff from defending itself from allegations of negligence or breach of duty with reference to the debt, money or property in question. Furthermore given that a fundamental purpose of the interpleader suit is to avoid multiple litigation and cost, interpleader suits must cover the entirety of the disputes to avoid all possible exposure to litigation on the same debt, money or property.

73. Therefore, we find that an interpleader suit is decided in two stages, the first where the court determines the issue of ownership or title and the second to decide on any consequential or incidental relief with respect to the rights of the claimants. In this case, based on the facts, we find that this is necessary because Respondents No.1 and 2 opted to bring the interpleader suit against the Appellants opting to have *its case* decided in one case, against all claimants. Hence Respondents No.1 and 2 cannot hide behind this suit to avoid any independent liability arising out of negligence, breach of duty and capacity issues, basically all relating to the manner in which the sukuk certificates and its transfer was handled by Respondents No.1 and 2 in the first instance. So Respondents No.1 and 2 cannot use the interpleader suit to shield itself and to protect itself from valid counter claims, which counter claims would have been adjudged but for the interpleader suit. Hence we are of the opinion that the relief claimed by the Appellants should have been decided in the interpleader suit.

74. In this context, the Impugned Judgment has decided Issue No.4 on vicarious liability of Wapda and the Sukuk Company based on its findings on Issue No.14-C. The said issue relates to breach of trust and failure of Respondents No.1 and 2 to discharge their obligations. The Impugned Judgment finds that Wapda and the Sukuk Company are victims of the fraud and they acted in good faith especially with reference to Ex.P24 when they acted on NFC's instructions. It also finds that Wapda and the Sukuk Company were diligent and gave the required duty of care, hence were not negligent. At the very outset, we note that these findings run contrary to the findings in Issue No.14 on fraud where the Impugned Judgment finds that a case of fraud is made out based on Ex.D1-32, which finds certain employees of Wapda and the Sukuk Company to be liable for fraud and criminal breach of trust under the PPC. On the one hand the Impugned Judgment has relied totally on Ex.D1-32, the judgment of the Special Judge (Central) Lahore whereas in Issues No.14 and 14-C, the Impugned Judgment finds that Wapda and the Sukuk Company to be a victim of fraud. These findings on the face of it are contradictory.

75. Issue No.4 is that *If forgery or fraud took place, the plaintiffs are vicariously liable to the holders or Sukuk Certificate for such forgery or fraud committed by their employees, and the plaintiffs are liable to their negligence, for an amount equivalent to the value the Sukuk and the Ijara thereon?* This issue is with reference to the vicarious liability of Respondents No.1 and 2, in the event of fraud, forgery or negligence. Issue No.14-C is *Whether the plaintiffs have committed serious breach of the trust and contract and have failed to discharge their obligations, duties and responsibilities and are thus not entitled to obtain indemnity for themselves?* This issue is with respect to the breach of trust and contractual obligations of Respondents No.1 and 2 and whether they are entitled to indemnity under Section 88 CPC. The Impugned Judgment finds that there is no evidence of negligence or breach of trust or failure to perform as per the obligations of Respondents No.1 and 2. This is the same argument made by Counsel for Respondents No.1 and 2. Although Respondents No.1 and 2 do not seek indemnity under Section 88 CPC, the issue of breach of trust and contractual obligations is relevant to the dispute between the parties. Respondents No.1 and 2 instituted the

interpleader suit on 12.12.2009. In the plaint they claim that fraud came to their knowledge on 25.4.2009 (Ex.P34) when NFC wrote to them informing them that they had not sold 72 sukuk certificates to SES. Respondents No.1 and 2 formed a fact finding committee (Ex.D1-10) which inquired into the matter and concluded in its report (Ex.D1-11) that Wapda Bonds Cell did not comply with the requirements set out in clause 10 of the Agency Agreement (Ex.P15). Further that the special security marker provided by the Pakistan Security Printing Corporation vide letter dated 3.5.2006 for verification of the sukuk certificates was not used when verifying the 72 sukuk certificates for transfer to SES. They also found issues with the authorization of Hammad Rasool as Company Secretary (Ex.P32) and with his letter of 22.4.2009 (Ex.D2-20). These findings by the fact finding committee (Ex.D1-11) are sufficient to establish a case of breach of contractual obligations and negligence by Wapda Bonds Cell. Furthermore the judgment by the Special Judge Central Lahore (Ex.D1-32) also finds that Wapda Bonds Cell and employees of the Sukuk Company were negligent of their duties. Hence findings of criminal breach of trust were made against some of the employees of Wapda Bonds Cell. Again this document also testifies to the negligence and breach of contractual obligations by Respondents No.1 and 2.

