*Quarterly*

# Case Law Update

*Online Edition*

Volume 4, Issue-II (April-June 2023)

**Published by:**
**Supreme Court Research Centre**

**Available online at**:
https://www.supremecourt.gov.pk/downloads/?wpdmc=research-center-publications

## Synopsis of Contents

**Supreme Court of Pakistan**

## Supreme Court of Pakistan

### 1. *Akber-Ud-Din v. Headmaster Government High School Reshun*

**https://www.supremecourt.gov.pk/downloads_judgements/c.a._1494_2017.pdf**

**Present:**
**Mr. Justice Qazi Faez Isa** and Mr. Justice Muhammad Ali Mazhar

***Abuse and misuse of the process of the court***

The appellant approached the Supreme Court of Pakistan by filing an appeal asserting therein that he had attended a Government High School from 9 September 1994 to 16 November 1995 and had asked the school to issue him a character certificate. The school issued the Character Certificate which stated that the appellant was caught cheating in an examination, cheating material was recovered from him, he lost his temper and abused and tore the exam paper, whereafter his name was stuck off from the school's record. He filed a civil suit, which was partially dismissed. The court directed the school to issue another character certificate to him, with the condition that it should not include the statements present in the earlier one. However, the prayer for damages was declined. He filed another suit for damages. However, the plaint in the said second suit was rejected under Order VII Rule 11 of C.P.C. by the High Court. Hence, this appeal.

**Mr. Justice Qazi Faez Isa** speaking for the bench observed that, "we have rarely witnessed such abuse and misuse of the process of the court as in this case. The appellant attended the school for hardly a year and upon his expulsion sought issuance of a character certificate, which was issued recording the above. Somehow the appellant managed to procure a clean character certificate. But, still he was not satisfied. After almost two decades he sued for damages. The suit was hopelessly time-barred, yet it was entertained. The learned Judge of the High Court had put a stop to the abuse of the process of the court, but the appellant remains incorrigible. The appellant initiated litigation, including this appeal, which is entirely frivolous. The appellant was unnecessarily accommodated and the school and its staff were involved in endless litigation. Court time and public resources were squandered. Therefore, this appeal is dismissed with costs throughout and by imposing costs of fifteen thousand rupees herein, which the appellant shall pay to the school." **Para 5**

### 2. *Syed Zahid Hussain Shah v. Mumtaz Ali and others*

**https://www.supremecourt.gov.pk/downloads_judgements/c.a._2015_2022.pdf**

**Present:**
**Mr. Justice Qazi Faez Isa** and Mr. Justice Yahya Afridi

***The law requires that a court should first attend to the matter of court-fees***

In this case, the main legal point, inter alia, before the Court was whether the respondents' rights were infringed or interest undermined on account of non-payment of court-fees or by its belated payment.

**Mr. Justice Qazi Faez Isa** speaking for the bench observed that the cases in which money is due to the opposite-party, such as sale consideration in a suit seeking specific performance of contract or a statutory provision requiring deposit of the amount in a preemption suit to secure the interest of the purchaser, cannot be equated with cases in which court-fees is not paid or belatedly paid; payment of court-fees is not received by the opposite-party. Non-payment or belated payment of court-fees does not adversely affect the interest of the opposite-party. The learned ADJ should not have proceeded to decide the appellant's appeal till he had paid court-fees. In the instant case the appeal was allowed, and thus it would have been in the interest of the appellant to have paid it. If instead the appeal was dismissed the appellant may not have had an interest to pay it. **Para 23**

### 3. *Nawabzada Abdul Qadir Khan v. Land Acquisition Collector Mardan*

**https://www.supremecourt.gov.pk/downloads_judgements/c.a._364_p_2019.pdf**

**Present:**

**Mr. Justice Ijaz ul Ahsan**, Mr. Justice Jamal Khan Mandokhail and Mrs. Justice Ayesha A. Malik

***The benefit of section 34 of the Land Acquisition Act 1894 is statutory in nature and such benefit cannot be withheld from the***

***landowners on the ground that interest has been declared against the injunctions of Islam***

In this land acquisition case the university contends that the initially awarded compensation was correct, based on a one-year average of the acquired land. The Supreme Court rejects this argument, asserting that such a valuation contradicts the criteria outlined in Section 23 of the Land Acquisition Act 1894 ("Act"), which emphasizes the need for just and sympathetic compensation for those affected by eminent domain. The Supreme Court emphasizes that the term "interest" in Section 34 of the Act differs from conventional financial interest (riba). It clarifies that the interest awarded under Section 34 of the Act is compensatory, aiming to compensate landowners for financial losses incurred from the date of land acquisition until compensation is paid by the acquiring authority. Unlike typical financial transactions where parties are assumed to have equal bargaining power, the exercise of eminent domain, a unilateral government power, lacks consent from affected landowners. The Court stresses that the benefits of Section 34 of the Act are statutory and cannot be denied to landowners on religious grounds. It distinguishes this compensatory interest from predatory riba/usury, highlighting its beneficial nature in allowing landowners to recover losses resulting from the government's unilateral land acquisition until they receive compensation. In conclusion, the Supreme Court upholds the High Court's judgment, deeming it well-reasoned and finding no grounds for a different conclusion. The appeals were dismissed.

### *4. Muhammad Aqil v. Muhammad Amir*

**https://www.supremecourt.gov.pk/downloads_judgements/c.a.32_k_2018.pdf**

**Present:**
**Mr. Justice Ijaz ul Ahsan**, Mr. Justice Munib Akhtar and Mr. Justice Sayyed Mazahar Ali Akbar Naqvi

***Sale agreement with the minor is void ab initio and there is no need for such minor to challenge the said sale after attaining majority***

In this case the appellants argue that a sale agreement with a minor was ratified when the minor did not challenge it upon reaching adulthood. However, the Supreme Court determines that the agreement involving the minor is void from the beginning and, therefore, there is no need for the minor to challenge it upon attaining majority, as it did not affect any of her legal rights in the property. It emphasizes the distinction between voidable and void transactions, stating that only voidable transactions need to be set aside, while void transactions, which produce no legal effects, do not require such action. The term "setting aside" is deemed inappropriate for a document that has no legal effects, even though it may be used colloquially in the context of declaring a document invalid.

### *5. Snamprogetti Engineering B.V. v. Commissioner of Inland Revenue*

**https://www.supremecourt.gov.pk/downloads_judgements/c.p._3286_2017.pdf**

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

***Double Taxation - importance of international tax conventions and the mode of their interpretation***

The petitioner, a company incorporated in the Netherlands, entered into an engineering contract with a local company to provide "engineering services" for the plants and for the procurement of spare parts regarding a project i.e., construction of a fertilizer complex. The petitioner filed tax returns declaring that the income arising from such engineering services was exempt from being taxed under the domestic tax regime of Pakistan. The department took exception to the exemption claimed by the petitioner.

The sole question for determination before the Court was whether the income derived by the petitioner from providing afore-referred engineering services to the local company was exempt from income tax in view of the 'Convention between the Kingdom of the Netherlands and the Islamic Republic of Pakistan for the Avoidance of Double Taxation' ("Convention") or was it liable to be taxed under normal tax regime of Pakistan.

Justice Syed Mansoor Ali Shah speaking for the bench emphasized that international tax conventions or agreements or treaties are of a special nature and the role of a state (being party

