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Sajid Mehmood VS Shazia Azad

Binding Effect of an offer of special oath, if accepted by the other party.

MUHAMMAD ALI MAZHAR, J.

6. The letter of the law makes it unequivocally clear that under the provisions of the Oaths Act, a party in litigation can offer the opposite party to accept or reject the claim on special oath, but they cannot compel each other to take the special oath, however if the offer is accepted by the other party, then a binding agreement comes into existence and the party making the offer has no right and authority in law to resile from it. When the Court communicates the offer to the other party and gets hold of his assent or refusal, as the case may be, it in fact plays a role as an intermediary between the parties and when the offer is accepted by the other party, the acceptance is transmitted to the party inviting the other to take special oath, thereafter the agreement is completed between the parties unless the offer is withdrawn before its acceptance by the other side. The stipulations of the Oath's Act cannot be construed to give an unfair or inequitable advantage to one party over the other, so in the event of an offer or proposal to be bound by the oath of the opposite party, then obviously, due to the mutuality of the promise between them, the party making an offer has no right to resile from it after the offer is accepted and the special oath is taken. In the absence of any such satisfactory or sufficient cause the Court is obligated to implement the agreement and to record the statement of the party concerned to make a decision in the case accordingly. The petitioner cannot wriggle out or withdraw his offer which was given by him voluntarily before the Family Court and the same acted upon according to his will.

7. In the case of Muhammad Ali Vs Major Muhammad Aslam and others (PLD 1990 SC 841), it was held by this Court that the words "be conclusive proof of the matter stated" in Section 11 of the Oaths Act, 1873 obviously means that the evidence on oath so given shall be conclusive proof in the suit in which such evidence is recorded of the matter in respect of which the parties have agreed to be bound. Whereas in the case of Muhammad Mansha and 7 others Vs Abdul Sattar and 4 others (1995 SCMR 795), this Court held that the offer was voluntarily made by the plaintiff which was accepted there and then by the defendant and, as such, the Trial Court rightly disallowed the plaintiff to resile from it and after administering the oath according to the desire of the plaintiff, dismissed the suit of the plaintiff and the appellate Court as well as the High Court rightly concurred with it. While in the case of Mahmood Ali Butt Vs Inspector-General of Police, Punjab, Lahore and 10 others (PLD 1997 SC 823), it was held by this Court in paragraph 10 of the judgment that "the special oath is administered to a party or nominated person or a witness when a party offers to bind itself to the statement to be made on oath by the other party. In Mst. Asifa Sultana v. Honest Traders, Lahore and another (PLD 1970 SC 331) it was observed that the offer to abide by the oath of opposite-party and its acceptance by the other party was in the nature of an agreement and the question whether the party who offered can resile from it depends on the facts and circumstances of each case. Again, in the cases of Muhammad Akbar and another v. Muhammad Aslam and another PLD 1970 SC 241; Attiqullah v. Kafayatullah 1981 SCMR 162; Muhammad Mansha and 7 others v. Abdql Sattar and 4 others 1995 SCMR 795; Muhammad Rafique and another v. Sakhi Muhammad and others PLD 1996 SC 237; Maulvi Muhammad Ramzan v. Muhammad Ismail 1982 SCMR 908 and Saleem Ahmad v. Khushi Muhammad 1974 SCMR 224 the principle laid

down is that a party offering to have a cause decided on oath and undertaking to abide by the special oath of a person (party or not a party to the suit) cannot be allowed to resile from it, for it amounted to a binding contract unless it was found to be void or stands frustrated. So validity of decisions given on the basis of special oath was upheld under the provisions of Oaths Act, 1873. It will, therefore, be seen that "special oath" made basis of the decision in the instant case is not covered by Article 163 of the Qanun-e-Shahadat and reference to Article 163 and alleged violation of any supposed prescribed procedure urged by the learned counsel is misconceived"

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Jawad Mir Versus V.C University of Swabi

The Rationality of Writ of Quo Warranto.

MUHAMMAD ALI MAZHAR, J.

