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SDO PESCO VS Khawazan Zad

Signing, verification, presentation and institution of a suit, discussed.

SYED MANSOOR ALI SHAH, J

5. Under Rule 14 of Order VI, every pleading is to be signed by the party and his pleader (if any); however, where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf. While as per Rule 15 of Order VI, every pleading is to be verified on oath or solemn affirmation at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case. The acts of signing and verifying pleadings (plaint and written statement), therefore, cannot be done by a pleader in terms of Rule 1 of Order III, C.P.C. Rule 1 of Order XXIX, which contains special provisions as to signing and verifying pleadings in suits by or against a corporation, is like a proviso to Rules 14 and 15 of Order VI, C.P.C. It authorizes, in addition to the persons specified in Rules 14 and 15 of Order VI, the secretary or any director or other principal officer of the corporation who is able to depose to the facts of the case, to sign and verify any pleading on behalf of the corporation.

Difference between signing/verifying a plaint and presenting/instituting a suit

6. The notable point is that neither Rules 14 and 15 of Order VI nor Rule 1 of Order XXIX says anything about presenting the pleadings to the court after signing and verifying the same. Rather, these are Rule 1 of Order IV and Rule 1 of Order VIII which deal with the subject of presenting a plaint or a written statement to the court. Different rules on these two matters make it obvious that there is a difference between the signing and verifying a pleading (plaint or written statement) under Rules 14 and 15 of Order VI, or under Rule 1 of Order XXIX, and the presentation of that pleading to the court under Rule 1 of Order IV (plaint) and Rule 1 of Order VIII (written statement), C.P.C. The act of presenting a plaint to the court under Rule 1 of Order IV is called the institution of the suit,[2] and the act of presenting a written statement under Rule 1 of Order VIII constitutes the defense of the suit.[3] These acts manifest the will of a litigant to pursue his claim or to defend the claim made against him, in a court of law. By presenting the plaint, a plaintiff sets the machinery of the court in motion for deciding upon his claim while the presentation of the written statement expresses the will of the defendant to defend that claim. The act of presentation of a plaint or a written statement can, therefore, be done only by the plaintiff and the defendant in person or by their recognized agents or by their duly appointed pleaders, in terms of Rule 1 of Order III.[4] Rules 14 and 15 of Order VI, or Rule 1 of Order XXIX, which relates to signing and verifying the pleadings (plaint and written statement), cannot be referred to for the purpose of establishing the authority of a person to institute, or defend, the suit.

8. A memorandum of appeal can be signed, as per Rule 1 of Order XLI, by the appellant or his pleader; so can a revision petition be signed by the petitioner or his pleader as the revisional jurisdiction is a part of the general appellate jurisdiction of a superior court[5] and the provisions of the C.P.C. in regard to appeals are applicable mutatis mutandis to revision petitions.[6] A

memorandum of appeal or a revision petition can, therefore, be signed by a duly appointed pleader as per Rule 1 of Order XLI, and presented to the appellate or revisional court by him on behalf of the appellant or petitioner as per Rule 1 of Order III, C.P.C. Rules 14 and 15 of Order VI, as well as Rule 1 of Order XXIX, as to signing and verifying the pleadings (plaint and written statement) are, thus, not applicable to the memorandums of appeal and revision petitions.

Curing of any defect in the authority of a person to sign and verify a pleading, or a memorandum of appeal and revision petition, and to present the same to the court

9. Having examined the scope of the above-cited rules of procedure contained in the C.P.C., we must reiterate the principle, which is by now well settled, that 'the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights ... Any system, which by giving effect to the form and not to the substance defeats substantive rights, is defective to that extent.' The courts, thus, always lean in favour of adjudicating the matters on merits rather than stifling the proceedings on procedural formalities. The rules of procedure are meant to facilitate the court proceedings for enforcing the rights of litigants, not to trap them in procedural technicalities for frustrating their rights. They are the tools to advance the cause of justice and cannot be used to cause the miscarriage of justice. The ultimate object of securing the ends of justice, therefore, outweighs the insistence on strict adherence to such rules. The same is the purpose of the rules of procedure discussed above. Any defect or omission in signing and verifying, or presenting, a pleading (plaint or written statement) or a memorandum of appeal or revision petition does not affect the merits of the case or the jurisdiction of the court and is therefore taken to be such an irregularity which can be cured at any stage of the proceedings. Likewise, any defect in the authority of a person to sign and verify a pleading filed in a suit by or against a corporation, or to institute or defend such a suit by presenting that pleading to the court, or in signing or filing of a memorandum of appeal or revision petition by a corporation, can also be cured at any stage of the proceedings.

P L D 2023 SC 190

Dean/Chief Executive, Gomal Medical College VS Muhammad Armaghan Khan

"Whether an appeal lies to the Supreme Court under Article 212(3) of the 1973 Constitution against an order of a tribunal created by a Provincial law to which the proviso to clause (2) of the said Article has not been made applicable?

MUNIB AKHTAR, J

10. The creation of an Administrative Tribunal is at the discretion of the relevant legislature; it is not mandatory for it to do so. One point to keep in mind is that the (exclusive) jurisdiction conferred on a Tribunal created under clause (1) need not be in respect of all the matters that can come within the scope of para (a); it may be that it is exercised only in relation to some of such matters. But if such a Tribunal is created, that in any case takes the matter to clause (2). This clause also opens with an identically worded non-obstante clause, i.e., it overrides "anything herein before contained". In respect of a Tribunal created by Federal legislation it has automatic effect, mandatorily excluding the jurisdiction of any other court to "grant an injunction, make any

order or entertain any proceedings in respect of any matter to which the jurisdiction of such Administrative Court or Tribunal extends". All judicial remedies are therefore closed as soon as the relevant legislation comes into force. The only such door left open is provided by clause (3), which provides for a right of appeal to this Court in terms as stated therein. Federal legislation therefore presents no special problem. The real problem is in relation to a Tribunal created by Provincial legislation. Here, the proviso to clause (2) becomes applicable. This provides that a Provincial Assembly may (but is not required to) pass a resolution asking Parliament to extend clause (2) to the Tribunal created by it, and on such resolution Parliament may (but is not required to) enact the necessary legislation in this regard. If both these stages are crossed the proviso becomes applicable, and the effect then is the same as in the case of Federal legislation: all judicial remedies are closed and the only avenue for redress is an appeal to this Court in terms of clause (3).

16. The principle having been identified; we turn to apply it to the situation at hand. The enactment of a federal law under clause (1), which has the automatic and immediate effect of making clause (2) operational and thereby opens the door to this Court in terms of clause (3) clearly acts, or has an effect, on the jurisdiction of the Court. The reason is that the jurisdiction of the Court has effectively been enlarged. It now has appellate jurisdiction in relation to a forum or tribunal over which it did not previously have any, a result brought about by the very act of the creation thereof. This is unexceptionable: Parliament can, if appropriately clothed with the necessary competence, make such a law. But the position is entirely different as regards an Administrative Tribunal set up under clause (1) by a Provincial law. If the learned Advocate General is correct, and clause (3) is a standalone provision, then the Provincial Assembly, by the very act of creating the Tribunal, would have the competence to act upon, or affect, the jurisdiction of this Court. But that is constitutionally impermissible. And if it had been that clause (2) would automatically become applicable in relation to Provincial legislation as it does in respect of a federal law, then the same constitutionally impermissible result would obtain. Hence, clause (3) cannot be regarded as an independent, standalone provision, and the need for the proviso to "activate" clause (2). Since Provincial legislation cannot of its own affect or act upon the jurisdiction of this Court there was the need for intervening Federal legislation. The necessary "bridge" is provided by the proviso. But, it must be remembered, the Federation cannot be compelled to enact the relevant law. If the Provincial Assembly wishes to shut out every judicial remedy and leave only the route to this Court, it must first pass the necessary resolution and that must then be followed up by a federal law. It is only then, and under cover of an Act of Parliament, that the door to this Court is opened. If the Provincial Assembly does not wish to follow this route or Parliament refuses to enact the enabling legislation in terms of the proviso, then the door to this Court remains shut. Since clause (2) would not then apply the jurisdiction of the other courts (which in practical terms would mean recourse to the High Court under Article 199) would remain open. Clause (2) and, as presently relevant, its proviso is the gateway to clause (3). The two must be read and applied together and not in isolation and as standalone provisions.

17. This brings us to the second reason

why in our view the submission made by the learned Advocate General cannot, with respect, be accepted. As noted, a consequence would be that (at least) two routes would be open to the litigant, one under clause (3) and the other by way of a petition under Article 199. Now, the appeal under clause (3) is not as of right. The litigant must cross a formidable barrier and satisfy this Court that his case "involves a substantial question of law of public importance". As opposed to that a petition under Article 199 would face much softer threshold requirements, if any. The question therefore is this: confronted with two such remedies, which one would a pragmatic litigant, given proper professional advice by his lawyer, choose? Surely the question answers itself. It would be a rare litigant indeed, whose case would have to involve special facts and circumstances, who would choose to approach this Court in terms of clause (3). The much safer course would be to file a petition under Article 199, especially when an appeal to this Court under Article 185(3) (again involving relatively softer threshold requirements) would also be available in any case. Practically speaking, the "remedy" of filing an appeal under clause (3) would be a dead letter. This cannot surely be the situation envisaged by the design of Article 212.

18. Accordingly, we hold that an appeal to this Court under clause (3) of Article 212 against a decision of an Administrative Tribunal created by a Provincial law under clause (1) is possible if, and only if, clause (2) applies to the said Tribunal, i.e., it is covered by an appropriate resolution of the Provincial Assembly and consequent Federal legislation in terms of the proviso. Since admittedly this is not the case as regards the Tribunal set up by the 2015 KPK Act the present appeal is not maintainable.

19. This brings us to the other laws referred to above, setting up Tribunals in relation to the district judiciaries in the Provinces and the Federal Capital. The 2016 Act, in relation to the Islamabad Capital Territory, presents no difficulties. It is Federal legislation and clause (2) applies in relation thereto automatically. The door to clause (3) is therefore open. However, this is not so in respect of the Provincial legislation, being the 1991 KPK Act, the 1991 Punjab Act and the 2021 Baluchistan Act. The position of the Tribunals set up under these laws is no different from the one set up under the 2015 KPK Act. Therefore, for the same reasons, no appeal to this Court is (at present) maintainable under Article 212(3) against decisions of the respective Tribunals. The position in Sindh requires separate consideration. As noted above, the Tribunal for the District judiciary is there set up by way of amendments to the Sindh Service Tribunals Act, 1974 ("1974 Sindh Act"). The amendments were made by the 1991 Sindh Act, a purely amending statute. Now, the 1974 Sindh Act originally set up an Administrative Tribunal that is covered by the proviso in terms of the 1974 Act. Appeals from this Tribunal do lie to this Court in terms of Article 212(3). What of the new Tribunal created by way of insertions in the said Act? Can it have, as it were, the benefit of the cover provided by the 1974 Act? Now, the general rule relating to a purely amending statute is that it effaces itself as soon as it takes force, the amendments being immediately incorporated in the text of the law being amended. It is for this reason that section 6A of the (federal) General Clauses Act, 1897 provides (as, indeed, does section 5 of the (provincial) General Clauses Act, 1956) that where "the text of any [Act] was amended by the express omission, insertion or substitution

of any matter, then, unless a different intention appears, the repeal [of the amending Act] shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal". We have considered the point. The proviso to clause (2) of Article 212 applies not as such to the law creating the Tribunal, or to the subject matter of the (exclusive) jurisdiction conferred on the Tribunal in terms of any of the paras of clause (1), but to the Tribunal itself. This is made clear by the use of the words "extends the provisions to such a Court or Tribunal", with which the proviso closes. Therefore, the 1974 Act applies not in relation to the 1974 Sindh Act as such, nor the subject matter of the jurisdiction that was thereby conferred, but to the Tribunal set up by that law at the time that Parliament enacted the 1974 Act. The Tribunal set up by the 1991 Sindh Act came much later. It is of no relevance for purposes of the proviso that the jurisdiction conferred upon it is but carved out from that conferred on the Tribunal originally set up. The Tribunal set up by the amendments is hence not covered by the proviso. Put differently, the 1991 Sindh Act, even though a purely amending statute, must for purposes of the proviso to clause (2) be regarded as a separate and distinct law in its own right inasmuch as it sets up a new Tribunal. No appeal therefore lies to this Court in terms of clause (3) of Article 212 from the said Tribunal.

20. The conclusions arrived at above require certain directions to be given, keeping in mind that leave petitions and appeals under clause (3) of Article 212 may well be pending from Tribunals not covered by the proviso to clause (2), and many such petitions and appeals appear to have been decided and disposed of in the past. We are of the view that matters must therefore be regularized in the following terms:

a. It is held that no appeal lies to this Court in terms of Article 212(3) against the decision of a Tribunal created by a Provincial law to which the proviso to clause (2) has not been applied. Any such leave petitions and appeals as are pending, being not maintainable, must be returned forthwith by the Office and no such leave petitions are to be entertained in future;

b. Nothing in sub-para (a) above applies in relation to the following:
   i. Leave petitions and/or appeals that already stand decided or disposed of (including by way of having been withdrawn or remanded or otherwise dealt with), whether by way of a detailed judgment or a short order whether announced orally or in writing and regardless of whether in respect of any such matter detailed reasons are awaited, all such matters being regarded as past and closed;
   ii. Leave petitions and/or appeals in which judgment is reserved, unless the concerned Bench directs otherwise;
   iii. Leave petitions and/or appeals that are part heard, unless the Bench concerned directs otherwise;
   iv. Such pending leave petitions and/or appeals as may be directed by the Hon'ble Chief Justice.

c. A litigant to whom a leave petition or appeal has been returned in terms of sub-para (a) or by reason of anything contained in sub-para (b), and who chooses or wishes to avail another remedy before any other forum as may be available under law shall have the benefit of section 14 of the Limitation Act,

1908 if any question of limitation arises or (as the case may be) equivalent equitable relaxations if any question of delay or laches arises.

d. The Registrar shall ensure that a copy of this judgment is forthwith sent to the registrars of all Tribunals to which sub-para (a) applies and the said registrars shall immediately bring it to the attention of the Chairpersons and members of the said Tribunals. It shall be the responsibility of each Chairperson to ensure that till such time as the proviso to clause (2) of Article 212 becomes applicable to the Tribunal, the following (or similar) legend is suitably incorporated in the title page of each decision thereof for the benefit of all litigants:

"This Tribunal is not covered by the proviso to clause (2) of Article 212 of the Constitution of the Islamic Republic of Pakistan and therefore no leave petition or appeal lies to the Hon'ble Supreme Court of Pakistan in terms of clause (3) of the said Article."