to such a bilateral agreement) is more of implementing the terms of such agreement rather than that of interpreting the same and that too in a unilateral manner. Treaty interpretation rules, therefore, differ from domestic tax rules. The Court said that the petitioner, being a tax resident of the Netherlands, is entitled to the benefits and concessions under the Convention in line with the provisions of section 107 of the Income Tax Ordinance. Article 7 of the Convention provides that the business profits of an enterprise of one of the states shall be taxable in the other state only if the enterprise maintains a permanent establishment in the latter state and only to the extent that the profits are attributable to the permanent establishment. The term 'permanent establishment' is dealt with under Article 5 of the Convention. The Court noted that the High Court, the Tribunal and the Commissioner (Appeals) all reckoned that the case of the petitioner was covered by Clause 4 of Article 5 of the Convention. However, they used different approaches to calculate the period of four months, necessary for any activity of furnishing services to be categorized as a permanent establishment. The Court held, "[t]he language used in Clause 4 of Article 5 of the Convention with respect to time period shows that there may be a number of periods, interspersed with breaks, during which services are furnished by an enterprise. If the aggregate of these periods crosses the threshold of four months within any twelve-month period, a permanent establishment will stand constituted. What could be the way to separate breaks from periods of activity other than counting the days of the actual physical presence of employees or other personnel engaged in furnishing services by an enterprise in the source country. We agree with the High Court that the engineering services for which the contract was executed were in relation to the construction and installation of fertilizer plants but we disagree with the High Court as regards the finding that the obligations of the petitioner relating to furnishing of services were in respect of the construction of the plants at the site and continued for the entire period of the validity of the contract. We do not see that contracts covering activities other than engineering services were concluded with the petitioner or related persons. The nature of the work involved in engineering services and construction activity could not be said to be the same. It has not been shown that the same employees rendered engineering services and performed construction activities under different contracts. Nor has it been brought on record that engineering services and construction activities would have been covered by a single contract except for tax planning considerations." The Court said that the department has failed to bring on record any evidence satisfying the threshold requirement of Clause 4 of Article 5 of the Convention that the petitioner had furnished services within Pakistan through employees or other personnel for a period or periods aggregating more than four months within any twelve-month period. "The furnishing of services as envisaged under the Convention does not, of itself, create a permanent establishment unless it continues for a period or periods aggregating more than four months within any twelve-month period." The Court came to the Conclusion that the representatives of the petitioner admittedly stayed in Pakistan for 97 days only which falls short of the requirement of continuation of services for four months in each year and, therefore, the provision of engineering services by the petitioner could not be placed in the category of permanent establishment set out in Clause 4 of Article 5 of the Convention. The income derived by the petitioner from the provision of engineering services to the local company being not attributable to a permanent establishment located in Pakistan is not taxable in Pakistan as long as it is not covered by other Articles of the Convention that would allow such taxation. The petitioner was therefore held entitled to the exemption provided in the Convention, and the income derived by the petitioner from providing the afore-referred services to the local company was declared exempt from income tax in Pakistan because of not fulfilling the conditions necessary to constitute a permanent establishment as set out in Clause 4 of Article 5 of the Convention.

### 6. *Muhammad Nawaz v. Additional District and Sessions Judge*

**https://www.supremecourt.gov.pk/downloads_judgements/c.p._2414_l_2015.pdf**

**Present:**

**Mr. Justice Syed Mansoor Ali Shah** and Mr. Justice Jamal Khan Mandokhail

***DNA test cannot be conducted without consent of the party in civil cases***

The matter arose out of a suit filed by the respondents asserting themselves to be the legal heirs of the deceased Muhammad Hussain, being

his nephews, and challenging a gift mutation, purportedly got sanctioned by Muhammad Hussain in favour of the petitioner, wherein the petitioner was mentioned as the son of Muhammad Hussain. The respondents asserted that their uncle, Muhammad Hussain, died issueless and the petitioner was not his son, and that the petitioner had got sanctioned the gift mutation fraudulently. At the trial, after the close of the petitioner's evidence, the respondents made an application alleging therein that the petitioner was the son of one Taj Din and his wife Zubaida Bibi, and prayed for the DNA test of the petitioner and of the said Taj Din and Zubaida Bibi to rebut the evidence produced by the petitioner regarding his parentage. The trial court dismissed the said application but it was allowed by the revisional court. The writ petition filed against the order of revisional court was dismissed.

Justice Syed Mansoor Ali Shah speaking for the bench expressed astonishment that the revisional court ordered the DNA test of two persons, namely, Taj Din and his wife Zubaida Bibi, who are not privy to the proceedings of the suit either as a party or witness; who were not heard in the matter; and no law was referred under which such an order could have been made, without their consent. It was further said that the High Court has maintained the order again without providing any opportunity of hearing to them and without pointing out and relying upon any law under which the DNA test of a person can be ordered, without his consent, in a civil case. The Court held that the conducting of the DNA test of a person, without his consent, infringes his fundamental rights to liberty and privacy guaranteed by Articles 9 and 14 of the Constitution. "A court order for the DNA test of two persons as a means of identifying their genetic relationships interferes with their right to privacy and liberty. This test can be ordered only either with the consent of the persons concerned or without their consent if permissible under a law."

The Court held that in a civil case, if the person upon whom the onus to prove his genetic relationship with another person lies, does not give consent for his DNA test, and thus withholds such evidence, the court may draw an adverse presumption against the claim of such person and presume that such evidence, if produced, would be unfavourable to him, as per Article 129(g) of the Qanun-e-Shahadat, 1984. But the court cannot draw such an adverse presumption if a person, who is not a party to the proceedings before it, does not give his consent and present himself for his DNA test. Further, the presumption under Article 129(g) of the Qanun-e-Shahadat, 1984 being permissive, not obligatory, in nature, the court may or may not draw such presumption in the peculiar facts and circumstances of a case. The order of the revisional court was declared to have been made without lawful authority.

### *7. Khan Afsar v. Mst Qudrat Jan*

**https://www.supremecourt.gov.pk/downloads_judgements/c.p._3573_2020.pdf**

**Present:**

**Mr. Justice Yahya Afridi** and Mr. Justice Syed Hasan Azhar Rizvi

***Commencement of period of limitation for a mortgagor to redeem the mortgage***

The issue relating to the commencement of the period of limitation for a mortgagor to redeem the mortgaged property was the contested point between the parties.

Justice Yahya Afridi speaking for the bench observed that the cause of action for a mortgagor to redeem the mortgage and recover the possession of the mortgaged property would commence from the point when the mortgagor can, under the terms of the mortgage, redeem the mortgage property or recover the possession thereof. The situations that may arise include the following scenarios:

(i) Where, under the terms of the agreement, a specific date has been fixed for payment of mortgage debt: In such a case, the money can only be payable after the expiry of that period and no right to redeem the mortgaged property can legally be entertained before the said date. A suit for redemption of the mortgaged property can be instituted by the mortgagor against the mortgagee within sixty years, and the limitation would start running from the date so agreed to redeem the mortgage or recover possession of immovable property mortgaged under Article 148 of the Limitation Act.

(ii) Where, under the terms of the agreement, the mortgage is for a fixed period but without a specific date of expiry of the term: In such a case, the right of redemption can only arise on the expiration of a specified period and not before. A suit for redemption of the mortgaged property can be instituted by the mortgagor against the mortgagee within sixty years, and the limitation

would commence from the expiry of the period so fixed.
(iii) Where, under the terms of the agreement, neither any specific date nor any term is fixed: In such a case, a suit for redemption of the mortgaged property can be instituted by the mortgagor against the mortgagee within sixty years, and the limitation would run from the date of the agreement of mortgage.
In the case before the Court, admittedly the mortgage of the disputed property was entered on 21.07.1935 and the term of the mortgage was agreed and fixed for a term of twenty years. Thus, the Court said, the term of twenty years would expire on 21.07.1955, and thereafter, the period of limitation of sixty years would commence, and the respondents/mortgagors could file a suit for redemption of the mortgage property until 21.07.2015. The claim of the respondents/mortgagors filed on 21.06.2010 was held well within the stipulated period of limitation.

### *8. PEMRA v. The Pakistan Broadcasters Association*

**https://www.supremecourt.gov.pk/downloads_judgements/c.a._11_2022.pdf**

**Present:**
Mr. Justice Ijaz Ul Ahsan, **Mr. Justice Munib Akhtar** and Mr. Justice Sayyed Mazahar Ali Akbar Naqvi

***Delegation under section 13 of PEMRA Ordinance could only be in terms of, and subject to, legally relevant and sustainable conditions imposed by rules***

The Pakistan Broadcasters Association, aggrieved by a decision made by the Regulatory Authority to delegate its powers under section 13 of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002, to its Chairman, challenged this delegation before the High Court of Sindh. Consequently, all actions taken by the Chairman pursuant to the delegated powers for the suspension of Broadcast Media Licenses were declared null and void. Subsequently, the Pakistan Electronic Media Regulatory Authority approached the apex court of Pakistan to appeal the judgment of the Sindh High Court.