8. The writ of quo warranto is in the nature of setting forth an information before the High Court against a person who claimed and usurped an office, franchise or liberty. The rationality of the writ of quo warranto is to settle the legality of the holder of a statutory or Constitutional office and decide whether he was holding such public office in accordance with law or against the law. The writ of quo warranto can be instituted by a person though he may not come within the meaning of words "aggrieved person". For the purpose of maintaining a writ of quo warranto there is no requirement of an aggrieved person, and a whistle blower need not to be personally aggrieved in the strict sense and may relay the information to the court to enquire from the person holding public office. The purpose of the writ of quo warranto is to pose a question to the holder of a public office: "where is your warrant of appointment by which you are holding this office?" In the writ of quo warranto no special kind of interest in the relator is needed, nor is it necessary to explain which of his specific legal rights is infringed. It is enough for this issue that the relator is a member of the public and acts bona fide. This writ is more in the nature of public interest litigation where undoing of a wrong or vindication of a right is sought by an individual for himself, or for the good of the society, or as a matter of principle. The conditions necessary for the issuance of a writ of quo warranto are that the office must be public and created by a statute or Constitution itself; the office must be a substantive one and not merely the function of an employment of a servant at the will during the pleasure of others; there has been contravention of the Constitution or a statute or statutory instrument by appointing such person to that office. The essential grounds for issuing a writ of quo warranto are that the holder of the post does not possess the prescribed qualification; the appointing authority is not the competent authority to make the appointment and that the procedure prescribed by law has not been followed. The burden of proof is then upon the appointee to demonstrate that his appointment is in accordance with the law and rules. It is clear that before a person can claim a writ of quo warranto, he must satisfy the court, inter alia, that the office in question is a public office and is held by a usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not. The concept and aftermath of the writ of quo warranto has been articulated in different jurisdictions with the following approach and frame of mind: -

Halsbury's Laws of England (Third Edition), Volume 11, page 145: Quo warranto.

An information in the nature of a quo warranto took the place of the obsolete writ of quo warranto which lay against a person who claimed or usurped

an office, franchise, or liberty, to enquire by what authority he supported his claim, in order that the right to the office or franchise might be determined. An information in the nature of quo warranto lay only if the office was substantive in character, that is, an office independent in title, and if the holder of the office was an independent official, not one

discharging the functions of a deputy or servant at the will and pleasure of others. An information in the nature of a quo warranto lay in respect of an office held at pleasure, provided the office was one of a public and substantive character.

Halsbury's Laws of India, Volume 35, Page 145: Quo warranto proceeding affords a judicial remedy by which any person, who holds an independent substantive public office or franchise or liberty, is called upon to show by what right he holds the said office, franchise or liberty so that his title to it may be duly determined, and in case the finding is that the holder of the office has no title, he would be ousted from that office by judicial order in other words, the procedure of quo warranto gives the judiciary a weapon to control the executive from making appointments to public office against law and to protect a citizen from being deprived of public office to which he has a right. These proceedings also tend to protect the public from usurpers of public office, who might be allowed to continue either with the connivance of the executive or by reason of its apathy.

American Jurisprudence (Second Edition), Volume 16, page 578:

Quo warranto is intended to prevent the exercise of powers that are not conferred by law, and is not ordinarily available to regulate the manner of exercising those powers. It cannot be used to test the legality of official actions of public corporations or officers, though it has been held that it may be used to determine whether a constitutional officer is attempting to usurp power not granted him by the constitution or laws.

Corpus Juris Secundum, Volume LXXIV, page 174-175 The writ of quo warranto is an ancient common law, prerogative writ and remedy. Indeed, it is one of the most ancient and important writs known to the common law. The ancient writ was in the nature of a writ of right for the king, against him who claimed or usurped any office, franchise, or liberty, to inquire by what authority he supported his claim, in order to determine the right, or, in the case of nonuser, long neglect, misuser, or abuse of a franchise, a writ commanding defendant to show by what warrant he exercised such franchise, never having had any grant of it, or having forfeited it by neglect or abuse.