21. The Office is directed to forthwith return the instant appeal to the present appellant.

P L D 2023 SC 207

Federal Board of Revenue VS Hub Power Company Ltd

Where the right to file an ICA before the High Court u/s 3 of the Ordinance exists, then a petition before the Supreme Court without exhausting the said remedy, and thereby circumventing the forum below, is ordinarily not maintainable.

SYED MANSOOR ALI SHAH, J

3. We have heard the learned counsel for the parties and have gone through the case law with their able assistance. It is settled law that where the right to file an ICA before the High Court under section 3 of the Ordinance exists, then a petition before this Court without exhausting the said remedy, and thereby circumventing the forum below, is ordinarily not maintainable. The requirement of filing an ICA is a rule of practice for regulating the procedure of the Court and does not oust or abridge the constitutional jurisdiction of this Court. Such petitions, however, have been entertained by this Court only when certain exceptional circumstances exist, such as, where the matter involves important questions of law of great public importance having far-reaching consequences, questions of law as to the interpretation of the Constitution and validity of provincial statutes, and substantial questions of law involving fundamental rights, coupled with the fact that the objection with regards to maintainability is taken at a belated stage before the Court.[14] We note that no such exceptional circumstances exist in the matter at hand and the objection regarding maintainability of the petition was also duly raised at the first instance. Reliance on Media Network (supra) by the learned counsel for the petitioners is misconceived as in the said judgment, this Court had noted that the objection as to maintainability was taken at a belated stage and important questions of law of great public importance having far-reaching consequences were involved in terms of selection of cases for audit under a Self-Assessment Scheme and policy guidelines issued by the Central Board of Revenue. Whereas, the present matter relates simply to adjustment of input tax with respect to services received by the

respondent against the sales tax on services. Consequently, we find that the instant petition, having been filed without availing the remedy of an ICA before the High Court, is not maintainable.

P L D 2023 SC 236

Sadiq Poultry VS Government Of KP

Suo motu Powers of the High Court explained

IJAZ UL AHSAN, J

6. It is settled law that the High Court does not have suo motu jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan (the "Constitution") as compared to this Court which has been conferred exclusive jurisdiction in the matter by the Constitution in terms of Article 184(3). Reliance in this regard is placed on Mian Irfan Bashir v. Deputy Commissioner (D.C.), Lahore (PLD 2021 SC 571). The prayer of the private respondents was essentially limited to the pricing of products. To the contrary, the learned High Court passed a series of suo motu orders, such as the orders dated 25.02.2021 and 01.07.2021, whereby a ban was imposed on the export of dairy and poultry products. It is pertinent to mention here that banning imports or exports of products is not the domain of the Courts but falls under the exclusive domain of the executive. The learned High Court could not have transgressed its jurisdiction under Article 199 of the Constitution by passing an order which not only amounts to exercise of suo motu jurisdiction, but also an encroachment on the jurisdiction of the executive.

7. Article 184 of the Constitution provides that the power to exercise suo motu jurisdiction vests only with the Supreme Court. The learned High Court has not cited any law or precedent on the basis of which it exercised suo motu jurisdiction. It is pertinent to mention here that the learned High Court was not competent to even fix the prices of products. The only course of action available to it, if necessary, was to direct the Government to do what it is required to do under the law in case its officials/functionaries were not doing that. The High Court, under Article 199, cannot devise a formula for pricing. Doing so is not permitted under the law and does not fall in the domain of the Courts and goes against the principle of trichotomy of powers envisaged under the Constitution. The act of issuing directions with respect to an issue or dispute which was not before the High Court constitutes overstepping jurisdictional limits which cannot be countenanced. The learned High Court could only pass appropriate and lawful orders on matters which have a direct nexus with the lis before it and could not overstep or digress therefrom. The impugned order not only goes against the mandate of Article 199 but is also against settled principles of law. As such, the learned High Court could not have, suo motu, provided a formula for the calculation of prices nor could the High Court direct that a pricing committee be formed to implement the formula provided by the High Court. These matters clearly relate to the executive and ought to be left to the policy makers to regulate.

8. Even otherwise, Item No.27 of the Federal Legislative List clearly and categorically provides that import and export are a federal subject. Further, Section 3 of the Pakistan Imports and Exports (Control) Act, 1950 clearly states that the power to prohibit or restrict imports and exports vests with the Federal Government. As such, directing the

Provincial Government to do so did not have any legal or constitutional basis or sanction behind it. For ease of convenience, Section 3 of the ibid Act is reproduced below: -

"3. POWERS TO PROHIBIT OR RESTRICT IMPORTS AND EXPORTS

(1) The Federal Govt. may, by an order published in the Official Gazette and subject to such conditions and exceptions as may be made by or under the order, prohibit, restrict or otherwise control the import and export of goods of any specified description, or regulate generally all practices (including trade practices) and procedure connected to the import or export of such goods and such order may provide for applications for licenses under this Act, the evidence to be attached with such applications, the grant, use, transfer, sale or cancellation of such licenses, and the term and manner in which and the periods within which appeals and applications for review or revision may be preferred and disposed of, and the charging of fees in respect of any such matter as may be provided in such order.

(2) No goods of the specified description shall be imported or exported except in accordance with the conditions of a license to be issued by the Chief Controller or any other officer authorized in this behalf by the Federal Government.

(3) All goods to which any order under subsection (1) applies shall be deemed to be goods of which the import or export has been prohibited or restricted under section 16 of the Customs Act, 1969 (1V of 1969), and all the provisions of that Act shall have effect accordingly.

(4) Notwithstanding anything contained in the aforesaid Act the Federal Government may, by an Order published in the official Gazette, prohibit, restrict or impose conditions on the clearance whether for home consumption or warehousing or shipment abroad of any imported goods or class of goods."

(Underlining provided)

The aforenoted provision of law clearly states that the subject of restriction or prohibition of imports and exports falls within the domain of the Federal Government. As such, the High Court clearly exceeded its jurisdiction by formulating a policy regarding pricing of goods or commodities and banning exports of livestock, poultry, dairy products or products derived therefrom. It is necessary to note that Section 5B of the ibid Act provides that in case of violation of an order restricting or prohibiting imports or exports, the jurisdiction to adjudge the same would exclusively vest with a Commercial Court. The High Court, acting under Article 199, cannot be termed as a Commercial Court. This is because civil/ criminal jurisdictions of the High Court are separate from the constitutional jurisdiction of the High Court. In the former, evidence is recorded by the competent Court and then the High Court sits in appeal/revision over a decision of the lower fora. In the latter, the High Court is the Court of first instance, does not ordinarily record evidence regarding factual matters, and is acting as a constitutional court inter alia to ensure that there is no infringement of the Constitution or the rights guaranteed to citizens by the Constitution.

9. We are of the view that the learned High Court has incorrectly applied the law. There are patent jurisdictional errors in the impugned order which warrant

interference. The Learned Additional AG KP has been unable to persuade us to endorse the view taken by the High Court. We have repeatedly asked the Additional AG KP to show us how the impugned order is legally sound. However, he has been unable to do so. As such,the impugned order is found to be unsustainable.

P L D 2023 SC 241

Commissioner Inland Revenue VS

SNGPL

"Guidelines/ Requirements of Pronouncement and Writing of Judgment, The delay in writing of Judgment and its effect."

ORDER: -

8. With regard to the original jurisdiction of a court, Order XX, Rule 1(2) of the Code stipulates that the 'judgment should be pronounced in open Court, either at once or on some future day in respect whereof notice shall be given to the parties or their advocates'. Order XX, Rule 3 of the Code stipulates that, 'The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it...'. And, decrees are attended to by Order XX, Rule 7 of the Code which provides that:

> '7. Date or decree. The decree shall bear date the day on which the judgment was pronounced, and, when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree.'

With regard to the appellate jurisdiction Order XLI, Rule 30 of the Code stipulates that the court, 'shall pronounce judgment in open Court, either at once or on some future day of which notice shall be given to the parties or their pleaders'. And, Order XLI, Rule 31 of the Code stipulates that the judgment 'shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein'. The abovementioned provisions of the Code clearly stipulate that a judgment, whether in a court's original or appellate jurisdiction, must be dated. And, the pronouncement of a judgment does not simply mean the result of the case, such as, allowed, dismissed or any other variant, but, as stipulated in section 2(9) of the Code, it is 'the statement given by the Judge of the grounds of a decree or order'.

12. Not inscribing the date when a judgment is written, signed and pronounced is connected with the belated writing of judgments. This Court has repeatedly held that a judgment must be written within a reasonable time of the case being heard. In the case of Iftikhar-Ud-Din Haidar Gardezi v Central Bank of India Ltd., it was held by a three-member Bench of this Court that:

> 'In this position of law, the High Court was required to pronounce judgment in open Court at once or on some future day. The "future day" under Rule 30 could not possibly mean that judgment would be announced after unreasonable delay as was done in this case. In any case, a period of 8 months is not reasonable according to the rule laid down by this Court in Muhammad Bakhsh's case supra. In the case of Mst. Ghulam Fatima, following observations were made:
>
> "I have deliberately reopened the case so far as the arguments are concerned, because after such a long time the learned Judge cannot be expected to remember the arguments put forward and he may either not have any notes or may have destroyed the notes. "Delay even of a little over three months was considered to be objectionable

and its explanation was asked for in case of Bashir Ahmad Khan. In the case of Walayat Hussain, there was delay of 8 months in announcing the judgment and it was held to be appropriate to rehear the case. The following observations were made:

> "It was contended by learned counsel for the petitioner that the suit was badly mishandled by the learned Civil Judge inasmuch as he hurriedly closed the evidence of the petitioner but then slept over the matter for a long time and decided it after about 8 months of the hearing of arguments. It was pointed out by them that the normal period for announcing judgment, after hearing of arguments, is three months and if the case is not decided within that period arguments are required to be heard afresh. Learned counsel for respondent could not justify the announcing of judgment by the learned Civil Judge after 8 months of the hearing of arguments and had no objection to the remand of the case to him for fresh decision after hearing arguments again."
>
> Dacca High Court while dealing with identical circumstances, took a very serious notice of delay in the announcement of judgment in case of M.K. Zaman. Para 4 of the judgment says:

"It is to be noted that the procedure adopted in this case by the learned Magistrate Mr. A.K.M. Fazlul Haq is open to serious objection. There was no reason for not delivering the judgment within a week of hearing arguments. The first date for judgment was fixed 22 days ahead and then pronouncement of the judgment was adjourned on two other dates till at last it appears to have been written on 29-10-1966 more than 3-1/2 months after hearing of the arguments. It was simple case under sections 323 and 379 of the Pakistan Penal Code and there was no justification whatsoever for such delay in delivery of judgment. The delay on the part of the learned Magistrate in pronouncing his judgment in this simple case cannot be too strongly condemned. Let a copy of this judgment be sent to the Chief Secretary, Government of East Pakistan." This Court in Muhammad Bakhsh case ruled that the reserved judgments had to be announced within reasonable time:

"... it is proper that once the arguments concluded and the judgment reserved, it has to be announced' within reasonable period. We are sure that in future no unnecessary delay will take place in announcement of judgments."

13. There are also adverse consequences when there is inordinate delay in writing judgments as pointed out in the case of Muhammad Ovais v. Federation of Pakistan by another three-member Bench of this Court:

'The unreasonable delay of ten months in the instant case in pronouncement of judgment by the learned High Court has caused prejudice as well. In the lengthy arguments addressed before us on merits, we were referred to a bulk of documentary evidence going to the very route of the case which was never found mentioned in the impugned judgment of the High Court. This omission seems to be caused only and only due to the delay of ten months in question.'

14. More recently in the case of MFMY Industries Ltd. v. Federation of Pakistan, which is also by a three-member Bench this Court, what had been earlier stated was reiterated and done so comprehensively after a thorough survey of precedents, and it was emphatically expounded, that:

'If the Judges cannot compose and deliver the judgments within the above

(reasonable) time, then they for sufficient reasons, to be recorded (by them) should set out the case for re-hearing. However, because of the high status of the judges of the High Courts, it is not expected that the learned Judges shall fix the matters for rehearing in routine just to cover up the lapse in composing the judgment within 90 days, rather I am sure that it shall definitely be for genuine reasons, reflected in the order of rehearing as to why the judgment could not be written and pronounced. However, pronouncement of judgment by the High Court after a lapse of time period of 90 days if the matter for any reason is not put for any rehearing per se shall not be invalid, though it may be frowned upon. But again it does not mean that learned High Court has indefinite time to pronounce the judgment after hearing of the matter. In my opinion, the maximum time within which the judgment should come is 120 days. Otherwise the judgment shall stand weakened in quality and efficiency, if not invalid altogether and therefore when challenged before this Court, the Court shall decide whether it should sustain or set aside on the simple and short ground of inordinate delay.'