**Mr. Justice Munib Akhtar** speaking for the bench observed that section 13 can be regarded as having three "parts", with the proviso as an (important) tailpiece. Firstly, and most obviously, the section states that the power of delegation is discretionary. The exercise of the power can be in terms general or special. Secondly, it identifies to whom, and of what, the delegation can be made. Here, the section has, prima facie, been cast in broad terms. This "part" can be regarded as having two aspects. Any power, responsibility or function of the Authority can be delegated. And such delegation can be to anyone, whether he is the "Chairman or a member or any member of its staff, or an expert, consultant, adviser, or other officer or employee". Thirdly, the section provides that the Authority may subject any delegation to conditions, which are to be provided for in the rules. The power to make rules, "to carry out the purposes of this Ordinance", is conferred on the Authority by section 39. It is however subject to the approval of the Federal Government. Finally, the proviso identifies what cannot be delegated. Since the position adopted by learned counsel for the Authority was that the section was to be read literally the three "parts" were, in effect, to be applied disjunctively. This would mean, in the case of the power of suspension, that it could be delegated by general or special order; that it could be delegated to any of the persons identified in the section; and that the Authority might (or might not) subject the delegation to any conditions. It was put to learned counsel during the hearing that this would mean that potentially the power of suspension could, e.g., be delegated to the junior most officer or employee of the Authority or even to an outsider such as an expert, consultant or adviser. That would, it was queried, be a rather startling result. To this learned counsel, with respect, could not come up with a convincing reply consistently with his position that the section had to be applied and read simply as it stood. That was held not to be a defensible position.
**Para 7**

**Hon'ble Judge** further observed that the Authority also failed, and this was in itself a fatal legal error, to take the "third" part into account. Even if the power of suspension is delegated to the Chairman for legally valid and sustainable reasons, the "threshold" for not exercising its "discretion" in relation to the imposition of conditions in relation to such delegation is so high that, as explained, it effectively vanishes. Conditions had to be

imposed, and that had to be done by rules. However, no conditions were imposed. Indeed, there was no consideration at all of this aspect. A blanket delegation was made, in near absolute terms. The actual decision to delegate did provide that the Chairman, "after exercising such powers", was to "bring such action into the notice of the Authority at its forthcoming meeting". However, this "condition", even if it could be so called (and in our view it cannot) was inconsistent with the proper understanding and application of the power of delegation, as set out herein above. In the legal sense therefore no condition was at all imposed. In our view this was an error that went to the very root of how section 13 is to be understood and lawfully applied. The High Court was therefore right in requiring that the delegation could only be in terms of, and subject to, legally relevant and sustainable conditions imposed by rules. The delegation being legally unsustainable was correctly quashed and set aside. **Para 12**

### *9. Afiya Shehrbano Zia v. The Hon'ble Supreme Judicial Council*

**https://www.supremecourt.gov.pk/downloads_judgements/const.p._19_2020.pdf**

**Present:**
Mr. Justice Ijaz Ul Ahsan and **Mr. Justice Munib Akhtar**

***Article 209 of the Constitution does not apply to a person who has retired or resigned from the office of a Judge of the Supreme Court or a High Court***

In this case, the "grievance" of the petitioners related to those Judges against whom a complaint (or perhaps even a reference) had been filed before the Council but who either retired or resigned before a report was made by the Council to the President or he made an order thereon.

Mr. Justice Munib Akhtar speaking for the bench observed that, "it is clear that the Constitution draws a distinction between a person who, at the relevant time, holds office as a Judge and one who, having held that office in the past, does not. Article 209 applies only to the former and not the latter. Thus, e.g., clauses (2) and (3) of Article 202 refer, respectively, to a "person who has held office" "as a Judge of the Supreme Court or of a High Court" or "as a permanent Judge". In similar vein, Article 182 allows, inter alia, for "a person who has held the office of a Judge of [the Supreme] Court" to attend sittings of the Court as an ad hoc Judge, and then goes on to state that "while so attending an ad hoc Judge shall have the same power and jurisdiction as a Judge of the Supreme Court". Other such examples are also to be found. This bolsters the conclusion that Article 209 has no application in the postulated situation. Finally, it must be noted that if accepted the logic of the proposition could be taken to the point that a complaint could even be filed under Article 209 against a Judge who has retired or resigned after he has left office, in relation to allegations of misconduct while in office. This is so because the petitioners advance the proposition on the basis of what they regard to be a matter of principle. If such a principle exists then arguably its application cannot be limited to the fortuitous circumstance as to whether there was a complaint pending against the allegedly errant Judge as on the date he retired or resigned. On the logic of the proposition such a complaint could conceivably be filed even years after the retirement or resignation (i.e., the alleged misconduct). Such an outcome is quite obviously beyond the contemplation of the Constitution. This is yet another reason why the proposition postulated cannot be regarded as correct." **Para 4**

### *10. Muhammad Aslam v. Muhammad Anwar*

**https://www.supremecourt.gov.pk/downloads_judgements/c.a._781_2017.pdf**

**Present:**
**Mr. Justice Amin-ud-Din Khan** and Mr. Justice Syed Hasan Azhar Rizvi

***Time is the essence of the contract when date for performance and consequences for non-performance are specifically mentioned***

The case involves a suit for specific performance of an agreement to sell immoveable property. The terms of the agreement emphasized the importance of time as the essence of the contract, specifying consequences for non-performance by the plaintiff-vendee, including cancellation of the agreement and confiscation of earnest money. The plaintiff admitted inability to arrange the

remaining consideration amount on the performance date. The Supreme Court determined that time was crucial in this contract, and given the plaintiff's fault, he was not entitled to the discretionary relief of specific performance. The appeal was allowed and judgments of lower courts set aside.

### *11. Gufran Ali v. Haseeb Khan*

**https://www.supremecourt.gov.pk/downloads_judgements/crl.p._1617_2022.pdf**

**Present:**
Mr. Justice Yahya Afridi and **Mr. Justice Sayyed Mazahar Ali Akbar Naqvi**

***Determination of Age in Criminal Responsibility: A Question of Evidence and Legal Interpretation***

The Supreme Court of Pakistan deliberated on the case concerning the determination of the accused's age at the time of the alleged crime. The appellant contested the High Court's decision upholding the accused's status as a juvenile. The Court examined various pieces of evidence including NADRA records, a Birth Registration Certificate, and medical opinions.

**Justice Sayyed Mazahar Ali Akbar Naqvi**, speaking for the Court emphasized the ossification test's significance in age determination amidst conflicting documentation, the Court supported the accused's juvenile status in line with the evidence presented. The ruling underscored the legal principle that in the face of two plausible interpretations, the one favoring the accused should prevail. This aligns with established precedents prioritizing the accused's benefit in cases of doubt. The petition was dismissed, reaffirming the High Court's judgment.

### *12. Jamaluddin Rabail v. The State:*

**https://www.supremecourt.gov.pk/downloads_judgements/crl.p._41_k_2023%20etc.pdf**

**Present:**
Mr. Justice Yahya Afridi, **Mr. Justice Sayyed Mazahar Ali Akbar Naqvi** and Mr. Justice Muhammad Ali Mazhar

***Bail in the face of evidential discrepancies***

The Supreme Court of Pakistan adjudicated upon the legal principles governing the grant of bail within the Pakistani criminal justice framework. The petitions involved two separate appellants: Jamaluddin Rabail sought pre-arrest bail, while the second petitioner sought post-arrest bail. Both petitions arose from the same the First Information Report (FIR) and pertained to an armed assault alleged to have caused injuries to the complainant and another individual. The appellants challenged the High Court's refusal of bail in a case registered under Sections 324/148/149 of the Pakistan Penal Code (PPC). The Court critically analyzed the delay in lodging FIR and scrutinized the nature of injuries sustained by the victims, thereby questioning the applicability of Section 324 PPC.

**Justice Sayyed Mazahar Ali Akbar Naqvi**, speaking for the Court, juxtaposed the principles for pre-arrest and post-arrest bail, emphasizing the protection of liberty and the importance of not incarcerating individuals on technical grounds without substantive evidence. Citing jurisprudence on bail considerations, the Court underscored that when the roles attributed to co-accused are identical, differential treatment in granting bail is not warranted. The Court converted the petitions into appeals and, by setting aside the impugned order, confirmed the pre-arrest bail of one petitioner and granted post-arrest bail to the other, contingent upon the furnishing of bail bonds. This judgment reaffirms the notion that personal liberty must be zealously guarded against baseless accusations, ensuring that the law's technicalities do not override substantive justice.

### *13. Zaffar Afzal v. Ashiq Hussain*

**https://www.supremecourt.gov.pk/downloads_judgements/c.a._415_2018.pdf**

**Present:**
**Mr. Justice Jamal Khan Mandokhail** and Mr. Justice Syed Hasan Azhar Rizvi

***Procedural safeguards to protect the rights and interests of persons with disabilities***

The matter in issue was an oral sale by a deaf and dumb person. The petitioners challenged the sale claiming that it was a result of fraud and that there wasn't sufficient evidence on record to establish the consent of the deceased seller for the transaction. It was also contended that the consideration was rupees two million and the availability of the said amount and its payment and subsequent safe keeping was also not established on record through cogent and reliable evidence.

Justice Jamal Khan Mandokhail speaking for the bench observed that any transaction in respect of rights and interests of a person(s) who is hard of hearing and non-verbal, communicates through signs and expressions and is not intellectually disabled, must be in the presence of witnesses who can understand, interpret, and express their views. The witnesses to the transaction should preferably be close relatives or anyone who is fully acquainted with such persons. The witnesses to the transaction should be apprised of the consideration of such transaction. It must be ensured that the persons who deal, assist and witness the transaction have no conflict of interest in the matter. The authorities before alienating the rights and interests of persons with disabilities must satisfy themselves with regard to the fulfilment of the requirements for a transaction explained herein so that it is free from any influence, misrepresentation or fraud, the amount of consideration is equal to the value of the property and was indeed paid. The reason for such an exercise is to take maximum measures in order to protect and safeguard the rights and interests of such persons.