Black’s Law Dictionary (Tenth Edition), page 1447: Quo warranto 1. A common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed. "Quo warranto means 'by what warrant?' – or authority? – and was a proceeding to inquire whether authority existed to justify or authorize certain acts of a public character or interest. Originally the proceeding of quo warranto was a criminal one instituted by the crown, the purpose of which was to find out, in the course of a formal inquiry, whether or not persons or corporations were exercising a privilege or franchise, illegally, or if persons who had no right to do so were occupying some public office. If it were found that the person or corporation was in fact illegally interfering with the prerogative power of the crown, or was in fact doing some other illegal act, it was ousted from the illegal practice or office. Accordingly, it can be seen at once that the proceeding on quo warranto was not one to be used by private parties in the conduct of ordinary litigation." Charles Herman Kinnane, A First Book on Anglo-American Law 662 (2d ed. 1952).

9. In our jurisdiction, compliant with the dictum laid down by this Court in various judgments, such as the case of Masud ul Hassan vs. Khadim Hussain and another (PLD 1963 SC 203), it was held that writ of quo warranto was in its nature an information lying against a person who "claimed or usurped an office, franchise or liberty" and was intended to enquire by what authority he supported his claim in order that the right to the office may be determined. In the case of Capt. (Retd.) Muhammad Naseem Hijazi vs. Province of Punjab and others (2000 SCMR 1720), this Court held that in the writ of quo warranto, under Article 199 of the Constitution of the Islamic Republic of Pakistan the High Court in exercise of its Constitutional jurisdiction is competent to enquire from any person, holder of a public office to show that under what authority he is holding the said office. Whereas in the case of Hafiz Hamdullah vs. Saifullah Khan and others (PLD 2007 SC 52), it was held that the object of writ of quo warranto is to determine legality of the holder of a statutory or Constitutional office and decide whether he was holding such office in accordance with law or was unauthorizedly occupying a public office. For issuance of a writ of quo warranto, the person invoking the jurisdiction of High Court under Art.199 of the Constitution is not required to fulfill the stringent conditions required for bringing himself within the meaning of an aggrieved person. Likewise, in the case of Imran Ahmad Khan Niazi vs. Mian Muhammad Nawaz Sharif (PLD 2017 SC 265), this Court held that Constitutional petition in the nature of a writ of quo warranto was maintainable against a Member of the Majlis-e-Shoora (Parliament), if he was disqualified or did not possess or had lost his qualification, in such behalf. Power to disqualify a member in cases where for some reason he escaped disqualification at the time of filing his/her nomination papers but such fact/event was discovered subsequently, could, in appropriate cases and subject to availability of admitted facts or irrefutable evidence be exercised by the High Court under Article 199 and by the Supreme Court under Article 184(3) of the Constitution. 10. At this juncture, it is quite interesting to quote an excerpt from the case of Dr. B. Singh vs. Union of India and Others, reported as (2004) 3 SCC 363, in which it was held that only a person who comes to the court with bona fide and public interest can have locus standi. Coming down heavily on busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit, either for themselves or as a proxy for others, or for any other extraneous motivation or for glare of publicity.

The court has to be satisfied about (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; and (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. Court has to strike a balance between two conflicting interests: (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions. In such case, however, the court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the executive and the legislature. The court has to act ruthlessly while dealing with imposters and busybodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of pro bono publico, though they have no interest of the public or even of their own to protect.

Meera Shafi Versus Ali Zafar
CP No. 1795/2022

https://www.supremecourt.gov.pk/downloads_judgements/c.p.1795_2022.pdf

Recording of Evidence through Video Conferencing.

SYED MANSOOR ALI SHAH, J.