76. We have also gone through the transaction documents being the Agency Agreement (Ex.P15) and the Declaration of Trust (Ex.P16). As per the Agency Agreement (Ex.P15) Wapda Bonds Cell was the Registrar and Transfer Agent with respect to the sukuk certificates as well as the Replacement Agent. The duties and obligations of the Registrar and Transfer Agent are provided for in clause 9 and 10 of the Agency Agreement. Amongst the duties of the Registrar, we note that clause 9 requires the Registrar to maintain proper records of the details of all documents and certificates received by itself or any other Transfer Agent, to register all transfers and to prepare the list of certificates holders. Under clause 10, the Transfer Agent is responsible for the transfer of the certificates in accordance with the terms and conditions prescribed in the Agency Agreement (Ex.P15). As per clause 19.5, the Agent is obligated to perform such duties as is set out in the Agreement and the certificates which essentially means the duties related to the transfer of the sukuk

certificates and the registration of title holders. The manner in which the register and transfer of certificates is to be delivered is provided for in the schedule to the Agency Agreement (Ex.P15). In the same way the Declaration of Trust (Ex.P16) renders the Sukuk Company liable for performance in accordance with the terms and conditions and obligations set out in the transaction documents and further requires in terms of clause 10 that they have the duty of care towards their investors and are liable with respect to the negligence, default, breach of duty or breach of trust. In his evidence PW-1 acknowledges the obligations and duties under the transaction documents particularly the Agency Agreement (Ex.P15) and the Declaration of Trust (Ex.P16) which includes the process of scrutiny and verification at the time of transfer and registration of the sukuk certificates in the Register of Certificate Holders. With reference to these duties and obligations he admits in his evidence that investigation against the employees of Wapda Bonds Cell which is responsible for the security and scrutiny of the sukuk certificates:

> واپڈا کے افسران جن کے خلاف FIR درج ہوئی اُن میں محمد نقی ریاض بجٹ اینڈا کاؤنٹ آفیسر آغا غضنفر علی اسسٹنٹ، بجٹ اینڈ اکاؤنٹ آفیسر اور محمدسعید رانا اسسٹنٹ بجٹ اینڈ اکاؤنٹ آفیسر کے نام شامل تھے۔ یہ تینوں ملزمان واپڈا بانڈ سیل میں تعینات تھے۔
> واپڈا کے جن تین ملزمان کا میں نے ذکر کیا ہے یہ وہ افراد تھے جن کےذمہ واپڈا بانڈ سیل میں منتقلی ملکیت فزیکل سکوک سرٹیفیکیٹس کی سکرونٹی تھی۔ سکرونٹی بابت فزیکل سکوک سرٹیفیکیٹس جوکہSES کے حق میں جاری ہوئے۔ اُن تینوں افراد نے کی۔ سکرونٹی ٹیم کے انچارج محمدنقی ریاض تھے۔

He also admits to the fact that he also saw 72 sukuk certificates in the verification process to affect the transfer from SES to AIMC and consequently he initialed Ex.P32 (letter from the Sukuk Company to the CDC requesting the use of global terminal facilities). He admits in his evidence that all necessary steps were taken for the transfer of the sukuk certificates from NFC to SES and from SES to AIMC. As per his evidence, Respondents No.1 and 2 followed the procedure and were not negligent in their duties. At the same time he admits that he along with another were terminated from service by Respondents No.1 and 2 on account of their negligence in the verification of the sukuk certificates and their transfers but he stated that subsequently they were reinstated by the Federal Service Tribunal.