15. Judgments by the superior courts, by which are meant the High Courts and the Supreme Court, were also specifically considered in the MFMY case and it was held, that:

'8. Now coming to the judgments to be rendered by the apex Court of the country. The cases/matters by this Court are heard in benches. Usual cases are heard by a three member bench, though two member benches also hear the matters. The rule of 90 days should also ordinarily extend to those (cases) heard by two, member benches of this Court and if the matter is not decided within this time the case should be fixed for rehearing. This is what I would do for myself.'

'9. Furthermore, in the context of the judgments in general and in particular to be delivered by the superior courts, it is, my firm and well thought-out view that if there is an inordinate delay in pronouncement of judgment after hearing of the matter, ... the Judges shall not be in a position to exactly recall and record with precision and exactitude as to what propositions of law and facts were argued before them. This shall have reflection upon the rule of audi alteram partem, which is a fundamental and salutary rule of justice and postulates that if someone has been denied appropriate opportunity of hearing in a case, any verdict/ decision given against such person/party shall not be laudable.'

16. This Court (in the case of MFMY) had also observed that Judges who do not decide cases quickly and do not write judgments within a reasonable time may be guilty of misconduct, and did so by referring to the Judges Code of Conduct:

'And of course the mandate of Article X of the Judges Code of Conduct, which they have sworn (vide their oath) to follow and abide by in letter and spirit. And the said Article stipulates:

"In this judicial work a Judge shall take all steps to decide cases within the shortest time, controlling effectively efforts made to prevent early disposal of cases and make every endeavor to minimize suffering of litigants by deciding cases expeditiously through proper written judgments. A Judge who is unmindful or indifferent towards this aspect of his duty is not faithful to his work, which is a grave fault."'

17. It may be that the date is not

inscribed on the judgment when it was written, signed and pronounced to circumvent the directions of this Court to write judgments within a reasonable time and/or to escape, as observed by this Court, the consequences of such misconduct.

P L D 2023 SC 265

F.I.A through DG VS Syed Hamid Ali Shah

"High Court has no power under Section 561-A, CrPC. to quash an FIR or an investigation proceeding, however, the High Court can quash a judicial proceeding pending before any subordinate court under Section 561-A, Cr.P.C."

SYED MANSOOR ALI SHAH, J

4. First of all, we want to make it clear that a High Court has no power under section 561-A, Cr.P.C. to quash an FIR or an investigation proceeding; therefore, the criminal miscellaneous applications filed under section 561-A, Cr.P.C. by some of the accused persons in the High Court for quashing the FIR and investigation proceeding in the present case were not maintainable. This is because jurisdiction of a High Court to make an appropriate order under section 561-A, Cr.P.C. necessary to secure the ends of justice, can only be exercised with regard to the judicial or court proceedings and not relating to proceedings of any other authority or department, such as FIR registration or investigation proceedings of the police department. This has been authoritatively held by a five-member bench of this Court in Shahnaz Begum. A High Court, therefore, can quash a judicial proceeding pending before any subordinate court under section 561-A, Cr.P.C., if it finds it necessary to make such order to prevent the abuse of the process of that court or otherwise to secure the ends of justice; however, it should not ordinarily exercise its power under section 561-A, Cr.P.C. to make such order unless the accused person has first availed his remedy before the trial court under section 249-A or 265-K, Cr.P.C. Where before the submission of the police report under section 173, Cr.P.C. to the court concerned, the accused person thinks that the FIR has been registered, and the investigation is being conducted, without lawful authority, he may have recourse to the constitutional jurisdiction of the High Court under Article 199 of the Constitution for judicial review of the said acts of the police officers.

5. In the present case, as the High Court was competent to judicially review the acts of registering the FIR and conducting the investigation by the officers of the FIA in the exercise of its constitutional jurisdiction under Article 199 of the Constitution, therefore, the acceptance of the criminal miscellaneous applications filed by some of the accused persons under section 561-A, Cr.P.C. and the reference to section 561-A, Cr.P.C. while quashing the FIR have no material bearing on the jurisdiction of the High Court while passing the impugned judgment. Even otherwise, if the reasons stated for passing the impugned judgment fall within the scope of the jurisdiction of the High Court under Article 199 of the Constitution, the reference to a wrong or inapplicable provision of law will not by itself have any fatal consequence.[4] The High Court has observed in the impugned judgment that the matter in issue, which relates to the violation of the terms and conditions of service of the CDA employees, does not constitute the offence of criminal misconduct punishable under

section 5(2) of the PCA nor are the ingredients of the offence of criminal breach of trust under section 409, P.P.C. made out. The High Court has also specifically quoted the statement made before it by the Addl. Director, FIA that "FIA has concluded investigation and no element of bribery has been found in the entire inquiry against any official of CDA". With the said observations, the High Court has quashed the FIR, by holding that FIA authorities have failed to legally justify their actions of initiating the inquiry and registration of the FIR. These reasons squarely fall within the scope of the provisions of Article 199(1)(a)(ii) of the Constitution.

6. Article 199(1)(a)(ii) of the Constitution empowers the High Courts to judicially review the acts done or proceedings taken by the persons performing functions in connection with the affairs of the Federation, a Province or a local authority and if find such acts or proceedings to have been done or taken without lawful authority, to declare them to be so and of no legal effect. The registration of an FIR and the doing of an investigation are the acts of officers of the police department (a provincial law enforcement agency) who perform functions in connection with the affairs of a Province and are thus amenable to the jurisdiction of the High Courts under Article 199(1)(a)(ii) of the Constitution. The High Courts can declare such acts of the police officers, to have been made without lawful authority and of no legal effect if they are found to be so and can also make any appropriate incidental or consequential order to effectuate its decision,[5] such as quashing the FIR and investigation proceeding. The acts of registering the FIR and conducting investigation by the officers of the FIA, in the present case, are also subject to said jurisdiction of the High Court, as they have been done by the officers performing functions in connection with the affairs of the Federation.

P L D 2023 SC 298

Qazi Naveed Ul Islam VS District Judge, Gujrat

"Frivolous Litigation, abusing process of the Court, Imposition of costs its purpose and benefits of awarding costs stated".

SYED MANSOOR ALI SHAH, J

11. Such frivolous, vexatious and speculative litigation unduly burdens the courts giving artificial rise to pendency of cases which in turn clogs the justice system and delays the resolution of genuine disputes. Such litigation is required to be rooted out of the system and one of the ways to curb such practice of instituting frivolous and vexatious cases is by imposing of costs under Order XXVIII, Rule 3 of the Supreme Court Rules, 1980 ("Rules"). The spectre of being made liable to pay actual costs should be such as to make every litigant think twice before putting forth a vexatious claim or defence[3] before the Court. These costs in an appropriate case can be over and above the nominal costs which include costs of the time spent by the successful party, the transportation and lodging, if any, or any other incidental cost, besides the amount of the court fee, process fee and lawyer's fee paid in relation to the litigation.[4] Imposition of costs in frivolous and vexatious cases meets the requirement of fair trial under Article 10A of the Constitution, as it not only discourages frivolous claims or defenses brought to the court house but also absence of such cases allows more court time for the adjudication of genuine claims. It also

incentivizes the litigants to adopt alternative dispute resolution (ADR) processes and arrive at a settlement rather than rushing to courts. Costs lay the foundation for expeditious justice and promote a smart legal system that enhances access to justice by entertaining genuine claims. The purpose of awarding costs at one level is to compensate the successful party for the expenses incurred to which he has been subjected and at another level to be an effective tool to purge the legal system of frivolous, vexatious and speculative claims and defences. In a nutshell costs encourage alternative dispute resolution; settlements between the parties; and reduces unnecessary burden off the courts, so that they can attend to genuine claims. Costs are a weapon of offence for the plaintiff with a just claim to present and a shield to the defendant who has been unfairly brought into court.

12. In the instant case, the petitioner has repeatedly abused the courts to advance a personal grudge by repeatedly filing vexatious and frivolous claims in various courts, not only wasting the precious time of these courts but also causing anguish and pain to the other party that unnecessary, unfair and prolonged litigation brings. We, therefore, dismiss the present petition with costs of Rs.100,000/- which shall be deposited by the petitioner in the trial court for payment to respondent No.3 (Qazi Mubasher Shahzad) within three months from today. In case of failure by the petitioner to deposit the said costs within the prescribed time, they shall be recovered from the petitioner as a money decree with 10% monthly increase, and the costs of the execution proceedings shall also be recovered in addition thereto.

2023 S C M R 217

DEO (Female), Charsadda VS Sonia Begum

Distinction drawn between Domicile & Residence

MUHAMMAD ALI MAZHAR, J

5. According to the lexicographers, the terms "Domicile" and "Residence" have been defined in the following context and perspective:

I. Domicile

1. Black's Law Dictionary (Ninth Edition), at page 558

   Domicile. The place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere. A person has a settled connection with his or her domicile for legal purposes, either because that place is home or because the law has so designated that place.

2. Words and Phrases (Permanent Edition), Volume 13, at page 425 - 426

Person's "domicile" is place where he has his permanent home or principal establishment, to which place he has, whenever he is absent, intention of returning. Vehrs v. Jefferson Ins. Co., La.App., 168 So.2d 873, 877.

The place in which a person has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something which is unexpected and uncertain shall occur to induce him to adopt some other permanent home is his

"domicile." Caldwell v. Shelton, 221 S.W.2d 815, 817, 32 Tenn.App. 45.

3. Corpus Juris Secundum, Volume XXV, At pages 2-3

The word "domicile" is derived from the Latin "domus", meaning a home or dwelling house. Domicile is the legal conception of home, and the term "home" is frequently used in defining or describing the legal concept of domicile.

Domicile is the relation which the law creates between an individual and a particular locality or country. What has been said to be the most comprehensive and correct definition which would be given is that, in a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning.

Domicile has also been defined as that place in which a person's habitation is fixed, without any present intention of removing therefrom, and that place is properly the domicile of a person in which he has voluntarily fixed his abode, or habitation, not for a mere special or temporary purpose, but with a present intention of making it his permanent home.

§ 2. Domicile and Residence Distinguished

While the terms "domicile" and "residence" are frequently used synonymously, or said to be synonymous, and "residence" and "legal residence" have been defined in language similar to that used in defining "domicile", "domicile" and "residence" are not, when accurately precisely used, convertible terms. "Domicile" is a larger term, of more extensive signification and has been said to be used more in reference to personal rights, duties, and obligations; and residence is of a more temporary character than domicile.

That there is a difference in meaning between "residence" and "domicile" is shown by the fact that a person may have his residence in one place while his domicile is in another and that he may have more than one residence at the same time but as appears in §3 infra, only one domicile.

II. Residence

1. Black's Law Dictionary (Ninth Edition), at page 1423

1. The act or fact of living in a given place for some time <a year's residence in New Jersey>. Also termed residency. 2. The place where one actually lives, as distinguished from domicile <she made her residence in Oregon>. Residence usu. just means bodily presence as an inhabitant in a given place; domicile usu. requires bodily presence plus an intention to make the place one's home. A person thus may have more than one residence at a time but only one domicile. Sometimes, though, the two terms are used synonymously. Cf. Domicile (2). [Cases: Domicile 2.] 3. A house or other fixed abode; a dwelling <a three-story residence>. 4. The place where a corporation or other enterprise does business or is registered to do business <Pantheon Inc.'s principal residence is in Delaware>. [Cases: Corporations 52, 503(1), 666.]

2. Words and Phrases (Permanent Edition), Volume 37, at pages 318 to 319

The word "residence" means the place where one resides, or sits down or settles himself, and is largely a matter of intention not involving dominion over the particular spot or domicile. Nevertheless, it ordinarily implies

something of permanence or continuity at least for an indefinite period, to the exclusion of other contemporaneous residence. In re Duren, 200 S.W.2d 343, 350, 355 Mo. 1222, 170 A.L.R. 391.

To create "residence" actual, bodily presence in county or place, combined with freely exercised intention of remaining there permanently or for an indefinite time, at least are necessary. Lewis v. Lewis, 176 S.W. 2d 556, 559, 238 Mo.App. 173.

"Residence" means place where one resides, an abode, dwelling, or habitation, especially a settled or permanent home or domicile, and is made of fact of abode and intention of remaining. Reaume and Silloway v. Tetzlaff, 23 N.W.2d 219, 221, 315 Mich. 95.

3. Corpus Juris Secundum, Volume LXXVII, at pages 292 to 293

The word "residence" implies, involves, or carries with it the idea of a place of abode, a place of living, or a home, and it has been said that it is impossible to consider the term and disassociate it from the elements of home and habitation, and that a definition of the term from which all the elements of home and habitation are excluded, as a matter of no consideration, is beyond the ordinary conception. Nevertheless, a person may have his residence in one place and his permanent home or domicile in a different place, and a person's residence may be in a place where he does not dwell or abide. Usually, however, the word "residence" means that a person has his home in a particular place, and it has been said that the term is employed in the law to denote that a person dwells in a given place. Ordinarily, but not necessarily, a man's residence is his home, and is where he actually dwells, and the term may imply the house or dwelling in which a person lives or resides.