9. The principle of extension of statutes to new things, referred to by this Court in the Fakir Muhammad case in 1958, has over the years been crystallized into the principle of "updating construction" of statutes. As the constant formal updating of all laws by the legislature is not practicable and each generation mostly lives under the law it inherits, the legislature is presumed to have intended that the laws enacted by it should ordinarily be taken as "always speaking" and applied at any future time in such a way that gives effect to its intention in the changed circumstances that have occurred since the enactment of the law. This is commonly called the "updating construction" of laws.5 The changes that require the updating construction of law may include technological or scientific developments, new natural phenomena or changes in social conditions, etc. 'It is not difficult to see why an updating construction of legislation is generally to be preferred. Legislation is not and could not be constantly re-enacted and is generally expected to remain in place indefinitely, until it is repealed, for what may be a long period of time. An inevitable corollary of this is that the circumstances in which a law has to be applied may differ significantly from those which existed when the law was made, as a result of changes in technology or in society or in other conditions. This is something which the legislature may be taken to have had in contemplation when the law was made. If the question is asked "is it reasonable to suppose that the legislature intended a court applying the law in the future to ignore such changes and to act as if the world had remained static since the legislation was enacted?" the answer must generally be "no". A "historical" approach of that kind would usually be perverse and would defeat the purpose of the legislation.

10. The updating construction is, however, applied only where its application would be consistent with the legislative intention. When a new state of affairs or matters comes into existence, the courts have to consider whether they fall within the legislative intention. 'They may be held to do so if they fall within the same genus of facts as those to which the expressed [legislative] policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can be fulfilled if the extension is made.' 7 We may underline here that the principle of updating construction is in consonance with the purposive approach, which this Court has consistently adopted while interpreting different statutes. 8 In fact, the purpose and policy of the law, which is to be interpreted, play a central role in applying this principle.

13. The "virtual attendance" of a witness in court through the medium of video conferencing enables the judge and other persons present in court to see the witness and hear what he says, and vice versa. Such an attendance is thus, in effect, in open court, and his evidence is also recorded under the personal superintendence of the judge. The judge under whose superintendence the evidence through video conferencing is recorded can satisfy himself about the free will of the witness present on screen as he does about the witness present physically in court by questioning him in this regard and ensuring that he is not under the immediate influence of any other

person. Needless to say, that a court can ensure the independence of a witness only from the immediate influence, not from any covert influence, of any other person in both situations whether he is physically present or virtually present in court. In the latter situation, the court can ensure that there is no other person in the room where the witness is sitting, while his evidence is being recorded, by asking him to provide a full view of that room on the screen. The identity of the witness, if disputed, can also be verified by the judge through appropriate means. The witness can be confronted on screen with documents produced or sought to be produced in court by any of the parties or, if needed, the scanned copies of such documents can be sent to him through modern means of communication. In all such necessary matters as to the recording of evidence, the physical attendance and the virtual attendance of a witness in court do not differ.12 The virtual attendance of a witness in court, thus, appears to be the species of the genus of "attendance" required under Rule 4 and fulfills the legislative purpose and policy in requiring the attendance of a witness in court for recording his evidence. Therefore, we can legitimately conclude that the word "attendance" used in Rule 4 can be extended to "virtual attendance", and the word "attendance" mentioned in this Rule does not mean only "physical attendance" but includes "virtual attendance" made possible by the modern technology of video conferencing.

14. Next, we proceed to examine under which provision of the CPC can a court make an order for the virtual attendance of a witness as there is no such provision in Order XVI of the CPC, which relates to 'Summoning and Attendance of Witnesses'. Learned counsel for the petitioner has referred to Section 151 of the CPC, in this regard; therefore, we need to see whether a court can make such an order, in the exercise of its inherent powers under Section 151 of the CPC.