It was held that in the case at hand there is no proof on the record to show that the alleged seller, who was deaf and dumb, was capable to understand the terms and conditions of the agreement, in order to protect his rights. It has not been explained as to whether alleged seller was actually desirous to sell the property in question. There is no evidence to prove how and when the transaction took place and who witnessed it. The respondent alleged that an amount of Rs.2,000,000/- was fixed as sale price of the property in question, but it has not been proved that the price was in accordance with the market rate at that time. It is alleged that the amount has been paid in cash, but there is no witness in whose presence the alleged amount was paid, nor has it been mentioned as to when and where it was paid. The respondent has also failed to prove whether the possession of the property in question was delivered to him as a result of the alleged sale. The Court came to the conclusion that the alleged sale transaction stands disproved.

### *14. Chancellor Preston University, Kohat v. Habibullah Khan*

**https://www.supremecourt.gov.pk/downloads_judgements/c.a._1833_2019.pdf**

**Present:**

**Mr. Justice Jamal Khan Mandokhail** and Mr. Justice Muhammad Ali Mazhar

***Unaccredited engineering program: student entitled to seek damages from the university***

The respondent got admission in the Bachelor of Engineering program in the appellant university and completed his first semester. Subsequently, the Higher Education Commission ("HEC") published a list of names of unaccredited universities and institutions, including the appellant university. The respondent discontinued his education and filed a suit for damages against the appellant university for the reason that it had established its Faculty of Engineering without accreditation from the Pakistan Engineering Council ("the Council"), consequently, his degree would not be recognized by the HEC and he would not be recognized with the Council. The suit was decreed by the trial court. The appeal filed against the decision of the trial court was dismissed by the High Court.

Justice Jamal Khan Mandokhail speaking for the bench observed that in absence of accreditation, the appellant-university was not competent to offer engineering education and enroll students. Since the appellant-university was not accredited, the respondent rightly decided to discontinue his education to secure his future. It is a fact that the appellant-university did not disclose its accreditation status while offering admission to students, including the respondent. The respondent lost his precious nine months due to the fault on the part of the appellant-university's administration for not obtaining accreditation prior to offering admission, therefore, he was left with the only remedy of recovering the expenses incurred for the period he remained in the appellant-university, and for the damages on the grounds mentioned in his plaint. The Court held that the suit for damages filed by the respondent was rightly decreed.

### *15. Chairman NAB v. Yar Muhammad Solangi*

**https://www.supremecourt.gov.pk/downloads_judgements/c.p._101_2020.pdf**

**Present:**

Mr. Justice Umar Ata Bandial, Mr. Justice Syed Mansoor Ali Shah and **Mrs. Justice Ayesha A. Malik**

***Bail considerations in corruption allegations***

In this judgment the Court addressed several legal principles regarding bail in corruption cases. It reinforced the presumption of innocence,

asserting that bail decisions should reflect this fundamental principle.

**Justice Ayesha A. Malik,** speaking for the Court, stressed that determining guilt or innocence is the function of a full and fair trial, not pre-trial detention. The Court considered the accused's cooperation with the investigation significant, noting that willing cooperation could reduce the need for physical detention.

The Court also highlighted the discretionary nature of bail, emphasizing that it should be granted judiciously based on the specific facts of each case. The judgment balanced effective law enforcement with the protection of individual rights, underlining that addressing corruption should not undermine legal safeguards.

The Supreme Court upheld the High Court's decision to grant ad-interim pre-arrest bail, observing no miscarriage of justice or deviation from legal standards in the High Court's judgment. Consequently, the Supreme Court refused leave to appeal, indicating the High Court's decision aligned with the principles of natural justice and existing legal norms.

### *16. Nadia Naz v. The President of Islamic Republic of Pakistan*

**https://www.supremecourt.gov.pk/downloads_judgements/c.r.p._255_2021.pdf**

**Present:**

Mr. Justice Yahya Afridi, Mr. Justice Muhammad Ali Mazhar and **Mrs. Justice Ayesha A. Malik**

***Expanding the definition of workplace harassment***

In instant Civil Review Petitions, the Court conducted a thorough examination of legal principles concerning workplace harassment. The central focus of the judgment was the interpretation of the term 'harassment' within the framework of the Protection against Harassment of Women at the Workplace Act 2010. This Act is pivotal in addressing and preventing harassment at workplaces in Pakistan, and the Court's analysis aimed to provide clarity on its scope and application.

One of the key aspects of the judgment was the definition of 'sexual' harassment. **Justice Ayesha A. Malik**, speaking for the Court, meticulously reviewed the Act's definition and made a significant clarification. It emphasized that 'sexual' harassment should not be narrowly construed to encompass only explicit sexual acts or advances. Instead, the term 'sexual' should be understood in a broader context, which includes not only sexual misconduct but also gender-based discrimination. This interpretation expands the scope of what constitutes harassment at the workplace, encompassing a wider range of behaviors and actions that can create a hostile or discriminatory environment.

Moreover, the judgment emphasized the importance of adopting a gender-sensitive approach when dealing with harassment cases. It underscored the need to protect the dignity and rights of individuals, particularly women, in the workplace. This aspect of the decision reflects a commitment to fostering a workplace environment that is free from discrimination and harassment, ensuring that individuals can pursue their professional careers without fear or prejudice.

By settling the interpretation of 'sexual' harassment within the context of the Act, this judgment provides legal practitioners and professionals with a clear understanding of the parameters of workplace harassment. It eliminates ambiguity and sets a precedent for addressing both explicit and subtle forms of harassment and discrimination, contributing to a safer and more equitable work environment.

### *17. Shamshad Bibi v. Riasat Ali*

**https://www.supremecourt.gov.pk/downloads_judgements/c.p._1692_l_2022.pdf**

**Present:**

Mr. Justice Umar Ata Bandial, CJ and **Mr. Justice Athar Minallah**

***Additional evidence at revisional stage***

The questions before the Court were: whether the High Court, while exercising its revisional powers under section 115 of the C.P.C., was justified in accepting the application under Order XLI, Rule 27 of the C.P.C. and remanding the matter for recording of additional evidence; whether the High Court, in the absence of jurisdiction having been exercised illegally or without material irregularity by the subordinate courts, was justified to allow the revision petition and remand the matter to the trial Court.

Justice Athar Minallah speaking for the bench observed that ordinarily at the stage of civil revision there is no question of recording additional evidence but there may be exceptional cases where, in the interest of justice and if so required by the court to enable it to adjudicate on the matter, the court may order that such

additional evidence should be recorded. In exceptional cases depending on the facts and circumstances, a court exercising revisional jurisdiction may record clarificatory statement or admit evidence in any other form, in order to determine whether the lower court had acted illegally or with material irregularity, so as to attract clause (c) of section 115(1) of the C.P.C. Where in a case falling under section 115(1)(c) of the C.P.C., it has been established that the appellate court had exercised its jurisdiction illegally or with any material irregularity then the scope of additional evidence is not excluded. Additional evidence can, therefore, be admitted in exceptional cases and to rectify the error where the court had acted illegally or with material irregularity in the exercise of its jurisdiction, and justifiably fell within the four corners of the power vested in the High Court under section 115 of the C.P.C. The power under Order XLI Rule 27 of the C.P.C. is not intended to be exercised to fill up lacunas, or to make up any deficiency, in the case, nor to provide an opportunity to the party to raise a new plea. The said power essentially has to be exercised cautiously and sparingly and not to facilitate an indolent litigant. The court before exercising its jurisdiction of allowing the recording of additional evidence must be satisfied that the document sought to be adduced in evidence is not of the nature that could be easily fabricated, tampered or manufactured.

### *18. Muhammad Taimur v. Chairman NAB*

**https://www.supremecourt.gov.pk/downloads_judgements/c.p._278_2023.pdf**

**Present:**

Mr. Justice Umar Ata Bandial, CJ, Mr. Justice Jamal Khan Mandokhail and **Mr. Justice Athar Minallah**

***Prohibition against rendering the concession of bail ineffective or redundant***

Bail was granted to the accused by the High Court on the ground of delay in conclusion of trial subject to the accused surrendering his passport and the cryptocurrency code to the Investigating Officer of the National Accountability Bureau ("NAB") and the name of the accused was also ordered to be placed on the Exit Control List.

The precise question before the Court was the validity and reasonableness of the condition of requiring the petitioner to surrender the cryptocurrency code.