6. The expression "domicile" would reflect a person's status as a citizen of a particular state or country, whereas the expression "permanent residence" is a pure question of fact with regard to residence in a particular area. In line with Section 16 of the Pakistan Citizenship Act, 1951 ("Citizenship Act"), the Federal Government may by order deprive any such citizen of his citizenship if it is satisfied that he obtained his certificate of domicile or certificate of naturalization under the Naturalization Act, 1926 by means of fraud, false representation or the concealment of any material fact. Whereas under Section 17 of the Citizenship Act, the Federal Government grants a certificate of domicile to any person in respect of whom it is satisfied that he has ordinarily resided in Pakistan for a period of not less than one year immediately before making an application and has acquired a domicile therein. The issuance of domicile certificate under Section 17 of the Citizenship Act read with Rule 23 of the Pakistan Citizenship Rules, 1952 makes it evident that a particular person is a domiciliary of Pakistan. In the case of Joan Mary Carter v. Albert William Carter (PLD 1961 SC 616), this Court held that whatever might be the difficulties in giving a precise legal definition to the word "domicile" it appears to us that it must have some relation to the word from which it is derived, namely, domes home. The two most important conditions, which have been generally accepted to be the conditions that must be fulfilled for effecting a change of domicile, namely, the physical fact of residence and the present intention of making that place a permanent home, were fulfilled in the present case and whatever might have been

the domicile of origin of the respondent upon the satisfaction of these conditions, he acquired a legal domicile in Pakistan. While this Court in the case of Muhammad Yar Khan v. Deputy Commissioner-Cum-Political Agent Loralai and another (1980 SCMR 456), held that the words "that he has ordinarily resided in Pakistan for a period of not less than one year immediately before the making of the application, and has acquired a domicile certificate therein" would need a bit of clarification. It is a well-settled principle of Private International Law, to which reference is necessary, as "domicile" has not been defined in the Act, that every person carries the domicile of the country in which he is born such that, so long as he does not intentionally and by the exercise of free volition choose the domicile of another country, he carries the domicile of his origin and that to prove that he had acquired another domicile of his choice he must show that he had intentionally taken a decision in that behalf in the sense that he had taken abode therein with the intention of making it his permanent residence. The Court has also quoted the excerpts from the book "Private International Law" (Seventh Edition) by Cheshire page 151, under the caption "The Acquisition of a Domicile of Choice" as under: -

"The two requisites for the acquisition of afresh domicile are residence and intention. It must be proved that the person in question established his residence in a certain country with the intention of remaining there permanently. Such an intention, however, unequivocal it may be, does not per se suffice. These two elements of factum et animus must concur, but this is not to say that there need be unity of time in their occurrence. The intention may either precede or succeed the establishment of the residence. The emigrant forms his intention before he leaves England for Australia, the emigre who flees from persecution may not form it until years later.

Since residence and intention must concur they should logically be examined, but it will be found that in practice it is difficult, if not impossible, to keep them in watertight compartments. It is not residence per se, but residence accompanied by a certain intention, that constitutes domicile, and since au fond the requirement of residence is satisfied by mere presence the crucial inquiry in a contested issue centres upon the mind of the de cujus. Strictly speaking, residence is a fact, though a necessary one, from which intention may be inferred.

This much is clear, however, that a person's residence in a country is prima facie evidence that he is domiciled there. There is presumption in favour of domicile, which grows in strength with the length of the residence. Indeed, residence may be so long and so continuous that, despite declarations of a contrary intention, it will raise a presumption that is rebuttable only by actual removal to a new place. A man cannot gainsay the natural consequences of permanent residence in a country by, for example, declaring in his will that he does not intend to relinquish his formal domicile in another country.

On the other hand, time is not the sole criterion of domicile. Long residence does not constitute nor does brief residence negative domicile. Everything depends upon the attendant circumstances, for they alone disclose the nature of the person's presence in a country. In short, the residence must answer "a qualitative as well as a quantitative test". Thus in Topp v. Wood, what it was held that a residence of twenty-five years in India did not suffice to give a certain John Smith an Indian domicile because of his alleged

intention ultimately to return to Scotland, the land of his birth".

7. The Latin expression "Animus manendi" conveys 'the intention of remaining.' To establish or get hold of a domicile, a person should have an abode at a particular place with the intent to be there for an unlimited period. In order to thrash out this particular aspect, the concept of animus manendi is a crucial component and a benchmark to resolve the question of dwelling and whether a person has elected any particular place for his abode rests on the facts of each case separately. The term 'residence' envisions a constituent of permanency in residence and does not connote occasional or intermittent dwelling for any particular period at any particular place. By and large, the domicile of a person can be the residence but the residence may or may not be the domicile or mere residence is not domicile. There is also no concept under the Citizenship Act for two simultaneous domiciles of the same person who may inhabit at many places but he can have one domicile only which indicates his permanent place of dwelling, whereas residence is a more flexible notion than domicile. The plainest definition of "domicile" has been given by Chitty, J. in Cragnish v. Craignish [1892] 3 Ch. 180, observing "that place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom." However, in the case of Central Bank of India v. Ram Narain (AIR 1955 SC 36), the learned Court held that this definition, however cannot be said to be absolute one. The term 'domicile' lends itself to illustrations but not to definition. In English Law most of the jurists agree that two constituent elements for existence of domicile are (1) a residence of a particular kind, and (2) an intention of a particular kind. There must be the factum and there must be the animus. The residence need not be continuous but it must be indefinite, not purely fleeting. The intention must be a present intention to reside forever in the country where the residence has been taken up. It is also a well-established proposition that a person may have no home but he cannot be without a domicile. The law may attribute to him a domicile in a country where in reality he has not. In other words, one of the constituents giving birth to domicile of a person is the place where he was born. In the case of Arvind Kumar v. State of U.P. and others ((2011) ILR 3 ALL 1350), the learned Court placed reliance on the judgment in the case of Flowers v. Flowers, (1910) I.L.R. 32, wherein it was held that a mere casual residence in a place for a temporary purpose with no intention of remaining is not covered by the word "resides". The expression "resides" implies something more than "stay" and implies some intention to remain at a place and not merely to pay it a casual visit, while in the case of Jagir Kaur v. Jaswant Singh (1963 AIR 1521=1964 SCR (2) 73), the learned Court observed that a person would be said to reside at a place when it is not a flying visit to or a casual stay in a particular place. There shall be animus manendi or an intention to stay for a period, the length of the period depending upon the circumstances of each case.

12. By and large, the domicile of a person is treated as a parent document for recruitment in order to ascertain the permanent abode. Here all the respondents unequivocally asserted that they possess the domiciles of the concerned UCs as a matter of course and also offered valid justifications for the intermittent change of address with further affirmation that the place of their permanent residence is as per their domiciles. It is translucent from

the provisions contained under the Citizenship Act that neither a person can obtain multiple domiciles, nor the law approves or allows any such act or practice. If the jobs are given merely considering the CNIC without considering the address on the domicile then it would create various complications and complexities and even in the case of temporarily shifting or in case of a rented house, the person will be forced every time to apply for fresh domicile with the address of changed abode and in such eventuality, he will be neither here nor there but unfortunately a rolling stone, who would never be able to secure a job due to the alleged discrepancy and his candidature will be rejected every time, meaning thereby that if he will apply on CNIC address, he will be rejected due to difference in domicile address and if he will apply on domicile, again he will be rejected due to different address on CNIC which will somehow or the other lead him out of arena, sometimes due to address on CNIC and sometimes on the basis of address on certificate of domicile which cannot be the same in each and every case as a rule due to different circumstances which include temporary dwelling despite having permanent address at the place of domicile. So for all intents and purposes, the weightage and preference should be given firstly to the certificate of domicile which cannot be ignored without due consideration. In our considerate view, no restrictive or dissuading interpretation of Section 3 of the 2011 Act can be accentuated or overextended to nullify and abolish the effect of certificate of domicile and/or to give preference to the CNIC over the domicile and if it is done, then it will render the entire concept of a domicile redundant and meaningless in the recruitment process. We have also noticed that according to the Corrigendum issued pursuant to original advertisement published in Daily Mashriq and Aaj on 22.1.2016 and 24.1.2016 respectively, one more condition was added that female candidates may apply also on the basis of husband's domicile. So far as the C.P.L.A. No. 658-P/2019 arising out of judgment in W.P No.3768/2019 is concerned, the candidate claimed to be placed at Serial No. 8 on the merit list out of seven vacant posts and Muhammad Amir, who was at Serial No. 3, opted for some other job, therefore, the directions given by the learned High Court to consider the candidature of Syed Amjad Rauf Shah on the vacant post, who was next in line on merit within the same recruitment process, seems to be a rational conclusion in the present set of circumstances.

13. One more crucial aspect cannot be lost sight of that all the respondents were allowed to compete in the aptitude tests for appointment on ad hoc/contract or permanent basis as per advertisement; they qualified the test; some of them secured top positions and collectively all of them were declared eligible but they were dropped from the merit list. If the department had any doubt with regard to the address as mentioned in the domiciles and CNIC, then why due diligence was not done at the time of scrutiny of application forms or at the time of shortlisting the candidates which was an appropriate stage to vet all the credentials and antecedents of each candidate and, in case of any objection, the candidate could be confronted and asked to remove the objection before joining the recruitment process. Thus, the conduct of the department is not above board. Nothing was said regarding any vetting of documents made before allowing the candidates to appear in the aptitude test and despite qualifying the test on the basis of documents submitted by them and

securing marks on merits, they were denied the job opportunity at the eleventh hour which is also against the doctrine of legitimate expectation. According to the judgment in the case of Uzma Manzoor and others v. Vice-Chancellor, Khushal Khan Khattak University, Karak and others (2022 SCMR 694), this Court held while exploring and surveying the doctrine of legitimate expectation that this doctrine connotes that a person may have a reasonable expectation of being treated in a certain way by administrative authorities owing to some uniform practice or an explicit promise made by the concerned authority. In fact, a legitimate expectation ascends in consequence of a promise, assurance, practice or policy made, adopted or announced by or on behalf of government or a public authority. When such a legitimate expectation is obliterated, it affords locus standi to challenge the administrative action and even in the absence of a substantive right, a legitimate expectation may allow an individual to seek judicial review of a wrongdoing and in deciding whether the expectation was legitimate or not, the courts may consider that the decision of public authority has breached a legitimate expectation and if its proved then the court may annul the decision and direct the concerned authority/person to live up to the legitimate expectation. This doctrine is basically applied as a tool to watch over the actions of administrative authorities and in essence imposes obligations on all public authorities to act fair and square in all matters encompassing legitimate expectation. As per Halsbury's Laws of England, Volume 1(1), 4th Edition, paragraph 81, at pages 151-152, it is prescribed that "A person may have a legitimate expectation of being treated in certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise from a representation or promise made by the authority including an implied representation or from consistent past practice." In the case of R. v. Secretary of State of Transport Exporte Greater London Council (1985) 3 ALL ER 300, it is propounded that "Legitimate, or reasonable, expectation may arise from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. The expectation may be based on some statement or undertaking by or on behalf of the public authority which has the duty of taking decision."

CPLA No. 211/2017

https://www.supremecourt.gov.pk/downloads_judgements/c.p._211_q_2017.pdf

Director Military Lands & Cantonment

VS Aziz Ahmed

High Court cannot exercise jurisdiction to resolve Factual Controversies.

AMIN-UD-DIN KHAN, J

5. It is a settled proposition of law that constitutional jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 cannot be exercised to resolve the factual controversies. Reliance can be placed on “Government of Khyber Pakhtunkhwa vs. Intizar Ali” **(2022 SCMR 472**, “Amir Jamal Vs. Malik Zahoor-Ul-Haq” **(2011 SCMR 1023)**. In the instant case, from the documents placed on record by the parties it can be gathered that the disputed road/lane leading to survey No. 322 as pleaded in Para No. 3 of writ petition, “said lane is 97 Sq.Ft in length and approximately 11 feet in breadth” whereas claim of the writ petitioners is that it is 30 feet wide and further the writ petitioners

claim that it is a road leading to survey No. 322 whereas as per the Director Military Lands & Cantonment it is part of survey No. 326 and 327 which are adjacent inter se. In the GLR Class "C" land is recorded as green belt roadside grassy plot. Survey No. 326 consists upon 8712 square feet whereas survey No. 327 is 3049 sq.ft and nothing else is recorded in the said two survey numbers except, "roadside grassy plots" with their measurement. This negates the version of the writ petitioners that between Survey Nos. 326 and 327 there is a road. If the stance of the writ petitioners is accepted it is against the record and it is not admitted position that there was a road between survey Nos. 326 and 327, for such stances taken by the writ petitioners either recording of evidence for arriving at a conclusion sought by the writ petitioners was required or otherwise there should have been an admitted position before the learned High Court for exercising jurisdiction under Article 199. Nothing of the said requirement was available with the learned High Court, therefore, the findings of the High Court that in the instant matter recording of evidence is not required and jurisdiction under Article 199 for resolving the matter in issue and grant of a relief to the writ petitioners for determination of writ petition in accordance with the relief sought can be adjudicated is misconceived in our view.

CP No.1133/ 2016

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Rao Abdul Rehman Vs Muhammad Afzal

Requirements of a Valid Contract, discussed.