15. Admittedly, the CPC is silent on the matter of evidence recording through video conferencing: there is no express provision either allowing or prohibiting such procedure of recording evidence. And regarding the procedural law, it is a well-settled principle that the 'courts are not to act upon the principle that every procedure is to be taken to be prohibited unless it is expressly provided for by the Code [of Civil Procedure], but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by law. As a matter of general principle, prohibition cannot be presumed.'13 The provisions of Section 151, which empowers the civil courts to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court, are intended to preclude the possibility of the civil courts being stuck in a situation for any omission in the CPC. The inherent powers of the civil courts saved by Section 151 are thus supplementary to their powers stated expressly in the CPC and are to be exercised where the situation is not covered by any provision of the CPC. It hardly needs lengthy arguments to establish that when in the circumstances of a case, requiring physical attendance of a witness in court will incur an unnecessary amount of delay, expense or inconvenience, the order of the court allowing virtual attendance of a witness through video conferencing is for the ends of justice, and the rejection of an unjustifiable insistence of the opposing party on securing physical attendance of such witness in court is to prevent abuse of the process of the court. An order allowing virtual attendance of the witness in such circumstances thus squarely falls within the scope of Section 151 of the CPC.

19. We find it necessary to underline here that although the powers conferred by Section 151 of the CPC and Article 164 of the QSO are discretionary, the courts are to exercise them judiciously, not arbitrarily or mechanically, on the filing of an application in this regard by a party to the proceedings. This discretion, like all other discretions, is to be exercised judiciously for valid reasons by considering the circumstances of the case. In exercising the discretion, the courts are to see: (i) whether the evidence of the witness appears essential to the just decision of the case, and (ii) whether requiring physical attendance of the witness in court would incur unreasonable delay, expense or inconvenience. We have inferred the standard of "unreasonable delay, expense or inconvenience" from the legislature's wisdom. The standard of unreasonable "delay or expense" for relaxing adherence to certain general rules of the law of evidence has been provided in Articles 46, 47 and 71 of the QSO, while Sections 503 and 512 of the Code of Criminal Procedure 1898 add the ground of unreasonable "inconvenience" to the said two grounds for creating exceptions to some general rules of recording the evidence of witnesses.

Mst Tayyeba Versus Shafqat

https://www.supremecourt.gov.pk/downloads_judgements/c.p._3209_2019.pdf

Perception and perspicacity of cruelty catalogued.

MUHAMMAD ALI MAZHAR, J.

11. The perception and perspicacity of cruelty, both physical and/or mental, can be catalogued as under:-

1) Halsbury's Laws of England (Fourth Edition), Volume 13, Para 1269, Page 602

Cruelty Generally

"The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exists.

If the court finds that one spouse has, by reprehensible conduct or departure from the normal standards of conjugal kindness, caused injury to health or a reasonable apprehension of it on the part of the other spouse then it is cruelty if a reasonable person, after taking due account of all the circumstances of the case, would consider that the conduct complained of is of so grave and weighty a nature that the complainant should not be called upon to endure it. The court's principal motive in intervening in the parties' affairs is not to punish

one spouse for his or her past conduct but to protect the other for the future, and the object underlying the jurisdiction of magistrates' courts to grant relief in matrimonial causes is to afford a practical alleviation of intolerable situations with as little hardship as may be against the party against whom relief is sought."

2) American Jurisprudence (Second Edition), Volume 24, Chapter: Divorce and Separation, Para 35, Page 217-218 § 35.

Mental Cruelty

In jurisdictions where cruelty is a ground for divorce, and in accord with the view that cruelty need not consist of physical violence or threats of violence, it is generally held, either because of an express statutory provision to that effect or because of the implications from the statutory reference to "cruelty" and the like, that cruelty may consist of mental cruelty, provided, of course, that the misconduct impairs, or threatens to impair physical or mental health. Even where a statute defines the ground for a divorce as "treatment endangering life," the cause of action need not be based on physical violence; a case may be made out by proving mental cruelty which endangers life. It has been stated that mental cruelty, as a ground for divorce, is a course of unprovoked, offensive conduct toward one's spouse which causes embarrassment, humiliation, and anguish, so as to render the spouse's life miserable and unendurable, and which actually affects the spouse's physical or mental health."