Justice Athar Minallah speaking for the bench observed that when the court comes to the conclusion that the accused is entitled to be released on bail then in such eventuality the grant of bail cannot be made subject to any rider or condition that would render the concession of bail granted by the court as ineffective or redundant. Even if bail is to be granted subject to conditions then they must not be unreasonable, disproportionate or excessive. Regarding the condition of surrendering the cryptocurrency code, question as to whether the accused had the ability to access the cryptocurrency could not have been decided at bail stage because it would require deeper appreciation of evidence, which was yet to be recorded during the trial. Such condition, therefore, appeared to be excessive and unreasonable because it denied the accused the right to liberty granted by the High Court by extending the concession of bail. The Court also said that there were more than fifteen hundred witnesses on the list of the prosecution who would be entering the witness box. Early conclusion of the trial, therefore, was not foreseeable. The cellular phone and the sim belonging to accused were admittedly seized and they were in the custody of NAB. Investigating Officer had stated that if the sim could be blocked it would serve the purpose because in such an event access of the accused to the cryptocurrency would be denied. The condition of surrendering the code, therefore, was excessive and disproportionate to the purpose which it sought to achieve. The petition for leave to appeal was converted into an appeal and the matter was remanded to the High Court to the extent of reconsidering the condition whereby the accused had been directed to surrender the crypto currency code, with the direction that the High Court may, inter alia, seek assistance of an expert in order to set out reasonable condition(s) to prevent the accused from having access to the cryptocurrency.

### *19. Allied Bank Limited v. Habib-Ur-Rehman*

**https://www.supremecourt.gov.pk/downloads_judgements/c.p._2537_2020.pdf**

**Present:**

Mr. Justice Amin-ud-Din Khan and **Mr. justice Syed Hasan Azhar Rizvi**

***Not every statement or observation in a Supreme Court judgment constitutes a binding precedent. A decision without accompanying reasons holds no binding effect, as envisaged by Article 189 of the Constitution***

In this case, an employee of a private bank sought recovery of benevolent funds after the bank introduced a new retirement benefits scheme. The scheme froze the basic pay for calculating pension for those who did not submit a "written option" for the old scheme. The respondent, a Vice-President, received benefits under the new scheme without objection. The Supreme Court held that by accepting benefits under the new scheme, the respondent was estopped from challenging its legality. It was also argued before the Court that earlier in the similar case a two member bench of this Court had already decided the matter and this two-member bench is bound by the view already taken by an earlier equal bench of this Court in Civil Appeal No. 793 of 2018, in view of the principle of stare decisis. However, the Supreme Court observed that not every statement/observation in a judgment creates a binding precedent and referred to Article 189 of the Constitution of Pakistan. Decision not expressed, not accompanied by reasons, and not proceeding on conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 189 of the Constitution. The Court highlighted that the earlier case did not decisively address whether an employee not submitting a "written option" should be governed by the old or new scheme. Consequently, the Court converted the petition into an appeal, set aside the Peshawar High Court's order, and restored the judgment of the trial court.

### *20. Syed Amir Raza v. Mst. Rohi Mumtaz*

**https://www.supremecourt.gov.pk/downloads_judgements/c.p._2865_2022.pdf**

**Present:**

Mr. Justice Amin-ud-Din Khan and **Mr. Justice Syed Hasan Azhar Rizvi**

***In a suit for dissolution of marriage, through khula, the wife is entiled to fifty percent of her deferred dower or up to twenty-five percent of her admitted prompt dower***

In this case the family court failed to award deferred dower to the wife on account of dissolution of marriage on the ground of Khula. The Supreme Court observed that the trial court's decree disregarded Section 10(5) of the West Pakistan Family Courts Act, 1964 wherein it is stipulated that in cases of khula, the wife must surrender up to 50% of her deferred dower. The petition was converted into an appeal, and the impugned order was modified to recognize the wife's entitlement to only 50% of the house's value or its market equivalent.

### *21. Higher Education Commission v. Allah Bakhsh*

**https://www.supremecourt.gov.pk/downloads_judgements/c.p._5877_2021.pdf**

**Present:**

Mr. Justice Syed Mansoor Ali Shah, Mrs. Justice Ayesha A. Malik and **Mr. Justice Shahid Waheed**

***Higher Education Commission is an independent legal entity with an independent legal existence; it cannot be said to be an alter ego of the Federal Government***

The petitioner filed suit for recovery of scholarship money on the ground that the respondent No.1 received the scholarship money but did not complete the course and returned to Pakistan without the permission of the petitioner, and therefore both the respondent no.1 and respondent no.2 (surety) jointly and severally were liable to refund the total amount of expenditure of scholarship including the travel cost incurred on respondent No. 1 along with penalty. The trial Court came to hold that the suit had been instituted by the petitioner after the lapse of the limitation period provided under Article 68 of the Limitation Act, 1908 and consequently dismissed the suit. In appeal, the High Court concluded that the deed of agreement alleged to have been breached by respondent No. 1, being an unregistered contract, did not attract Article 116, but instead Article 115 of the Limitation Act, 1908 was attracted, which prescribed a period of three years, and it started to run from the time when the contract was breached and the appeal was dismissed. Being so, the petitioner approached the apex court of Pakistan on the ground that the petitioner is a Government, its suit was governed by Article 149 of the Limitation Act, 1908 but was

dismissed based on the wrongful application of the law.

**Justice Shahid Waheed** speaking for the bench observed that the Higher Education Commission Ordinance, 2002 brings into being the Higher Education Commission, which is a statutory corporation. It has many qualities, for instance, defined powers that it cannot exceed, and it is directed by a group of persons, collectively known as the Commission, whose function it is to see that those powers are properly used. It may acquire, hold and dispose of property, both movable and immovable, and may sue or be sued. The day-to-day control of the administration is vested in the Chairperson assisted by other officers. It makes its own appointments, has its own rules for recruitment. It has an independent account. Its Chairperson, members and officers, servants, consultants and advisers are public servants. All these attributes make it clear that although the Higher Education Commission is owned and funded by the Government, and its Chairperson and members are appointed by the Prime Minister, it is, in the eye of the law, still a separate legal entity and has a separate legal existence. It is its own master and is answerable as fully as any other person or corporation of the State. It is not the Government, nor does it act on behalf of the Government, and as such, does not enjoy any immunity or privileges of the Government. Para 6

**Hon'ble Judge** further observe that to be a suit on behalf of the Federal Government as allowed by Article 174 of the Constitution of the Islamic Republic of Pakistan, 1973 read with section 79 of the Code of Civil Procedure, 1908, it should be instituted under its authority so as to make the decision of the suit binding on it. In fact, it cannot be, in our view, found to have been instituted on its behalf unless there is an averment in the plaint to that effect either express or such as to contain it by necessary implication. In the absence of any such averment and when admittedly the result of the suit is not intended to be binding on the Federal Government, the plaint cannot possibly be, by any stretch of imagination, held to have been filed on its behalf, and resultantly, the petitioner cannot be permitted to invoke Article 149 of the Limitation Act, 1908 to bring its stale claim within time.

## Foreign Superior Courts

### Supreme Court of USA

#### 1. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*

**https://www.supremecourt.gov/opinions/22pdf/600us1r53_4g15.pdf**

**Present:**
**Roberts, CJ,** Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson, JJ.

***Race-based admissions programs of two colleges violate the Equal Protection Clause of the Fourteenth Amendment***

The Supreme Court ruled that the admissions processes of Harvard College and the University of North Carolina, which consider race as a significant factor, violate the Equal Protection Clause of the Fourteenth Amendment. The Court stated that any racial classification must pass strict scrutiny, meaning it must advance compelling governmental interests and be narrowly tailored to achieve that interest. The Court found that the admissions programs failed to meet these criteria, as they used overbroad, arbitrary, or undefined racial categories, employed stereotypes, and lacked a logical endpoint. The ruling emphasized that the purpose of the Equal Protection Clause is to eliminate all government-imposed racial discrimination.

#### 2. *Yegiazaryan v. Smagin*

**https://www.supremecourt.gov/opinions/22pdf/599us1r43_jhek.pdf**

**Present:**
Roberts, CJ, Thomas, Alito, **Sotomayor**, Kagan, Gorsuch, Kavanaugh, Barrett and Jackson, JJ.

***Domestic injury requirement does not bar foreign plaintiffs to collect international arbitration awards in the United States***

Smagin, a Russian resident, won a multimillion-dollar arbitration award against Yegiazaryan, a California resident, for misappropriation of funds. Smagin filed a suit in California to enforce the award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The district court froze Yegiazaryan's California assets. Yegiazaryan then concealed funds from an unrelated arbitration award to avoid the freeze. Smagin filed a RICO suit, alleging that Yegiazaryan and others conspired to prevent him

from collecting the judgment. The district court dismissed the complaint for lack of a "domestic injury", but the Supreme Court disagreed, stating that the requirement is context-specific and does not exclude foreign plaintiffs. The Court found that Smagin's injury, his inability to collect his judgment, arose in the U.S., as the racketeering activity largely occurred in the U.S. and was aimed at frustrating the California judgment.