MUHAMMAD ALI MAZHAR, J

10. Another crucial aspect is what constitutes a valid contract between the parties for which undoubtedly one of the essential conditions is *consensus ad idem* for settling all the terms of the contract but, upon perusal of the alleged agreements to sell, we have found that no proper description or even exact location was mentioned to identify the suit property, instead the description of the suit property was jotted down by the petitioner in the plaint rather than in the alleged agreements. Fundamentally the phrase "*consensus ad idem"* in the law of contract connotes and epitomizes a meeting of the minds inured to describe the intention of the parties. This also speaks of the set of circumstances where there is a reciprocal understanding in the manifestation of the contract. Section 10 of the Contract Act, 1872 does not exclude an oral contract from being enforced, although in the case of an oral contract the clearest and more satisfactory evidence would be required by the Court. Admittedly the co-owner, Muhammad Afzal (respondent No.1), had neither signed the alleged agreement, nor he was privy to the alleged sale agreements. It is also an admitted position that the property was not partitioned by metes and bounds which means that no specific portion of the property was earmarked for signifying the specific share or location which could be dealt with independently, including the sale of an individual share out of the joint property. On this score or count also there was no valid contract for the whole property and the agreements were defective with inherent lacunas. According to Black's Law Dictionary (5th Edition), a 'contract' is "an agreement between two or more persons which creates an obligation to do or not to do a particular thing. Its essentials are competent parties, subject matter of a legal consideration, mutuality of agreement and mutuality of obligations." Anson has defined the word contract in the following words: "A contract consists in an actionable promise or promises. Every such promise

involves two parties, a promisor and promisee, and an expression of a common intention and expectation as to the act or forbearance promised". Ref: Anson's Law of Contract, 23rd Edition, by A.G. Guest, 1971, p. 23. According to Treitel, "A contract is an agreement giving rise to obligations which are enforced or recognized by law. The factor which distinguishes contractual from other legal obligations is that they are based on agreement of the contracting parties. This proposition remains generally true, in spite of the fact that it is subject to a number of important qualifications." Ref: G.H. Treitel, The Law of Contract, Tenth Edition (1999) by Sir Guenter Treitel, Sweet & Maxwell (1999), p. 1. (Source: Moitra's Law of Contract & Specific Relief, Fifth Edition). No doubt to constitute a valid contract one of the conditions is "*consensus ad idem*" which must exist with regard to the terms and conditions of the contract and, in case of any ambiguity, it may adversely reflect on its very existence. In fact, it is a Latin term in the law of contract that means the existence of meeting of minds of all parties involved which is the elementary constituent for the enforcement and execution of a contract and in case of no *consensus ad idem* there shall be no binding contract and in case of any palpable inexactitude or obliviousness in the settled terms and conditions then there shall be no probability to get a hold of any outcome of such defective agreement. Where an effective and enforceable contract is not structured by the parties, it is not the domain or province of the Court to make out a contract for them but the *lis* would be decided on the basis of terms and conditions agreed and settled down in the contract. The decree for specific performance may not be passed if the substratum of the contract suffers from shortcoming or legal infirmities which renders the contract unacceptable and unenforceable.

10. The petitioner in the Trial Court pleaded that he was not aware that the subject property was a joint property. Here the doctrine of *Caveat emptor* ("let the buyer beware") also applies which is based on a Latin phrase and for all intents and purposes lays down an obligation on buyers to rationally and intelligently scrutinize status including the clear title of the property before embarking into the transaction of sale. This is a rudimentary doctrine stuck between vendor and vendee in all contractual relationships and arrangements. According to Broom's Legal Maxims (Tenth Edition), Chapter IX, (page 528), the maxim *caveat emptor* applies, with certain specific restrictions, not only to the quality of, but also to the title to land which is sold, the purchaser is generally bound to view the land and to inquire after and inspect the title-deeds, at his peril if he does not. He does not use common prudence, if he relies on any other security. The ordinary course adopted on the sale of real estates is that the seller submits his title to the inspection of the purchaser, who exercises his own judgment, or such other as he confides in, on the goodness of the title; and if it should turn out to be defective, the purchaser has no remedy, unless he take special covenant or warranty, provided there be no fraud practiced on him to induce him to purchase. Whereas under Black's Law Dictionary (Sixth Edition), page 222, this maxim summarizes the rule that a purchaser must examine, judge, and test for himself. This maxim is more applicable to judicial sales, auctions, and the like, than to sales of consumer goods where strict liability, warranty, and other consumer protection laws protect the consumer-buyer. *Caveat emptor, qui ignorare non debuit quod jus alienum emit*. Let a purchaser beware, who ought not to be ignorant that he is

purchasing the rights of another. Let a buyer beware; for he ought not to be ignorant of what they are when he buys the rights of another. While the Words and Phrases (Permanent Edition), Volume 6A (Pages 8 & 9), describes the doctrine of caveat emptor as a rule of law that the purchaser buys at his own risk. Wood v. Ross, Tex.Civ.App., 26 S.W. 148, 149. Under the rule purchaser takes all the risks, being bound to examine and judge for himself as to title of land purchased unless he is dissuaded from so doing by representations of some kind. Kain v. Weitzel, 50 N.E.2d 605, 607, 72 Ohio App. 229. The maxim is used with reference to sales of property with respect to which the buyer must use proper diligence to inform himself as to its quality, and, in the case of real estate, as to its location. The quality of land on which its value depends, and which is too various for a market standard, the purchaser can see, if he will but look. No action lies against the vendor of real estate for false and fraudulent representations as to the location of lands. Land is not like a ship at sea; it has a known location and can be approached, and, even should it be necessary to purchase the land unseen, covenants may be inserted respecting the quality as well as seisin or title. Sherwood v. Salmon, 2 Day, 128, 136. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He may not shut his eyes or his ears to the inlet of information, and then say he is a bona fide purchaser without notice. Burwell's Adm'rs v. Fauber, Va., 21 Grat. 446, 463. Whereas the Major Law Lexicon (Fourth Edition), (page 6035-see page number,) the 'rule of *caveat emptor*' means that the buyer is bound to see that, what he buys, he buys after satisfying himself that there is good title. If a person chooses to buy a property without looking into title he does so at his own and the law will not help him to get rid of the bargain. Gour Kishan v. Chunder Kishore, per Gart T CJ, (1876) 25 SUTH WR 45 (46). In the case of Bahar Shah and others Vs Manzoor Ahmad **(2022 SCMR 284),** this Court held that an honest buyer should at least make some inquiries with the persons having knowledge of the property and also with the neighbors. Whether in a particular case a person acted with honesty or not will obviously depend on the facts of each case. The good faith entails righteous and rational approach with good sense of right and wrong which excludes the element of deceitfulness, lack of fair-mindedness and uprightness and or willful negligence. The purchaser is required to make inquiry as to the nature of possession or title or further interest if any of original purchaser over the property in question at time of entering into sale transaction.

Peshawar High Court

https://www.peshawarhighcourt.gov.pk/PHCCMS//judgments/WP923-P2022.pdf

WP No. 923-P/2022

Adnan Malik VS Govt KPK

Allotment of Residential Accommodation and Jurisdiction of High Court.

Musarrat Hilali, J

5. Under section 4 and 7 (2) of the Act, 2018, the Estate Officer is authorized to allot, cancel, extend and exchange any provincial building under the management and control of establishment and administration department or evict any person or public office holder from such building. If any Government department, office, or public office holder is aggrieved from order of the competent authority,

they under section 10 of the Act, 2018, as well as Rule 35 of the Khyber Pakhtunkhwa
Residential Accommodation at Peshawar (Procedure for Allotment) Rules, 2018, "the Rules 2018" shall have a right of appeal to be made to the appellate authority. The Relevant section 10 for ready reference is reproduced herein below;

10. Appeal. ---(1) Any Government Department, office or public office holder, as the case may be, aggrieved from the orders of the competent authority shall have a right of appeal to be made to the Appellate Authority in the manner, as may be prescribed.

(2) A Government Department, office or public office holder, as the case may be, aggrieved from the decision or order of the Appellate Authority, may file an appeal to the second Appellate Authority consisting of Minister for Law, a nominee of the Chief Minister and such other members and in such manners, as may be prescribed.

(3) Appellate Authority shall not review its own decision.

6. Hon'ble the apex court in Para 5 of a judgment dated 18.08.2022 passed in C.P No. 361-p/2018 titled Govt of Pakistan vs. Malik Safeer Ahmed has observed that if any person is aggrieved from any order made or proceedings taken by an authorized officer in respect of an official accommodation can avail the remedies provided by the relevant applicable rules, regulations, policies instructions directions etc for redressal of his/her grievance.

7. Under Article 199 of the Constitution, an aggrieved person can approach this court for the redressal of his/her grievance if there is no other adequate remedy provided. In the instant case, the petitioner has bypassed the remedy available to him under section 10(1) and (2) of the Act, 2018, read with Rules 35 of the Rules, 2018, and now it has been well settled that when the statute provides a special remedy to an aggrieved party like right of appeal then an implied bar arises.

CR No. 370-P/2017.

https://www.peshawarhighcourt.gov.pk/PHCCMS//judgments/CR370-17.23.12.220001.pdf

Sardar Muhammad Khan VS Rais Khan Afridi

Proof of Pre-Emption Suit & its Requirements.

MOHAMMAD IBRAHIM KHAN, J

5. Before this Court there is no controversy with regard to holding of superior right of Sardar Muhammad Khan, plaintiff/ petitioner. The only argument addressed on top priority was to delve deep into the evidence as to whether the talb-e-Muwathibat has in fact been made out in accordance with its requirement? The judgment of the learned appellate Court, while setting aside the judgment of the learned civil Court, was mainly based that since talb-eMuwathibat was not made in accordance with the criteria laid down hence, while the same is defective then there would be no need to further find any need to examine the evidence of making of second talb i.e. talb-e-lshhad even if at all, any exercise of the right of preemption talb-eKhusumat is made within stipulated period of 120 days. It is to be appreciated that where making of talb-e-Muwathibat, if it is not made in accordance with the preemption law, the entire superstructure would be crumbled. Section 13 for the

demand of preemption right needs to be reproduced herein below for ready reference: -

6. "13. Demand of pre-emption- (l) The right of preemption of a person shall be extinguished unless such person makes demands of preemption in the following order, namely: -

a. Talb-e-Muwathibat
b. Talb-e-lshhad
c. Talb-e-Khusumat

Explanation---(i) "Talb-eMuwathibat" means immediate demand by a preemptor in the sitting or meeting (Majlis) in which he has come to know of the sale declaring his intention to exercise the right of preemption. Note- Any words indicative of intention to exercise the right of preemption are sufficient. Explanation-(ii) "Talb-e-lshhad" means demand by establishing evidence. Explanation-(iii) "Talb-eKhusumat" means demand by filing a suit"

In the case in hand, the plaintiff/ petitioner Sardar Muhammad Khan has examined PW-7 namely Javed S/o Sher Afzal who is running his shop at Jhandi Station on 05.03.2013 while he was present in his shop, two persons came to his shop who were talking about the sale in favor of Rais Khan Afridi (Defendant] respondent) in a land situated being preempted in which, Sardar Muhammad Khan, plaintiff/ petitioner is co-owner. He, on the same day, while back to his house in evening time at 05 pm, saw Sardar Muhammad Khan sitting in his baithak; went inside and gave him information about the sale of the land he being a co-owner. On learning that in fact the sale has taken place, the said Sardar Muhammad Khan announced his right of preemption; thereafter, the other talbs i.e. talb- e-lshhad was reduced into notice form duly admitted by his own son Ehsan Sardar and Nadir Jan, a co-villager. Later, talb-e-Khusumat was made in accordance with law by filing a suit within 120 days.

7. It is an admitted fact that the information regarding the sale was communicated

while two persons came to the business place of the said witness Javed Khan informer; however, their names have not been disclosed neither by the said Javed Khan nor any question in this regard was put to him that who actually were those persons. According to the case law reported in __PLD 2015 SC 69 the preemption suit was mainly dismissed on the ground that persons who had conveyed information regarding sale and price to the brother of the said preemptor was not produced as a witness, hence, the elements of talbe-Muwathibat were not proved. Yet, there is another latest dictum of the august Apex Court reported in 2022 SCMR 1231 wherein the aspect that it is mandatory to examine the person who either conveyed the sale information to the person

who informed the preemptor or from the conversation in between those two persons who had learnt about the sale which was further communicated to the preemptor, must be examined.

8. This is the dire need as to maintain chain of source of information as to the fact of sale from the very first person who has the direct knowledge or pass on the same to the person who lastly informed the preemptor must be complete. It is utmost necessary that only complete chain of source of information of the sale can account for essential elements of talb-e-Muwathibat which are the time, date and place when the preemptor obtain the first information of the sale and the immediate declaration of his intention by the preemptor to exercise his right of preemption there and then on obtaining such information. The making of talb-e-Muwathibat shall not be based on

hearsay evidence of a witness as there would beskepticism that such information has been given in order to only fulfill the requirement of talb-eMuwathibat rather the veracity and truthfulness of the witness of talb-e-Muwathibat shall be of prime consideration.

9. This is as coming out that the evidence of the preemptor that though the information regarding the sale in favour of Rais Khan Afridi has been given by PW-7 Javed Khan but the chain qua such information has been broken as to how the information has been given to him by those persons who came to his businessplace and were talking about the subject is hearsay evidence which can lshhad and talb-e-Khusumat are made in accordance with law will be of no useful purpose. As such, the plaintiff/ petitioner cannot be granted decree for preemption.

Cr.A No.1123-P/2022

https://www.peshawarhighcourt.gov.pk/PHCCMS//judgments/CR.A1123-20222----FFFFEEE.pdf

Hassan Shah vs The State

Directory & Mandatory Provision of Law.