3) Corpus Juris Secundum, Volume XXV, at page 16

"Cruel treatment. Any act intended to torment, vex, or afflict, or which actually afflicts or torments without necessity, or any act of inhumanity, wrong, oppression or injustice, the wilful infliction of pain, bodily or mental, such as reasonably justifies an apprehension of damage to life, limb or health. Cruel treatment does not always consist of actual violence; but includes mental anguish and wounded feelings." "Cruelty. Every willful act, omission, or neglect, whereby unjustifiable physical pain, suffering, or death is caused or permitted; any act of a human being which inflicts unnecessary pain; the infliction of great pain or misery without necessity; either actual violence endangering life or limb or health, or conduct creating a reasonable apprehension of such violence. It has been said that the word clearly includes both the willfulness and cruel temper of mind with which the act was done, and the pain inflicted by the act."

4) Black's Law Dictionary (Ninth Edition), at page 434

"Cruelty. (13c) The intentional and malicious infliction of mental or physical suffering on a living creature, esp. a human: abusive treatment; outrage. Cf. ABUSE; INHUMAN TREATMENT; INDIGNITY." "Mental Cruelty. (1898) As a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse.

5) Words and Phrases (Permanent Edition), Volume 10-A

Cruelty – In general (At page 329 to 331) "Cruelty," as [the] word is used in divorce cases, is an act that endangers or threatens life, limb or health of aggrieved party, including outrages upon feelings or infliction of mental pain or anguish. Ingham v. Ingham, Tex.Civ.App., 240 S.W.2d 409, 411."

"Husband's misconduct, which endangers wife's health to degree rendering it physically or mentally impossible for wife to discharge marital duties

properly, constitutes "cruelty" within meaning of divorce statute. Schwartzmann v. Schwartzmann, 102 A.2d 810, 813, 204 Md. 125."

"If conduct alleged and shown in suit for divorce on ground of cruelty is of such a nature as utterly to destroy the legitimate purpose and object of the marital relationship, such conduct constitutes "cruelty" and justifies a divorce. Best v. Best, Tex.Civ.App., 214 S.W.2d, 806, 808."

"Cruelty" warranting divorce may result from continuing course of abusive and humiliating treatment of one spouse by another, as in case of course of conduct calculated to torture complaining spouse's mental health and emotional nature and affecting his or her bodily health. Humphreys v. Humphreys, 281 S.W.2d 270, 281, 39 Tenn.App. 99."

"Cruelty" which will justify divorce, is the willful, persistent infliction of unnecessary suffering, whether in realization or apprehension, whether of mind or body, to such extent as to render cohabitation dangerous and unendurable, and term comprehends conduct endangering life, limb or health or productive of mental anguish, and conduct of nature utterly destructive of purpose of marital relationship. Gentry v. Gentry, Tex.Civ.App., 394 S.W.2d 544, 546."

Accusation of infidelity (At page 335)

"The public aspersion of a virtuous wife by her husband, charging her with unchastity, constitutes such cruelty as will entitle her to divorce. Jones v. Jones, 60 Tex. 451, 458, 461."

"False accusations of adultery, maliciously made, without probable cause or reasonable grounds for belief, and producing requisite degree of anguish, suffering, and danger to health constitute sufficient cause to warrant limited divorce for "cruelty". Bostick v. Bostick, D.C.Mun.App, 163 A.2d 817."

"In a pleading and by testimony in support thereof, accusations by husband or wife that his or her spouse has been guilty of marital infidelity, if false and made maliciously without reasonable cause for suspecting fidelity of other spouse, may amount to "cruelty" and justify granting of divorce, particularly if accompanied by proof of other cruel acts. Maley v. Maley, 140 P.2d 262, 265, 18 Wash.2d 766."

"Continual charges to a wife of unchastity with a disavowal of paternity of the children, made continuously in the presence of others and in the presence of the children, would constitute "cruelty" within the meaning of the divorce laws. Morris v. Morris, 107 P. 186, 57 Wash. 465."

"Circulation of false and slanderous statements, tending to destroy reputation and harmful to peace of mind and health, may constitute "cruelty" justifying divorce. Williams v. Williams, 291 P. 993, 994, 37 Ariz. 176."