## Supreme Court of UK

### 3. *Jalla and another (Appellants) v. Shell International Trading and Shipping Co*

**https://www.supremecourt.uk/cases/docs/uksc-2021-0050-judgment.pdf**
**[2023] UKSC 16**

**Before:**
Lord Reed (President), Lord Briggs, Lord Kitchin, Lord Sales, **Lord Burrows**

***A continuing nuisance is no different from any other continuing tort or civil wrong***

The issue before the Supreme Court of the UK was whether pollution caused to land and waterways by an offshore oil spill constitute a continuing nuisance with fresh causes of action accruing until such time as the oil is cleared up, or it eventually disappears of its own accord, in circumstances where the event causing the pollution occurs only once?

The claimants and appellants, Mr Jalla and Mr Chujor, are two Nigerian citizens. The defendants and respondents are both companies within the Shell group of companies. The claimant and appellants allege that the oil migrated from the offshore Bonga oil field to reach the Nigerian Atlantic shoreline where they claim it has had a devastating impact and has not been removed or cleaned up. Although the defendants dispute these claims, maintaining that the spill was successfully contained and dispersed offshore and that it did not impact the shoreline.

The Supreme Court of the UK observed that a continuing nuisance was, in principle, no different from any other continuing tort or civil wrong. In principle, and in general terms, a continuing nuisance was one where, outside the claimant's land and usually on the defendant's land, there was repeated activity by the defendant or an ongoing state of affairs for which the defendant was responsible, causing continuing undue interference with the use and enjoyment of the claimant's land. For a continuing nuisance, the interference might be similar on each occasion, but the important point was that it continued day after day or on another regular basis. So, for example, smoke, noise, smells, vibrations, and overlooking were continuing nuisances where those interferences continued on a regular basis. The cause of action, therefore, accrued afresh on a continuing basis. Applying the relevant principles to the facts of this case, the claimants' argument that there was a continuing nuisance, because on the assumed facts, oil was still present on their land and had not been removed or cleaned up, was rejected.

## High Court of Justice King's Bench Division Administrative Court

### 4. *The King v. the Secretary of State for Defence*

**https://www.judiciary.uk/judgments/craighead-v-secretary-of-state-for-defence-agreed-statement/**

**Before:**
**Mr Justice Lane**

***Unveiling the Conflict between National Security and Freedom of Expression***

The Claimant challenged a decision by the Defendant to refuse permission for the publication of a book. The Claimant was a former member of the United Kingdom Special Forces ("UKSF"). He challenged the Defendant's refusal to give him "express prior authority in writing" ("EPAW") for the publication of a book he had written. The Claimant had to obtain EPAW before he could publish the book because, as was required of all those upon joining UKSF, he signed a confidentiality contract in which he agreed that, unless he obtained EPAW first, he would not disclose any information about the work of UKSF or make statements purporting to be such a disclosure.

The Court observed that the basis of the refusal of EPAW was the Defendant's assessment that the material in the book was covered by the confidentiality contract and its publication would cause damage to national security. The issue in the case was whether that refusal was incompatible with the Claimant's right to

freedom of expression under Art.10(2) of the ECHR. If so, it would be unlawful under s.6. of the Human Rights Act 1998.

Further observed that the book contained the Claimant's account of his involvement in the response to a terrorist attack at the DusitD2 hotel complex in Nairobi, Kenya in January. It was agreed that the draft version of the book contained disclosures or statements caught by the Claimant's confidentiality contract. However, the Defendant neither confirmed nor denied whether the information contained in the book was true or false. Similarly, the Defendant neither confirmed nor denied anything in relation to the incident at the DusitD2 hotel and did not comment publicly on the activities of UKSF.

## SUPREME COURT OF CANADA

### 5. *Murray-Hall v. Quebec (Attorney General)*

**2023 SCC 10**
**https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19829/index.do**

**Coram:**
Wagner CJ and Karakatsanis, Côté, Brown,* Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ

***Quebec's ban on possessing and cultivating cannabis plants for personal purposes is constitutional***

In 2018, the Canadian federal government enacted a law limiting cannabis possession and cultivation to four plants per household. Subsequently, provinces and territories established their own regulations. Quebec's Cannabis Regulation Act, however, completely bans the possession and cultivation of cannabis plants for personal purposes, with fines ranging from $250 to $750 for violations.

Mr. Murray Hall challenged this Quebec ban in court, arguing that only the federal government, under its criminal law jurisdiction, has the authority to regulate cannabis. He contended that the Quebec ban should be voided due to federal law supremacy.

Initially, the Quebec Superior Court sided with Hall, declaring the ban unconstitutional. However, the Quebec Court of Appeal overturned this decision, ruling that the ban falls within provincial jurisdiction under sections related to property, civil rights, and local matters. Hall's appeal to the Supreme Court was dismissed.

The Supreme Court, led by Chief Justice Wagner, unanimously upheld the Quebec ban. The Chief Justice reasoned that the provincial law's primary goal is to protect public health and safety by effectively managing cannabis through the state monopoly. This includes ensuring product quality, educating on cannabis risks, and enforcing minimum age requirements for purchase. The ban, therefore, aligns with the province's jurisdiction over property, civil rights, and local matters.

Moreover, the Court found that the Quebec law does not contradict the federal law's objectives, which are to diminish criminal involvement in the cannabis market, rather than to explicitly grant the right to possess or cultivate cannabis. The provincial law's objectives are consistent with those of the federal government, leading to the conclusion that Quebec's ban on the possession and cultivation of cannabis plants is constitutionally valid.

## HIGH COURT OF AUSTRALIA

### 6. *CCIG INVESTMENTS PTY LTD (ABN 57 602 889 145) v SCHOKMAN*

**[2023] HCA 21**
**https://eresources.hcourt.gov.au/downloadPdf/2023/HCA/21**

**Coram:**
Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ.

***Criteria for establishing employer liability in employee misconduct***

The High Court of Australia overturned a decision by the Court of Appeal of the Supreme Court of Queensland, ruling that an employer was not vicariously liable for a tortious act committed by an employee in shared staff accommodation.

In 2016, Mr. Schokman was employed at a resort in the Whitsunday Islands, Queensland, where he was required to live on-site in furnished, shared accommodation with another employee, Mr. Hewett. After returning intoxicated from the staff bar, Mr. Hewett urinated on Mr. Schokman while he was asleep, causing Mr. Schokman to suffer a cataplectic attack. Mr. Schokman sued the employer,

claiming vicarious liability for Mr. Hewett's actions, arguing that they occurred within the scope of his employment due to the mandatory shared living arrangement.

The trial judge initially ruled against the employer's vicarious liability, viewing Mr. Hewett's actions as not within the course of his employment. However, the Court of Appeal reversed this decision, noting the connection between Mr. Hewett's employment and his actions, as his living in the shared accommodation was a condition of his employment.

The High Court disagreed with the Court of Appeal, finding the employer not liable for Mr. Hewett's actions. The Court emphasized that determining whether a wrongful act was committed in the course of employment requires analyzing the specific circumstances, including the employee's actual employment duties. The Court found that Mr. Hewett's drunken misconduct had no real connection to his employment, as it was neither authorized by, required by, nor incidental to his job. Consequently, the employer could not be held vicariously liable for Mr. Hewett's tortious act in the shared staff accommodation.

### *7. The King v Jacobs Group (Australia) Pty Ltd*

**[2023] HCA 23**
**https://eresources.hcourt.gov.au/downloadPdf/2023/HCA/23**

**Coram:**
Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson And Jagot JJ.

***Interpretation of 'value of benefit' in bribery offenses***

The High Court of Australia allowed an appeal from the Court of Criminal Appeal of New South Wales regarding the correct interpretation of section 70.2(5) of the Criminal Code (Cth). This section determines the maximum monetary penalty for offenses by a corporate body involving bribery or conspiracy to bribe a foreign public official. Under this section, the maximum penalty is either 100,000 penalty units or, if ascertainable, three times the value of the benefit gained from the offense.

In this case, the respondent had pleaded guilty to three counts of conspiracy related to bribing a foreign official, where the benefit was securing contracts for construction projects. The dispute arose over how to calculate the "value of the benefit" — whether it should be the total gross amount received from these contracts or the net amount after deducting costs paid to third parties (excluding costs involved in the bribery).