ISHTIAQ IBRAHIM, J

8.Regarding the second objection of the learned counsel for the appellants that warrant u/s 27 of the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019, was not obtained. It is pertinent to mention here that the information was received to the police while they were on routine patrol and thereafter they straightaway rushed to the place of occurrence. At times law enforcing agencies are left with no choice but to conduct raid for the reason that any sort of delay would give time to the culprits to leave the place of occurrence or to dispose of the incriminating articles. Therefore, in the present situation the raid has been conducted according to law by considering the facts and circumstances of the case. In addition to above, the provision of section 27 of the Khyber Pakhtunkhwa Control of Narcotic Substances, Ac, 2019, and that of the provisions of section 20 & 21 of Control of Narcotic Substances Act, 1997, are almost identical to each other and it has been held by the Apex Court in four-member bench judgment rendered in case titled "Zafar..Vs..The State" (2008 SCMR 1254)" that these are directory and not mandatory. Furthermore, Section 28 of the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019, subject to proviso of sub-section 1 of Section 27, empowers authorize officer to enter any building, place, premises, dwelling house or conveyance on receipt of information or knowledge, if he is of the opinion that narcotic substances is kept or concealed, and obtaining search or arrest warrant from the Special Court will give opportunity for concealment of evidence or facility for escape to any person involved in commission of offence. Compliance of proviso of subsection 1 of Section 27 is also not attracted in the present case. The rationale behind the compliance of the proviso is to preserve privacy and maintain dignity and modesty of women and dwelling house. So the raiding police party acted within the four comers of law. Therefore, in view of this Court the proceedings in question cannot be declared void due to non-observance of section 27 of the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019.

Labor RevisionN0.04-P/2018

https://www.peshawarhighcourt.gov.pk/PHCCMS//judgments/labour-revision--04-p2018==.pdf

Muhammad Haroon VS M/S Amin Hotel

Jurisdiction of Court in Wages cases

IJAZ ANWAR, J

6. The jurisdiction of the Wages Court within the meaning of Khyber Pakhtunkhwa Payment of Wages Act, 2013 is very exhaustive and deals with delayed or deducted wages. The term "wages" has specifically been defined in the ibid Act.

It is pertinent to mention here that the jurisdiction of the Wages Court has not been restricted to the workman only rather its application has been extended to "persons" employed in factories or industrial and commercial establishments and thus the word "person" used in the "Act" also include a non-workman. However, in the case in hand, the claim of the petitioner pertains to Gratuity, Leave Encashment and Bonus and such rights are secured and guaranteed under the Khyber Pakhtunkhwa Industrial and Commercial Employment (Standing Orders) Act, 2013 (hereinafter to be referred as "Standing Orders Act 2013"). The application of the Standing Order Act 2013 has, however, been restricted to the workers employed, directly or through any other person or in any industrial or commercial establishments. Thus, in order to avail the benefits provided under the Standing Orders Act 2013, such, person must also prove himself to be a worker in accordance with Section-2, Sub Section (n) of the Standing Orders Act 2013, which provides the definition of "worker" as follows: - "worker" means any person employed in any industrial establishment or commercial establishment or a mine to do any skilled or unskilled, manual or clerical work for hire or reward and includes permanent, probationer, badlis, temporary, apprentices and contract workers".

8. It thus follows that for other benefits i.e. arrears of salaries etc. a non-workman can also approach the Wages Court, however, to avail the benefits flowing from the Standing Order Act, 2013 such claimant/person must prove himself to be a worker as provided in the Act ibid.

9. Now coming to the case of the deceased petitioner it appears that initially while submitting his claim petition he never alleged himself to be a workman nor referred to any of his manual or clerical duties, similarly, when he appeared as PW-I, he admitted in cross-examination to having been posted as Finance Manager. It was in view of such scanty evidence of the petitioner that the Wages Court further allowed him opportunity to submit his additional evidence on his status as a workman, thereto he miserably failed to prove himself to be a worker. The record placed on file clearly suggests that he was heading the accounts Section and his name appeared on the top of the list of employees provided.

10. It is by now well settled that where a person claiming certain rights flowing from the Standing Order Act 2013, he has to prove himself to be a workman within the provision of ibid Act, but the evidence produced by the petitioner is too scanty and he failed to dispel the impression of his high sounding post of Finance Manager to be a non-workman. It is also by now well settled that the initial burden to prove a person to be a workman is on the person, who alleges himself to be a workman and such burden will be shifted only to the respondents when once such person proved himself to be a workman.

In the instant case, despite providing the petitioner sufficient opportunity by the Wages Court, deceased petitioner has miserably failed to demonstrate that he was a workman within the meaning of law. In this view of the matter, he failed to prove himself to be a workman within the meaning

of Standing Order Act 2013, as such, it has no application to the case of the petitioner.

WP No. 623-P/2023

https://www.peshawarhighcourt.gov.pk/PHCCMS//judgments/wp.623.2023.1603.pdf

M/S Ittehad Customs Agency VS Federal Board of Revenue / FoP

Exemption of Customs Duty on Hybrid electric Cars (HEVs)

Shakeel Ahmad, J

6. It is reflected from the record that SRO dated 12th June 2013 was issued by the Federal Government of Pakistan in exercise of powers conferred by section 19 of the Customs Act, Clause (a) of subsection (2) of section 13 of the Sales Tax Act, 1990 **(**here-in to be referred as Sales Tax Act and section 53 and 148 of the Income Tax Ordinance, 2001 (hereinafter to be referred as "ITO 2001'). A plain reading of section 19 of the Customs Act, 1969 makes it crystal clear that it confers the general powers of granting exemption from customs duties whenever circumstances exist to take immediate action for the purpose of national security in emergency situations, protection of national economic interest in the situation arising out of abnormal fluctuation in international commodity prices, implementation of bilateral and multilateral agreements etc, under aforesaid situations, the Government of Pakistan may by notification exempt any goods imported into or exported outside Pakistan from the whole or any part of the customs duty chargeable thereon and may remit fine, penalty charge or any other amount recoverable under the Customs Act. We find similar provisions in sub-section (2) of section 13 of the Sales Tax Act, 1990 whereunder, the Federal Government is competent to exempt any supplies made or import of any goods from the whole or any part of the tax chargeable under the said Act. Likewise, section 53 of the ITO 2001 also empowers the Federal Government to grant exemption and tax concessions in the Second Schedule and section 148 of the ITO 2001 relates to advance tax paid to a collection agent. The Federal Government, in exercise of powers conferred to it in the aforesaid statutory provisions issued SRO No.499(1)/2013 dated 12th June 2013 to exempt customs duty, sales tax and withholding tax on the import of HEVs (Hybrid Electric Vehicles) falling within the ambit of PCT Code 87.03 and it was given effect from 13th June 2013. During existence of this SRO, the Assistant Collector Customs, MCC Appraisement-West issued Circular dated 05.10.2018, imposing unjustified condition, which was totally in conflict with the said SRO. It was stated therein that the benefit of exemption of duties, and taxes on the import of HEVs under SRO is only available to fully Hybrid Vehicles, which have larger batteries and a motor to drive the electric vehicle. The said SRO came up for consideration before this Court in Custom Reference No.270-P/2020 titled “Collector of Custom Model Customs Collectorate. Peshawar versus Waseef-Ullah & another", which was answered in "negative" vide judgment dated 01.12.2021 and the customs reference filed by the Collector Customs was dismissed. It will be advantageous to reproduce the relevant portion of the said judgment as under: -

10. Besides, when SRO relates to Hybrid Electric Vehicles, it does contain new or used, kind of vehicles i.e., used or new could be gathered from import policy of the respective year when the vehicles in question were imported by the respondents. Insofar as, the applicability of the circular

dated 0510.2018, is of two folds, firstly, as to whether SRO requires to be interpreted by any officer and that too without having any legal sanctity attached to it, authority vested in it or powers delegated. Admittedly, the issuance of circular by Model Custom Collectorate of Appraisement Vest), Karachi would amount to classify Hybrid vehicles and the extension of SRO to any specific class of vehicle i.e., fully Hybrid was not within the domain of authority rather it can be either by direct legislation or by delegated and in case of any ambiguity it shall be interpreted by the Court Likewise, the contention of the learned counsel for the applicants that SRO relates only to new vehicles and could not be extended or applied for exemption of tax, custom levy of tax to the specification mentioned in column No.2 is also misconceived. Neither the specification of the vehicles i.e., Fully Hybrid or Semi nor new or used was given in the standard regulatory order while issuing SRO of the year 2013, therefore, in such an eventuality, neither the Model Customs Collectorate of Appraisement (West), Karachi nor the learned counsel for the applicants could interpret it otherwise. It is by now well settled principle of law that when the law requires a thing to be done in a particular manner, it must be done in that manner and not otherwise especially the principle enunciated in the judgment of the Apex Court in case titled "Muhammad-Hanif Aþþgsi-zer.sus-lmtan-Than-Mad etc(PLD 2018 SC 189), it was ruled by the apex Court that it is settled law that where the law requires something to be done in a particular manner, it must be done in that manner. Another important canon of law is that what cannot be done directly cannot be done indirectly. Secondly, the date of issuance of the circular is of worth consideration i.e., 0510.2018 whereas the vehicles in question were imported earlier to 2017 as reflected in the audit report for the year 2017/18 by alleging therein violation of section 3(1) of the Import and Export (Control) Act, 1950 etc, thus, the circular dated 0510.2018 could not be given retrospective effect It is well established principle of interpretation of statutes, notifications, executive orders that they would not operate retrospectively unless they expressly provide for retrospective operation. The Hon'ble Supreme Court of Pakistan in the case of "Hashyani-HoteLLtd.-ys, Federation ...of Pakistan" (PLD 1997 SC 315) has enunciated that the interpretation of notification and/or an executive order will be operated prospectively and not retrospectively.

07. Being aggrieved by the judgment of this Court, the Collector Customs filed Civil Petitions bearing No.389, 696 to 742 of 2022, which were dismissed vide judgment dated 06th July 2022. Where after, the Additional Collector Customs issued Public Notice No.02/2023 on 20.01.2023 incorporating therein the same conditions as mentioned in the Circular dated 05.10.2018. The learned counsel representing the respondents owned, accepted and admitted the existence of SRO dated 12.06.2013, but attempted to argue the case that the impugned circular was issued for general financial benefit to the public exchequer. We are not in agreement with the learned counsel for the respondents. In our view, the benefit of exemption extended through SRO cannot be withdrawn under the garb of altogether a new criteria introduced through Public Notice, saying that the benefit of original SRO is only attracted to the fully Hybrid vehicles, which have larger batteries and a motor to drive the vehicles, but we do not find anything mentioned in this regard in the SRO itself. We asked the learned counsel for the respondents to show us the provisions of law where under an Additional

Collector Customs is competent to issue such circular, making amendment in the SRO, thereby completely making change in the complexion and substance of the original SRO, but he could not. We also find that there is no distinction between new or used Hybrid vehicle or large or small batteries or Mild Hybrid vehicles. The plea of the learned counsel representing the respondents seems to be based on misconception and is, therefore, out rightly rejected. The SOR only classifies Hybrid Electric Vehicles (HEVs) with PCT headings without drawing any distinction with regard to fully, semi, mild hybrid or used or new vehicles or any specification of large batteries.

8. In our view, exemption of customs duty, Sales tax and withholding tax on import of Hybrid Electric Vehicles (HEVs) falling within the ambit of PCT Code 87.03 specified in column 2 of the table to the extent as specified in column 3 in terms of SRO No.499(1)/2013 dated 12th June 2013 could neither be denied nor circumvented under the garb of impugned Public Notice dated 20th January 2023.

9. For what has been discussed hereinabove, we allow this petition and declare the denial of benefit of exemption under SRO No.499(1)/2013 dated 12th June 2013 to the petitioners under the garb of public notice issued on 20.01.2023 as illegal, without lawful authority, without jurisdiction and in conflict with the SRO. The petitioners are entitled to be treated in accordance with the SRO dated 12.06.2013, therefore, the respondents are directed to refund the duty/taxes if any collected by them under the garb of impugned Public Notice dated 20.01.2023.

WP No.6999-P/2019

https://www.peshawarhighcourt.gov.pk/PHCCMS//judgments/WP-6999.2019-24.01.2023.pdf

Ali Azim Afridi Vs Federation of Pak

Strike of Lawyers in view of Rule 175-B and 175E of the Pakistan Legal Practitioners and Bar Council Rules 1976, discussed.

SHAKEEL AHMAD, J

9. Adverting to arguments of the petitioner on the validity of impugned rule 175-B and 175-E of the Pakistan Legal Practitioners and Bar Council Rules, 1976, though the arguments before us ranged over a very wide field, however, the attack on the validity of the rules was vested on two grounds (i) that the impugned rules contravene the fundamental right guaranteed under Article 18 of the Constitution i.e. freedom of trade, business or profession (ii) that it violates Articles 4 and 8 of the Constitution.

10.We shall consider these two points in that order: First as to whether the impugned provisions are obnoxious to, or in contravention of Article 18 of the Constitution. Under this Article, the constitution gives the fundamental right of freedom of trade, business or profession and permits the right to do the lawful business. The only restriction which can be placed on trade or business or profession is to conduct the business in accordance with law of the land. It is not denied that the right of the petitioner to appear and plead before the Court in routine on its literal meaning has been denied to him by the impugned rules. The arguments, however, was that it would not be a proper construction of the content of this guaranteed freedom to read the text literally, but the freedom should be so understood as to cover not merely a right, but of placing no impediments or restrictions on

appearance of the lawyers even on the day when call of strike is issued or strike is observed.

Article 17(2) of the Constitution guarantees the right to the citizens in general, lawyers and workers in particular to form associations and unions subject to reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan or public order or morality. In this context, it is pointed out that the expression association formed in this Article refers to associations formed by workmen for trade union purposes or bar associations constituted by lawyers, whereas the word union being specifically chosen to designate labour or trade unions.

11 . The right to form associations in the sense of forming a body carries with it as a concomitant right, a guarantee that such associations shall achieve the object for which they were formed. If this concomitant right were not conceded, the right guaranteed to form an association would be an idle right, an empty shadow lacking all substance.