12. The matrimonial bond between a man and woman is a pious relationship which plays an important part and also nurtures between the husband-and-wife happiness and compassion and the lineage and family heredity also depends on it. Connubial affairs are based on gentle, human and emotional affiliation which requires mutual trust, regard, respect, love and affection with adjustments with the spouse, and the relationship should also be in accordance with social norms. Mental cruelty is a conduct and behavior which inflicts upon the wife such mental pain and anguish making it impossible for her to continue the matrimonial relationship which is also a state of mind caused due to the behavioral pattern of the husband, but this is required to be determined by the Court according to the facts and circumstances of each case and must be more serious than the ordinary, petty or trivial issues or disputes of married life which usually

occur in day-to-day married life. According to the injunctions of Islam, the husband is obligated and responsible to provide food, clothing, accommodation and all the other necessities of life to the best of his capability and capacity. A man is expected to treat his wife nicely, with love and affection. Here we would like to quote few excerpts from some verses of the Holy Quran which have direct nexus with the matrimonial relationship ordained under the commandments of the Almighty Allah (SWT): -

1. Men are the caretakers of women, as men have been provisioned by Allah over women and tasked with supporting them financially. And righteous women are devoutly obedient and, when alone, protective of what Allah has entrusted them with. And if you sense ill-conduct from your women, advise them first, if they persist, do not share their beds, but if they still persist, then discipline them gently. But if they change their ways, do not be unjust to them. Surely Allah is Most High, All-Great. (Ref: An-Nisa-4.34- quran.com/en/an-nisa/34

2. And one of His signs is that He created for you spouses from among yourselves so that you may find comfort in them. And He has placed between you compassion and mercy. Surely in this are signs for people who reflect. (Ref: Ar-Rum-30.21-quran.com/30/21)

3. He is the One Who created you from a single soul, then from it made its spouse so he may find comfort in her. After he had been united with her, she carried a light burden that developed gradually. When it grew heavy, they prayed to Allah, their Lord, “If you grant us good offspring, we will certainly be grateful”. (Ref: Al-A’raf-7.189-quran.com/en/al-araf/189)

4. O humanity! Be mindful of your Lord Who created you from a single soul, and from it He created its mate, and through both He spread countless men and women. And be mindful of Allah—in Whose Name you appeal to one another—and honour family ties. Surely Allah is ever Watchful over you. (Reference An-Nisa-4.1-quran.com/4)

5. O you who have believed, it is not lawful for you to inherit women by compulsion. And do not make difficulties for them in order to take [back] part of what you gave them unless they commit a clear immorality. And live with them in kindness. For if you dislike them - perhaps you dislike a thing and Allah makes therein much good. (Ref: An-Nisa-4.19 legacy.quran.com/4/19)

6. Your spouses are a garment for you as you are for them. (Ref: Al-Baqarah Quran, 2:187-quran.com/al-baqarah/187) 7. Give women you wed their due dowries graciously. But if they waive some of it willingly, then you may enjoy it freely with a clear conscience. (Ref: AnNisa-4.4-quran.com/an-nisa/4)

13. At this juncture, it would be quite apt and pertinent to quote the teachings and canons articulated by our Holy Prophet Hazrat Muhammad (may Allah's peace and blessings be upon him):

1. Abu Huraira (Allah be pleased with him) reported Allah's Apostle (صلى الله عليه وسلم (as saying: He who believes in Allah and the Hereafter, if he witnesses any matter, he should talk in good terms about it or keep quiet. Act kindly towards woman, for woman is created from a rib, and the most crooked part of the rib is its top. If you attempt to straighten it, you will break it, and if you leave it, its crookedness will remain there. So, act kindly towards women. [Narrated by Sahih Muslim, 1468a, Book No.17, Hadith-80] (Ref: sunnah.com/muslim:1468a)