The primary judge in the Supreme Court of New South Wales favored the "net benefit" approach, and since the penalty calculated using this method was less than 100,000 penalty units, the maximum penalty was set based on the 100,000 penalty units. However, the High Court disagreed with this interpretation. The Court held that the "value of the benefit" should be the total amount received under the contracts without any deductions for costs incurred in performing the contracts.

The majority of the High Court ruled that the maximum penalty under section 70.2(5)(b) should be three times the total amount received from the contracts, which amounted to $30,391,062. This decision was based on the understanding that the terms "benefit" and "value of the benefit" in Division 70 of the Criminal Code refer to the value of the advantage as received or obtained. The High Court's interpretation aligns with international law, specifically Australia's obligations under the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions. As a result, the penalty imposed should have been determined with reference to this higher maximum penalty.

## FEDERAL CONSTITUTIONAL COURT OF GERMANY

### *8. In the proceedings about the constitutional complaints . . .*

**2 BvR 166/16, 2 BvR 1683/17**
**https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2023/06/rs20230620_2bvr016616.html**

**Coram**
King, Vice President, Müller, Kessal-Wulf, Maidowski, Langenfeld and Wallrabenstein JJ

***Provisions on the remuneration of prisoner labour declared unconstitutional for lack of clarity on social reintegration goals***

The prisoners in Bavaria and North-Rhine Westphalia receive wages for their labour in

detention. Pursuant to relevant provisions of the Bavarian Prison Act and the Prison Act of North-Rhine Westphalia, these wages are based on a so-called 'base remuneration' in the amount of 9% of the average income of all payees into the German Federal Pension scheme in the calendar year before last, which is used as a reference point. The daily rate is 1/250th of the base remuneration. In both federal states, wages can be set at varying levels based on the type of labour and the work performance of the prisoner. Wages may only drop below 75% of the base remuneration if the work performance of the prisoner fails to satisfy certain minimum requirements. In addition, in Bavaria, if a prisoner has been working for two consecutive months, they are entitled to a day off work upon request. In North-Rhine Westphalia, prisoners can request either two days off work or two days of home leave after having worked for three consecutive months. If no request is made or the days off work or the home leave cannot be granted, then the days are credited towards an earlier release date.

One of the complainants worked in printing operations in a correctional facility in Bavaria while the other worked in a cable recycling operation in a correctional facility in North-Rhine Westphalia. They contended that insufficient remuneration constitutes a violation of the requirement to seek the social reintegration of offenders.

The Federal Constitutional Court held that provisions in the Bavarian Prison Act and the Prison Act of North-Rhine Westphalia, specifying the remuneration for prisoners' labor, are incompatible with the constitutional requirement to seek the social reintegration of offenders. The Court reasoned that the legislative concepts in both states lack internal coherence and consistency, failing to clearly define the significance of labor as a reintegration measure and its intended goals, and essential aspects such as prisoners' financial contributions for health care are missing. The Court directed that the provisions will continue to apply until new legislation is enacted or until June 30, 2025, at the latest.

## EUROPEAN COURT OF HUMAN RIGHTS

### 9. *Chkhartishvili v Georgia*

**ECHR 142 (2023)**
**https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-224577%22]}**

**Present:**
Georges Ravarani, President, Mārtiņš Mits, Stéphanie Mourou-Vikström, Lado Chanturia, María Elósegui, Kateřina Šimáčková, Mykola Gnatovskyy, JJ, and Victor Soloveytchik, Section Registrar

***Unjustified custodial sentence for non-violent conduct during a demonstration***

The applicant was a Georgian national living in Tbilissi (Georgia). He was a civil-society activist and member of the Georgian Labour Party. On the morning of 29 November 2019, the applicant took part in a demonstration to protest against the Parliament's failure to approve electoral reform. The video coverage of the event showed the police telling the demonstrators not to block the road or the entrance to the building. At some point, the applicant could be seen throwing beans at the police and shouting that beans used to be "gruel for slaves". He was arrested immediately and escorted to the police station for having allegedly committed offences under two articles of the Code of Administrative Offences i.e. he had blocked the road, breached public order, insulted the police and disobeyed their orders. He was brought before a judge that afternoon. After criticising and interrupting the judge loudly several times, the appliacnt was fined 300 Georgian laris (GEL) for contempt of court. After a further warning, he was removed from the court and the case was heard in his absence. The applicant's defence lawyer requested that the trial be adjourned, stating that she had not been able to meet with him prior to the trial and that she needed time to familiarise herself with the case file and to collect evidence. The judge granted the request and adjourned the hearing for three hours and ten minutes. Once the hearing resumed, he rejected the defence lawyer's further requests for the applicant to be questioned as a witness, for the trial to be postponed again, and for the applicant to be released from detention. During the hearing the officer who wrote the administrative-offence report stated, among other things, that on at least two previous occasions the applicant had received administrative fines. The officer requested that the trial court apply a stricter sanction as a deterrent for the future. The applicant's representative contested the officer's submission as unsubstantiated and irrelevant. That same afternoon, the Tbilisi City Court found the applicant guilty of insulting and disobeying police orders. He was sentenced to eight days'

administrative detention. The court clarified that calling the police officers 'slaves' was insulting and degrading and incurred liability under Georgian legislation. It held that such actions could not be considered as a form of protest. A subsequent appeal lodged by the applicant was rejected as inadmissible.

Relying on Article 6 (right to a fair hearing), Article 10 (freedom of expression) and Article 11 (freedom of assembly) of the European Convention on Human Rights ("ECHR"), the applicant complained that he had not had a fair hearing, and that his arrest and the custodial sentence had amounted to an unjustified interference with his rights. The applicant also complained under Article 5 § 1 (c) (right to liberty and security) that his administrative arrest and detention had been unlawful and arbitrary.

The European Court of Human Rights ("ECtHR") dismissed the complaint that authorities impeded contact between him and his representative, noting the lack of evidence and a formal complaint. Regarding his removal from the courtroom, the ECtHR deemed it a normal duty of the trial panel to maintain order and justified his exclusion due to disruptive behavior. The ECtHR considered the applicant to have waived his right to be present, given his indifference and his representative's continued participation. It concluded that the proceedings adhered to Article 6 requirements.

However, the ECtHR found that the applicant had been given a custodial sentence mainly because of the way he had expressed his views, rather than for disobeying police orders to move off the road. It did not consider that the grounds cited in the trial court's judgment were sufficient in themselves to render the sanction proportionate. In particular, it did not appear that the conditions provided for by law for counting the applicant's previous administrative-offence convictions as an aggravating factor had been met. The ECtHR held that, in the absence of appropriate reasoning, a custodial sanction for the applicant's non-violent even if disruptive conduct had not been justified.

In the context of Article 11 and Article 10, the ECtHR analyzed the applicant's arrest and custodial sentence, considering the interference with his freedom of assembly. Acknowledging the public interest in the protest, the ECtHR emphasized the need for strong reasons to restrict expression. While noting the immoderation of throwing beans at the police, it deemed the act non-violent, lacking injury or escalation. The ECtHR emphasized the protection of both substance and form of expression under Article 10. It criticized the lack of broader context in domestic courts' reasoning for custodial sanctions, finding them unjustified for non-violent, albeit disruptive, conduct. Consequently, the ECtHR determined a violation of Article 11 in conjunction with Article 10.

Regarding Article 5, the ECtHR rejected the applicant's complaint about pre-trial detention as time-barred, given its submission beyond the six-month limit following the detention's end on November 29, 2019.

The ECtHR held that Georgia was to pay the applicant 1,200 euros (EUR) in respect of non-pecuniary damage.

## EUROPEAN COURT OF HUMAN RIGHTS

### *10. Drozd v Poland*

**ECHR 109 (2023)**
**https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-223982%22]}**

**Present:**

Marko Bošnjak, President, Krzysztof Wojtyczek, Alena Poláčková, Ivana Jelić, Gilberto Felici, Erik Wennerström, Raffaele Sabato, JJ, and Renata Degener, Section Registrar

***Ban on entry to the Sejm for displaying a banner violated the Convention***

The case concerned a one-year ban imposed on the applicants on entering the Sejm (the Polish Parliament's lower house). They were banned for displaying a banner which read "Defend Independent Courts" in the grounds of the Sejm during a protest against the Government's planned reforms in the judiciary.