13. In the case of "Lt. Col. S. J. Chaudharv Vs. State (Delhi Administration)" reported in (1984) 1 SCC 722, the High Court had directed that a criminal trial go on from day-today. Before the Court, it was urged that the Advocates were not willing to attend day-to-day as the trial was likely to be prolonged. It was held that it is the duty of every advocate who accepts a brief in a criminal or civil case to attend the trial day to-day. It was held that a lawyer would be committing breach of professional duties if he fails to so attend.

14. In the case of "K. John Koshv & Ors. Vs. Dr. Tarakeshwar Prasad Shaw" reported in (1998) 8 SCC 624, one of the questions was whether the Court should refuse to hear a matter and pass an Order when counsel for both the sides were absent because of a strike called by the Bar Association. The Supreme Court of India held that the Court could not refuse to hear the matter as otherwise, it would tantamount to Court becoming a privy to the strike.

15. Before parting with the judgment, it is observed that in the name of strike, no person has any right to cause inconvenience to any other person or to come in any manner a threat or any apprehension of risk to life, liberty and property of any citizen or destruction of life and property, and the least to any government or public property. It is added that taking out noisy and disorderly demonstrations for instance throwing stones by the demonstrators would not obviously be within the meaning of Articles 18 and 19 of the Constitution. However, the right to strike or the right to declare strike may be restricted to appropriate cases or rarest of rare cases where the dignity, integrity and independence of the bar or the Bench are at stake. Therefore, the validity of impugned rule 175-B relating to nonobservance/defiance of the decisions/instructions of the Pakistan Bar Council by any Bar Council or Bar Association or any member of the Bar/Advocate relating to strike, restraining the lawyers from making appearance in the Courts of law in discharge of their professional obligations considering appearance of the lawyers in the Courts of law on the day of strike as gross professional misconduct making them liable for disciplinary action, when tested with reference to the provisions laid down in Articles 4, 8 and 18 of the Constitution, we are of the view that it offends the provisions of Articles 4, 8 and 18 of the Constitution of Islamic Republic of Pakistan, 1973, therefore, the same is struck down to that extent only.

WP No. 4346-P/2019

https://www.peshawarhighcourt.gov.pk/PHCCMS//judgments/wp-4346-2019.pdf

M/S CGGC-Descon Joint Venture VS

Federation of Pakistan

Tax Exemption in Erstwhile FATA

SYED ARSHAD ALI, J

9. There remained a judicial consensus that the Income Tax as well as Sales Tax Laws were never extended to the FATA, prior to the promulgation of 25th amendment thereby omitting Article 247 from the Constitution. However, there has been a long standing dispute between the Federal Board of Revenue ("FBR") and the trade community/business community of erstwhile tribal area regarding the imposition of income tax as well as sales tax on the import of raw material for the manufacturing units, which were located in the erstwhile FATA. This Court in its celebrated judgment authored by his Lordship Justice Yahya Afridi as he then was in the case of Messrs Tai_Packages Company (Pvt) Ltd through Manager vs. The Government of Pakistan through Federal Secretary Finance and Revenue Division and 6 other (2016 PTD 203), has elaborately dealt with the issue of taxing the raw material/goods which were imported for the purpose of its consumption in the erstwhile FATA. The said judgment was also approved by the august Supreme Court of Pakistan in the case of Pakistan through Chairman, FBR and others Vs. Hazrat Hussain (2018 SCMR 939), wherein it has been unequivocally held that the business concerns/manufacturing units located in the PATA are immune from the impost of both, the income tax as well as sales taxes; that similarly, the goods or machinery, which they are importing for their home consumption are equally immune from the impost of both taxes at the import stage, however, in order to ensure that the consumption of goods do not cross the limits of non-tariff area, the petitioners have to provide a security in form of post-dated cheques equal to the value of the imported goods.

11. The aforesaid immunity was available to the persons/corporate entities located within the erstwhile area of PATA as in view of the legal barrier of Article 247 of the Constitution; the provisions of the Ordinance were not extended to the erstwhile FATA.

12. Upon promulgation of the 25th Constitutional Amendment Act, 2018 on 24.5.2018, this legal barrier in form of Article 247 of the Constitution was erased and, thus, the provisions of the Ordinance became applicable to all the persons/corporate entities located within the territory of erstwhile FATA, as such, their income was subject to imposition of income tax under the Ordinance.

13. After 25th amendment in the Constitution, the trade community had raised voice for continuance of the said exemption from imposition of income tax and sales tax. The Federal Government through SRO. 1212 (1)/2018 dated 05.102018 and SRO. 1213(1)/2018 dated 05.10.20218 had allowed the said exemption to the resident/domicile of the erstwhile FATA/PATA.

14. The Ordinance provides both; the provisions of charging as well the mechanism for collection of tax whereas the word 'income' is defined in Section 2(29) of the Ordinance"(29) "income " includes any amount chargeable to tax under this Ordinance, any amount subject to collection or deduction of tax under section 148, 150, 152(1), 153, 154, 156, 15", 233, 233A, subsection (5) of Section 234 and any amount treated as income under any provision of this Ordinance and any loss of income. "Chapter Il of the Ordinance deals

with the charging provisions whereas Part I of Chapter Ill explains taxable income, total income and heads of income. Chapter X of the Ordinance envisages for procedure of filing of return/assessments adjudication of claims as well as recovery of income tax dues. The mechanism for deduction and collection of advanced tax is provided in Part V of Chapter X of the Ordinance. The Division IV of the said chapter relates to grant of exemption from total income tax or issuance of lower rate certificate.

15. Section 53 of the Ordinance empowers the Federal Government not only to grant exemption to any person or class of persons from the payment of income tax but can also exempt/partially exempt any person from the application of the Ordinance. For convenience, Section 53 is reproduced as under:-

"53. Exemptions and tax concessions in the Second Schedule.—(l) The income or classes income, or persons or classes of persons specified in the Second Schedule shall be — (a) exempt from tax under this Ordinance, subject to any conditions and to the extent specified therein; (b) subject to tax under this Ordinance at such rates, which are less than the rates specified in the First Schedule, as are specified therein; (c) allowed a reduction in tax liability under this Ordinance, subject to any conditions and to the extent specified therein; or (d) exempted from the operation ofany provision ofthis Ordinance, subject to any condition and to the extent specified therein. "

16. Section 80 of the Ordinance, envisages that association of persons includes a firm, a Hindu undivided family, any artificial juridical person and anybody of persons formed under a foreign law but does not includes a company. 17 Section 92 of the Ordinance envisages for principal of taxation of association of persons which reads:-

"An association of persons shall be liable to tax separately from the members of the association and [where the association of persons has paid tax the] amount received by a member of association in the capacity as member out of the income of the association shall be exempted from tax. "

18. Reverting back to the legal issue involved in the present case; as stated above, when on the promulgation of 25th amendment in the Constitution, the provisions of Ordinance became operative in the erstwhile FATA, the Federal Government pursuant to their commitment with the people/residents of erstwhile FATA/PATA issued SRO No. 887-1 of 2018 on 08.7.2018 thereby granting exemption to the individuals/corporate entities domiciled/resident of erstwhile FATA/PATA from the payment of income tax. Later the aforesaid SRO was substituted by SRO No. 1213, which read as under: -

Government of Pakistan Revenue Division
Federal Board of Revenue Islamabad, the 5th October, 2018

NOTIFICATION
(Income Tax)

SRO. 1213(1)/2018 WHEREAS prior to the Constitution (Twenty-fifty Amendment) Act, 2018 (zwŒ11 of 2018), the Income Tax Ordinance, 2001 (XLIXof2001) was not in force in the Tribal Areas as defined in Article 246 of the Constitution of the Islamic Republic of Pakistan, hereinafter called as the Constitution, and the levy of income tax was not attracted to the said Tribal Areas; AND WHEREAS Article 247 of the Constitution stood omitted on commencement of the Constitution (Twenty-fifth Amendment) Act, 2018 of 2018) with effect from 31st day of May,

2018 and the Federally Administered Tribal Areas (FATA) and Provincially Administered Tribal Areas (PATA) stood merged in the Provinces of Khyber Pakhtunkhwa and Baluchistan under paragraph (d) of Article 246 of the Constitution.

AND WHEREAS on commencement of the Constitution (Twenty-fifth Amendment) Act, 2018 of 2018), the Income Tax Ordinance, 2001 (XLIXof2001) is in force in the said Provinces including the erstwhile Tribal Areas forming part thereof;

AND WHEREAS a phased approach was needed for the full application of fiscal laws to the said erstwhile Tribal Areas, a decision was made to exempt all persons from levy of income tax which was not applicable to the said areas by virtue of said Article 247 and accordingly Notification No. SRO. 887(1)/2018 dated the 23rd July, 2018, was issued by the Federal Government granting exemption from income tax as aforesaid;

AND WHEREAS concerns were raised by the trading community of the said erstwhile Tribal Areas to the effect that the aforesaid Notification did not restore the position as existed prior to the commencement of the Constitution (Twenty-fifth Amendment) Act, 2018 of 2018);

NOW THEREFORE in order to address the concerns so raised and to restore the position in relation to levy of income tax to the said erstwhile Tribal Areas, and in exercise of the powers conferred by sub-section (2) of section 53 of the Income Tax Ordinance, 2001 (XLIX of 2001), the Federal Government is pleased to direct that the following further amendments shall be made in the Second Schedule to the said Ordinance, namely: -

In the aforesaid Schedule(a) In Part —

(i) Clauses (144) and (145) shall be omitted; and

(ii) after clause (145), omitted as aforesaid, the following new clause shall be added, namely: -

"(146) Any income which was not chargeable to tax prior to the commencement of the Constitution (Twenty-fifth Amendment) Act. 2018 (XXW110f2018) of any individual domiciled or company and association of person's resident in the Tribal Areas forming part of the Provinces of Khyber Pakhtunkhwa and Baluchistan under paragraph (d) of Article 246 of the Constitution with effect from the 1st day of June, 2018 to the 3dh day of June, 2023 (both days inclusive); and

(b) In Part IV.-

(i) clause (106) shall be omitted;

(ii) after clause (109), the following new clause shall be added, namely: -

"(110) The provisions of sections in Division 111 of Part V of Chapter X and Chapter MI of the Ordinance for deduction or collection of withholding tax which were not applicable prior to commencement of the Constitution (Twenty-fifth Amendment) Act, 2018 (WWII of 2018) shall not apply to individual domiciled or company and association of person resident in the Tribal Areas forming part of the Provinces of Khyber Pakhtunkhwa and Baluchistan under paragraph (d) of Article 246 of the Constitution with effect from the 1st day of June, 2018 to the 3dh day of June, 2023 (both days inclusive).

22. Thus, keeping in view the law laid down, as stated above, that while interpreting a taxing statute must first be given their ordinary and natural meaning and in case of exemption, the person claiming exemption, it should establish that its case squarely falls under the provision of exemption. The history of extension of tax laws to the erstwhile FATA the immunity claimed by the residents of the

area and the clear language of SRO 1213(1)/2018 dated 05.10.2018 would clearly suggest that the said exemption was/is applicable to those individuals/domiciled in erstwhile FATA, companies and associations of persons resident in the said area, their income prior to 25th amendment was immune from payment of income tax could only claim the said exemption and any company or individual not being the resident of erstwhile FATA who have subsequently established their office in FATA after 25th Amendment in the Constitution are not entitled to the exemption in terms of SRO 1213(1)/2018 dated 05.10.2018.

WP No. 6005-P/2019

https://www.peshawarhighcourt.gov.pk/PHCCMS//judgments/WP-No-6005-P-of-2019.pdf

Kohat Cement Factory VS Govt of KP

Determination / Valuation of Stamp Duty.

SYED ARSHAD ALI, J

4. The Stamp Act, 1899 ("Act") deals with the chargeability and determination of stamp duty on instrument, bill of exchange etc. The present issue relates to the payment of stamp duty on the sale of immovable property. Section 27 of the Act envisages that the consideration (if any) and all other facts and circumstances affecting the chargeability of any instrument with duty, or the amount of the duty with which it is chargeable, shall be fully and truly set forth in the instrument; whereas under section 31 of the Act, the Collector has authority to determine the stamp duty. However, through Khyber Pakhtunkhwa Act No.VI of 1992, Section 27-A was inserted in the Stamp Act, 1899, which deals with the matter and is hereby reproduced as under: -

"Where any instrument chargeable with ad valorem duty under clause (b) of Article 23 or clause (b) of Article 23 or clause (b) of Article 31 of Schedule 1 relates to land only or land with any building or structure thereon, the value of the land shall be calculated according to the valuation table notified by the Collector in respect of land situated in the area or locality concerned ["or as the Provincial Government may, from time to time, by notification in the official Gazettee, determine "].

This section empowers the Collector to notify a valuation table in respect of land situated in the area or locality concerned classifying the nature of the property for the purpose of payment of stamp duty. Subsection (3) of Section 27-A further envisages that if the value of the land stated in the instrument to which subsection (l) applies is more than the value fixed according to the valuation table, the value declared in the instrument shall be accepted as value for the purpose of duty. Thus, it is clear from Section 27-A of the Act that valuation table issued by the Collector classifying the land into various categories i.e. agriculture, residential or commercial envisaging value of the property as per its character would be the minimum benchmark for the purpose of evaluation of advalorem stamp duty.