77. Therefore, from the evidence of PW-1 the obligations and duties set out in the transaction documents especially the Agency Agreement (Ex.P15) and the Declaration of Trust (Ex.P16) were complied with and followed by Respondents No.1 and 2. However, this evidence is contradicted by the Wapda's own fact finding committee's report (Ex.D1-11) which clearly states that the employees of Wapda Bonds Cell were negligent in their duties with respect to the transfer and verification of the sukuk certificates.

78. Another document of relevance is the Special Audit Report (Ex.D2-10) which also sets out a case of negligence against Respondents No.1 and 2. This report finds that Respondents No.1 and 2 did not exercise proper verification of the sukuk certificates nor did they confirm from the transferors and transferees of the sukuk certificate's transfers. It finds that regulations for transfer of the sukuk certificates by the Wapda Bonds Cell were made on 9.5.2009 (Ex. D2-9) after transfer to SES and AIMC were effected. Consequently senior management of Respondents No.1 and 2 should have set out internal checks to prevent fraud. Further that the transfer should have been on the CDC and not physically. Also that there was no application of security checks by Respondents No.1 and 2 as required by the Pakistan Security Printing Corporation (Private) Limited to check the genuineness of the certificates. That they did not use the required security marker, which means that it was easier to make fake certificates. The Audit Report details the areas where Respondents No.1 and 2 were negligent and failed to take necessary steps, including an internal audit of the sukuk certificates. PW-1 admits to these facts and states that the public accounts committee unilaterally concluded that Wapda Bonds Cell should improve its internal controls to avoid fraud. In this regard, the Special Audit Report finds that the Sukuk Company failed to function as an efficient company which caused reputational damage to Wapda. In the context, the Auditor's Report as at June 30, 2015, dated 18.9.2015 (Ex.D2-4) finds Respondents No.1 and 2 should bear the loss of Rs.180,000,000/-. Hence a clear case of negligence and breach of duty is made out against Respondents No.l and 2, that its employees were involved not only in the negligence but also failure to ensure performance of its contractual duties. Consequently we find that the stated

Respondents failed to take appropriate steps to prevent fraud and were negligent as they failed to ensure the required safety and security mechanisms for transfer of the sukuk certificates. This is evident from the fact that they devised the required SOPs for the verification process on 9.5.2009 whereas they began the process of sale and transfer of the sukuk certificates in 2006.

79. In this regard, we find that Respondents No.1 and 2 have tried to shield themselves from any liability with reference to their negligence by filing the interpleader suit, and thereafter claiming that the only issue which needs determination in the interpleader suit is as to whom payment of ijara should be made, that is to decide who is the owner of the disputed sukuks. While we have held that they failed to make out a case of fraud, a case of negligence and breach of duties is evident from the evidence. Therefore, Respondents No.1 and 2's contention that there is no cogent evidence of the negligence and breach of duty by its employees is without basis, as their own documents testify to the negligence. Consequently, Respondents No.1 and 2 are liable for the negligence which resulted in the duplication of 72 sukuk certificates. They failed to provide the investors with the required contractual duty of care and trust which is evident from their own fact finding report, special audit report and audit report. Hence they are liable to pay NFC the price of the 72 sukuk certificates that it claims it did not sell and by way of compensation it cannot recover the ijara payments made to NFC. Consequently we find that Respondents No.1 and 2 cannot seek to recover ijara payments from NFC on account of its own negligence and payments by NFC received will suffice as compensation for NFC. This is especially so as NFC has not claimed any specific loss or damage from Respondents No.1 and 2 and the compensation in the form of retaining the ijara payments is to compensate for the negligence caused by Respondents No.1 and 2.

80. In view of the aforesaid, all these appeals are **allowed** and the impugned judgment and decree dated 14.4.2017 passed by the Civil Judge 1st Class, Lahore is set aside.

(**Shahid Bilal Hassan**)
Judge

(**Ayesha A.Malik**)
Judge

Announced in an open Court on ***1st day of December, 2021***.

Judge ***Judge***

Approved for Reporting

Judge ***Judge***

*Allah Bakhsh***