The European Court of Human Rights ("ECtHR') held, unanimously, that there had been a violation of Article 10 (freedom of expression) of the European Convention on Human Rights ("ECHR"). The ECtHR observed that the ban on entering the Sejm's buildings and grounds had prevented the applicants from being able to obtain first-hand information on the activities of public administration bodies. It had thus interfered with their right to freedom of expression. It understood that the ban had had a basis in domestic law, namely in a provision of the Speaker's Ordinance, and had been aimed at preventing any disruption to the work of the Sejm. At the same time, it acknowledged that it was

legitimate for members of the public to want to obtain first-hand and direct knowledge of the events and debates taking place in the Sejm. It was therefore necessary to weigh up the Parliament's need to maintain orderly conduct of parliamentary business against the public's need to receive first-hand information on an important societal issue. The ECtHR felt that a distinction should be made between that incident, which had occurred outside the Sejm building, and incidents inside which interfered directly with the orderly conduct of parliamentary debate. It found that the ban had been given without any procedural safeguards. In particular, the applicants had simply received letters from the Head of Parliament Security informing them that they were banned, without any clear procedure for challenging the measure. The ECtHR held that Poland was to pay the applicants jointly 1,000 euros (EUR) in respect of nonpecuniary damage and EUR 2,361 in respect of costs and expenses.

## SUPREME COURT OF INDIA

### 11. *Ghanshyam Vs. Yogendra Rathi*

**https://main.sci.gov.in/supremecourt/2011/3649/3649_2011_6_1502_44653_Judgement_02-Jun-2023.pdf**

**Present:**
Dipankar Datta and **Pankaj Mithal**, JJ.

***Although an Agreement to Sell doesn't confer title, the possessory right of the prospective purchaser is protected under Section 53-A of the Transfer of Property Act, 1882***

The plaintiff-respondent claimed ownership of a property and filed a suit for eviction and mesne profits against the defendant-appellant. The defendant-appellant was allowed temporary occupancy as a licensee but failed to vacate after the license period. Despite contesting the suit, the defendant-appellant did not dispute the execution of the agreement to sell or the payment of the sale consideration. The Supreme Court ruled that while the agreement to sell does not confer absolute title, it does establish the plaintiff-respondent's possessory rights over the property. The Court observed that an agreement to sell may not be regarded as a transaction of sale or a document transferring the proprietary rights in an immovable property but the prospective purchaser having performed his part of the contract and lawfully in possession acquires possessory title. This is liable to be protected in view of Section 53A of the Transfer of Property Act, 1882. The said possessory rights of the prospective purchaser cannot be invaded by the transferer or any person claiming under him. The apex court also declared any such practice or tradition such as general power of attorney prevalent would not override the specific provisions of law which require execution of a document of title or transfer and its registration so as to confer right and title in an immovable property of over Rs 100 in value.

### 12. *Karandeep Singh v. CBI*

**https://www.livelaw.in/pdf_upload/482-karandeep-singh-v-cbi-9-jun-2023-477842.pdf**

**Present:**
Aniruddha Bose and Rajesh Bindal, JJ

***The bail condition to furnish a bank guarantee is unsustainable in law***

The Supreme Court set aside a pre-bail condition imposed by the High Court requiring the accused to furnish a bank guarantee of Rs. 2 Crore. The Court modified the condition, directing the accused to deposit a bail bond of Rs. 5 Lakhs instead. The accused had argued that the bank guarantee condition was onerous. The Court ruled in favor of the accused, citing a previous judgment that found such a precondition unsustainable. The remaining conditions imposed by the High Court were not modified.

## SUPREME COURT OF BANGLADESH

### 13. *Shamim Uddin v. The State*

**ttps://www.supremecourt.gov.bd/resources/documents/1506813_Crl_A_No_40_of_2018_final.pdf**

**Present:**
Md. Nuruzzaman, **M. Enayetur Rahim** and Md. Ashfaqul Islam, JJ

***Belated examination of witnesses by the investigating officer is not a valid ground to discard their evidence***

This criminal appeal pertains to a High Court judgment that modified the sentence of condemned prisoner Shamim Uddin from death penalty to life imprisonment, while confirming the death sentence for three other prisoners. The court relied on the evidence of two witnesses, despite their statements being recorded late. The Supreme Court held that belated examination by the investigating officer cannot be the sole ground to discard their evidence. A belated

statement in court can be believed if it withstands the scrutiny of cross-examination, unless it is otherwise deemed unbelievable. The Supreme Court found no reason to discredit the evidence of these witnesses, as they withstood cross-examination and their testimonies were found credible. There is no infirmity in the statement of the witnesses and accepted the belated disclosure of the names of the assailants by accepting the cogent explanation given by the witnesses. Thus, the Court dismissed the appeal, finding no error in the conviction based on these witnesses' evidence.

14. ***Muntachir v. Ruposhi Begum***

**https://www.supremecourt.gov.bd/resources/documents/1082046_C_A_No_10_2017_final.pdf**

**Present:**
Hasan Foez Siddique, C. J, **M. Enayetur Rahim** and Jahangir Hossain, JJ

***Partial pre-emption is permissible in law***

In this case pre-emptors filed a case for pre-emption of suit land on the basis of co-ownership of the land, which was sold without their knowledge. The purchasers contested the case, arguing that the pre-emptors were not contiguous owners of the land. The trial court rejected the pre-emption case, and subsequent appeals were dismissed. The pre-emptors then filed a civil revision before the High Court Division, which was granted. The purchasers appealed this decision, leading to the current appeal. The purchasers argued that the trial Court as well as the appellate Court concurrently held that pre-emptor's claim for partial pre-emption is not permissible in law but the High Court Division erred in law in making the rule absolute holding that claim of partial pre-emption is maintainable. The Supreme Court observed that the rule of partial pre-emption is applicable to a case where pre-emption is sought by a co-sharer tenant who is required to pre-empt the entire land transferred, but is not applicable in a case where a contiguous land holder seeks pre-emption and 'contiguity' being the only basis for his claim, he may pre-empt only that part of the land transferred to which his land is contiguous unless the land transferred is a compact block of area. If we consider the above propositions of law coupled with the attending facts and circumstances of the present case the Supreme Court is of the view that the High Court Division did not commit any error in allowing the partial pre-emption as the same is permissible in law.

## SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

15. ***Officer-in-Charge, Police Station, Padiyatalawa v. Gamini Harischandrage Nandana Sisira Kumara***

**https://www.supremecourt.lk/images/documents/sc_appeal_16_2018.pdf**

**Present:**
Priyantha Jayawardena, **A.L. Shiran Gooneratne** and Mahinda Samayawardhena, JJ.

***Cancellation of a driving license in cases of rash and negligent driving without any proof of previous conviction is deemed unlawful***

This appeal challenges the judgment of the Provincial High Court. The appellant was convicted in the Magistrate's Court for driving a bus recklessly, causing a person's death, and committing four other offenses. The learned Magistrate convicted the appellant and imposed sentences, considering the appellant's lack of previous convictions. The sentences included imprisonment, fines, and cancellation of the driving license, along with an order to pay compensation. The appellant appealed to the Provincial High Court and the same was dismissed. The Supreme Court observed that the sentences imposed by Court upon conviction for the aforesaid offences committed by the Appellant are lawful. However, prior to the cancellation of driving license, the Court was aware that the Appellant had no previous conviction endorsements. Therefore, a cancellation of the diving license in addition to the sentences imposed as charged, is not according to law. Furthermore, the learned Magistrate when imposing the cancellation of the driving license gave no reasons justifying the said cancellation nor made any reference to the effect that the cancellation was in addition to the sentence imposed to a particular offence to which the said cancellation related to. The appeal was allowed.

16. ***Officer-in-Charge, Police Station, Padiyatalawa v. Gamini Harischandrage Nandana Sisira Kumara***

**https://www.supremecourt.lk/images/documents/sc_fr_368_2016.pdf**

**Present:**
Vijith K. Malalgoda, A. L. Shiran Gooneratne and **K. Priyantha Fernando**, JJ

***Any action which is arbitrary or unreasonable violates the equal protection of law guaranteed under the constitution***

The petitioners were arrested by the respondents on the charges of transporting of mutton without a permit and transporting mutton that was unfit for human consumption. The petitioners were later on discharged by the Magistrate on the ground that no offence is made out. The petitioners challenged their unlawful arrest on ground of violation of their fundamental rights granted under the constitution. The Supreme Court held that the arbitrariness of the arrest made without legal basis affects the equal protection guaranteed under the constitution. The police officers do not have the right to arrest individuals based on vague suspicions, with the intention of finding evidence after the arrest. Such actions are deemed arbitrary, unreasonable, and a violation of Articles 13(1) and 12(1) of the Constitution, which guarantee fundamental rights and equal protection. The arrest of the petitioners was deemed illegal and unlawful due to the lack of reasonable suspicion. The application challenging the arrest was allowed, and the respondents were ordered to pay compensation to the petitioners for the violation of their constitutional rights. The compensation was to be paid from the respondents' personal funds.

*****

**Contact Info:**
**Email:** scrc@scp.gov.pk
**Phone:** +92 51 9201574
Research Centre
Supreme Court of Pakistan