5. In this case, the valuation table for the year, 2018-2019 envisaging a benchmark for the purpose of valuation of different classes land has been issued which is available at page-17 of the file. According to the said valuation table, any land which is commercial in nature, the minimum benchmark for valuation of stamp duty is Rs. 256,941/-; similarly, in the case of a residential building, the amount of stamp duty shall be assessed against Rs. 27,552/per marla; whereas when the nature of property is agriculture, the benchmark for

evaluation of stamp duty is Rs. 13011/9950/- per marla. Along with the comments, the respondents have placed the criteria regarding the classification of the property has been provided. The same is reproduced as under: -

DEFINITION AND CRITERIA

The whole District is categorized in three sectors as under: -

1. COMMERCIAL.
2. RESIDENTIAL
3. AGRICULTURE

COMMERCIAL: All main roads and link road having commercial business activities like Shops, Hotels, Schools/Colleges, Plazas, Shopping Centers, Petrol/CNG Filling Stations, Commercial Offices, Hospital, Clinics/Laboratories.

- Urban: Properties falls within the Municipal Corporation Limits; the parameter is as under. One hundred feet (100ft) from both sides of road will be considered as Commercial and beyond IOOft it would be considered as Residential (Abadi).
- Rural: Two hundred feet (200fi) from both sides of road will be considered as Commercial and beyond 200fi, it would be considered as Residential (Abadi).

RESIDENTIAL:

- Urban: It is beyond 100/ from both sides of main/link roads having an area measuring two Kanals in urban limits.
- Rural: It is beyond 200/ from both sides of main/link roads having an area measuring four (4) Kanals in rural limits.

AGRICULTURE: The agriculture land is considered if area of land is more than two (2) Kanals in urban limits and more than four (4) Kanals in rural limits.

6. According to the admitted facts since the purchased property is situated in the rural area and is at a distance of more than 200 ft from the road side, therefore, nature and character of the property is agriculture. The respondents do not deny the location, character and nature of the property, but it is the case of the respondents that despite the fact, the character of the property is agriculture but since its future use would be for the purpose of commercial activities (industrial purposes), therefore, the benchmark as provided in the valuation table for commercial property would be applicable and accordingly, the stamp duties would be charged on the basis of said benchmark. Admittedly, the Act deals with the imposition of duties which is equivalent to a taxing statute and it is settled by now that where a provision in a taxing statute can be reasonably interpreted in two ways, the interpretation which is favourable to assessee has to be accepted albeit if two views relating to the interpretation of the taxing statute are possible, the one favourable to assessee has to be accepted. CIT vs. Nava Hills Tea co. Ltd (AIR 1973 SC 2524) and Haider Industries through Managing Partner and others vs. Federation of Pakistan through Secretary. Law Division at Islamabad and others (2016 PTD 2004).

7. It is also well settled principle of interpreting and taxing statute that in a taxing statute, as in any other statute, we see no reason to depart from the general rules that the words used in a statute must first be given their ordinary and natural meaning. It is only when such an ordinary meaning does not make sense then the resort can be made to discovering other appropriate meanings.

There is no room to discover the intention of legislature. Pakistan Textile Mill owners' Association Karachi and 02 others vs. Administrator of Karachi and 02 others (PLD 1963 SC 137) and M/S Islamabad Electric Supply Company Limited vs, Deputy Commissioner Inland Revenue Audit-Il, LTU, Islamabad and others (2016 PTD 2685).

8. While applying the aforesaid principle, we are clear in our mind that the relevant date for determination of chargeable duty would be the date of registration of instrument and character of the property as on the time of sale would determine the stamp duty and its subsequent use either for commercial or other activities cannot be considered as a benchmark for determination of ad-valorem stamp duty. The Hon'ble Lahore High Court in the case of Imtiaz Rati Butt (PLD 1996 Lahore 663) in para-7 & 8 of the judgment relating to valuation of stamp duty in terms of Section 27-A of the Act has obsewed:-

"7. The valuation of urban land for the purposes of stamp duty is to be made on the basis of the character of the property at the time of registration of the sale-deed and not on its subsequent use. Nature of the property in question at the time of registration of sale-deed was residential as borne out from the certificate of the Excise and Taxation Department and the stamp duty was also charged accordingly and it would not be open to the Collector to say that when the matter was brought to his notice the character of the property had been changed from residential to commercial. Ultimate use of the property subject matter of sale will not determine value of the stamp duty but its character at the time of registration of the sale-deed would be relevant. It cannot be said that all properties situate at Jail Road, Lahore are commercial because still there are many residential houses on that road and it would be unjustified to charge stamp duty at commercial rates if any sale or purchase transaction takes place in their respect.

8. The valuation table issued under section 27A of the Stamp Act generally makes a distinction between the valuation of commercial and residential properties and the stamp duty is payable at the rates 'notified for residential or commercial properties. The relevant date for the determination of the chargeable duty would be the date of registration of the instruments. Character of the property at that time would determine the stamp duty and not any subsequent use that may be made of the said property. Since after the registration of the sale-deed in question, the nature of the property is reported to have undergone a change, any further transaction in respect of it may be subject to valuation provided for commercial properties for the purpose of stamp duty.

9. In view of the above, we have reached at a conclusion that the benchmark for valuation of stamp duty in terms of Section 27-A of the Act would be the nature and character of the property at the time of registration of the instrument and not its potential use. Thus, this petition is admitted & allowed and accordingly we direct the respondents to re-evaluate the stamp duty on the impugned transaction according to the nature and character of the property as it was/would be on the date of execution of the instrument and not its future potential use. However, if the sale price of the property is more than the value as provided in the valuation table, then, the petitioner shall pay the stamp duty.

C.R No. 19/2022

https://www.peshawarhighcourt.gov.pk/PHCCMS//judgments/C.R-19-C-of-2022.pdf

Nazir Ahmad Vs Hasanullah

Formal Defect in a Suit, discussed.

Dr. Khurshid Iqbal, J

4. The sole question for determination is that whether the non-mentioning of certain other portions of the property in the legacy of her predecessor and the non-arraying of necessary parties to the suit would amount to formal defect within the meaning of Order XXIII Rule 2, C.P.C., warranting withdrawal of the suit with permission to bring a fresh one. The underlying principle of the law contained in Order XXIII Rule 2(a), C.P.C., is that there must be a formal defect in the suit. The phrase 'formal defect' has not been defined in the Civil Procedure Code, 1908. It is held by the higher Courts that a formal defect is one which goes to the roots of a case, which if remains intact, is bound to cause failure of the suit. In a recent case Muhammad Yousaf and others vs Nazeer Ahmad Khan (deceased) through LRs and others (2021 SCMR 1775), it was observed that a formal defect mean any kind of defect that has no impact on the merits of the case. The court further observed a defect that is material and substantial, going to the roots of the case, would not amount to formal defect.

5. The Court also observed that "where a defect is removable or rectifiable by amendment of the plaint, permission to file a fresh suit cannot be granted. Finally, where a defect which goes to the root of the case and is not merely a formal defect, permission to file a fresh suit would amount to allowing the plaintiff to retrace his steps plug the loopholes in the earlier suit andfile a different case with different/additional parties and a totally different relief These to our mind are not steps that could by the stretch of the language be termed as removal offormal defect. See Muhammad Boota v. Member (Revenue), Board of Revenue (PLD 2003 SC 979), Muhammad Kazim Ziauddin Durrani v. Muhammad Asim Fakharuddin Durrani (2001 SCMR 148), Amiad Rashid Khan Malik v. Shahida Naeem Malik (1992 SCMR 485) and Ali Muhammad v. Rahmatullah (1990 SCMR 913). As such, neither the suit can be permitted to be withdrawn nor permission to file a fresh suit be granted on that score.„

6. In a 1996 case title as Dilbar Khan vs Said Akbar (1996 CLC 1178 [Peshawar], it was held:

"3. A suit can be allowed to be withdrawn with permission to file a fresh suit on the same cause of action provided it is likely to be dismissed on the basis of some formal defect having been noticed. Such formal defect as mentioned in the application itself is that the disputed house is in fact situated in Khasra 1167 whereas Khasra 1166 in the plaint had inadvertently been mentioned 1...1." Coming to the case in hand, the so-called defects pointed out by the respondent No. I in her suit could have been rectified through amendment in the plaint. This drags the case in hand to Order VI Rule 17, C.P.C., which reads asunder:

"17. Amendment of pleadings. The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

7. An amendment could be sought when it is necessary to determine the real matter in controversy. Such an amendment may be allowed provided it cause no prejudice to the other party and does not introduce a new cause of action to alter the nature of the suit and where it is just and necessary.

https://www.peshawarhighcourt.gov.pk/PHCCMS//judgments/WP-3259-P-2022-File-Judgment.pdf

WP No. 3259-P/2022

Mst. Muhammad Bibi VS Govt. of KP / Director Education

Qualifying Length of Service for Pension

Dr. Khurshid Iqbal, J

6. The core question for determination is that whether under the applicable law—Rules 2.2 and 2.3 of the Pension Rules read with article 371-A of the Civil Service Regulation (CSR), the service rendered on contract basis/fixed pay could be counted towards regular service after completion of the service necessary for the purpose of pensionary benefits. Our Supreme Court considered this issue in the year 1997 in the case of Mir Ahmad Khan[3]. and ruled that the more than 10 years temporary service entitled the appellants in that case to pensionary benefits under article 371-A (i) of the CSR. In 2016, a five-member bench of the Supreme Court reversed the ruling in Chairman Pakistan Railway Government of Pakistan Islamabad and others. It seems appropriate to reproduce the relevant passage from the judgment as under:Mst. Islam Bibi v. Government of Pakistan through Secretary State and Frontier Regions Division, Islamabad and 3 others" [2022 PLC (CS)] 1 196. Government of Pakistan Islamabad and others Vs. Shah Jehan Shah (PLC) 2016 SC 534). Mst. Rashida Khatoon and 2 others v. District Education officer (Male) and 3 others 12016 PLC(CS)) 308. Mir Ahmad Khan v. Secretary to Government and others (1997 SCMR 1477.

7. It is not disputed that the respondent rendered continuous temporary service and that his length of service was continuous and for more than five years. However, the question that needs to be answered is whether he was working in a "temporary establishment" or not. "Temporary establishment" has not been defined in the CSR. the Fundamental and Supplementary Rules issued by the Government of Pakistan, the ESTA Code or the Compendium of Pension Rules and Orders. In this context Article 369 of the CSR mentions temporary establishment but only explains what it is not and thus is not very helpful. Therefore, as mentioned earlier in the opinion, as per the settled rules of interpretation, the dictionary meaning of the words has to be resorted to. The Concise Oxford Dictionary (6th Ed.) has defined "temporary" as lasting, meant to last, only fora time", and "establishment" as an "organized body of mean maintained for a purpose." Chambers 21st Century Dictionary defines '"temporary" as "lasting, acting or used, etc for a limited period of time only", and "establishment" as "a public or government institution." Oxford Advanced Learner's Dictionary of Current English (7th Ed.) defines "temporary" as "lasting or intended to last or be used only for a short time; not permanent" and "establishment" as "an organization, a large institution In light of the above dictionary meanings, "temporary establishment" can be said to mean an organization or institution which is not permanent, rather effective for a certain period only: Admittedly the respondent was serving in Pakistan Locomotive Factory Risalpur, Pakistan Railways, which does not in any way fall within the meaning and purview of "temporary establishment." Thus, the respondent could not rely upon Article 37 1-A of the CSR. Besides, if hypothetically speaking Pakistan Locomotive Factory Risalpur was a temporary establishment, even then the respondent would not be able to take the benefit of Article 371A (supra) as he otherwise does not qualify for pensionary

benefits having wit been subsequently taken into permanent employment, which is sine qua non for the grant thereof.

8. Adverting to the law laid down in the case of Mir Ahmad Khan (supra) wherein it was held: -

"Admittedly the appellant put in more than ten years' temporary service before his services were terminated, he was, therefore. entitled to pensionary benefits under Regulation 371 -A(i) of Civil Service Regulations."

In light of the discussion in paragraph No.6, the judgment delivered in Mir Ahmad Khan's case (supra) is declared to be per incuriam."

9. The principle expounded is that a civil servant must have completed 10 years of regular service first. In other words, temporary service couldn't be counted for the purpose of pensionary benefits. However, once the 10 years regular service completion is established, the temporary service, then. could be added up towards pension.

10. It is worth mentioning here that some Division Benches of this court expressed their opinions that contract services were countable towards pensionary benefits. In order to resolve the controversy, a larger Bench was constituted which, in the writ petition of Amir Zeb declared that the completion of the prescribe length of service would, for the purpose of pension, be countable from the first date of appointment and not from the date of regularization of the service. In 2022, the issue also came up before the apex Court in the case of Ministry of Finance through Secretary and others' in which it has been held:

In case, an employee had served a government department for the duration of the period qualifying him to receive pension, the period spent as a contractual employee may be added to his regular qualifying service only and only for the purpose of calculating his pension and for no other purpose. The provisions of Article 371-A of Civil Service Regulations (C.S.R.) started "'ith a non obstante clause which meant that the said Article did not relate to the question entitlement or eligibility to receive pension. It was clearly and obviously restricted to counting the period of a minimum of five years which had been rendered by a temporary contractual employee to be taken into account with the object of calculating the quantum of his pension.

I2 . Most recently, vide its opinion dated 14/02/2023 recorded in the case of Inayat Khan this court has observed: decided on 14/02/2023 has held that:

Being based upon the interpretation of Article 371A of C.S.R made by the apex Court; it is concluded that the service rendered on contract followed by regularization could only be counted for pensionary benefits provided the civil servant has completed qualifying ten years' service independently. Thus, the contention of learned counsel for petitioner for addition of service of the petitioner rendered on contractual side in the service rendered by him after his regularization for pensionary benefits is misconceived.

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Note: Please read the original full judgments before referring them to for any purpose.