2. And the Prophet (peace and blessings be upon him) said. “The best of you is the best to his wives, and I am the best of you to my wives and when your

companion dies, leave him alone." [Jami at-Tirmidhi, 3895, Book No.49, Hadith-295]- (Ref: sunnah.com/tirmidhi-3895)

3. Prophet Muhammad (PBUH) also said: The believers who show the most perfect Faith are those who have the best behavior, and the best of you are those who are the best to their wives." (At-Tirmidhi)- (Ref: thefaith.com/women-in-islam)

4. It was narrated from Jabir b. Abdullah (R.A) that the Holly Prophet (PBUH) said in his Farewell Sermon:

"Fear Allah concerning women! Verily you have taken them on the security of Allah, and intercourse with them has been made lawful unto you by words of Allah. You too have rights over them, and that they should not allow anyone to sit on your bed whom you do not like. But if they do that, you can chastise them but not severely. Their rights upon you are that you should provide them with food and clothing in a fitting manner" (Narrated by Sahih Muslim, 1218-a)(Ref:sunnah.com/muslim:1218a)

2023 SCMR 46

Azra Bibi Versus CPO Pakistan Railways

Actio personalis moriter cum persona: Applicability in service laws.

MUHAMMAD ALI MAZHAR, J.

3. All the more so, the claim of regularization, rightly or wrongly, from the date of initial appointment was a cause of action that could only be agitated by the deceased husband in his lifetime, but no such claim or legal proceedings were set into motion by him which shows that the deceased was satisfied and not interested in lodging any such claim and after his death, this cause of action does not survive to be agitated by his legal heirs. According to Section 2 (b) (Definitions clause) of the Civil Servants Act, 1973, a "civil servant" means a person who is a member of All-Pakistan Service or of a civil service of the Federation, or who holds a civil post in connection with the affairs of the Federation, including any such post connected with defence, but does include (i) a person who is on deputation to the Federation from any Province or other authority; (ii) a person who is employed on contract, or on work-charged basis or who is paid from contingencies; or (iii) a person who is "worker" or "workman" as defined in the Factories Act, 1934, or the Workman's Compensation Act, 1923. Whereas under Section 2 (a) of the Service Tribunals Act, 1973, a "civil servant" means a person who is, or has been, a civil servant within the meaning of the Civil Servants Act, 1973. The provision for filing an appeal to the Tribunal is provided under Section 4 of the Service Tribunals Act, 1973 by means of which civil servants aggrieved by any final order, whether original or appellate, made by a departmental authority in respect of any of the terms and conditions of his service may, within thirty days of the communication of such order, file an appeal to the Tribunal. The above provisions unequivocally interpret and elucidate that there is no scope or prospect for filing any appeal before the Service Tribunal under Section 4 other than by the civil servant himself, and the law does not permit the legal heirs to knock on the doors of the Service Tribunal after the death of the said civil servant.

4. We are sanguine to the legal maxim "actio personalis moritur cum persona" which is a legal turn of phrase of Latin origin. In the well-read literary connotation, it means that the personal right to an action dies with the person. There are certain categories of legal proceedings or lawsuits in which the right to sue is personal and does not survive to

the legal representatives and, as a consequence thereof, the proceedings are abated.

5. The petitioner in this case did not apply to the learned Tribunal for impleading legal heirs on the notion that cause of action survives despite death, rather the appeal was filed much after the death of her husband who did not opt to initiate any legal proceedings within his lifetime. Had the appeal been filed by the husband and during pendency he passed away, then subject to first deciding an elementary question by the Tribunal in the set of circumstances of the case whether the cause of action does survive despite death, then unambiguously, the petitioner could have moved the application for impleadment in the Tribunal as if the Tribunal had not become functus officio. For instance, if the service appeal is filed against the dismissal of service or for compulsory retirement, and death of petitioner occurred during the pendency of appeal, then obviously the main relief of reinstatement in service, which was personal to the appellant cannot be granted after his death but the learned Service Tribunal after taking into consideration the facts and circumstances of each case separately and to alleviate the miseries of the bereaved family, may continue the pending appeal only to examine and decide whether any monetary relief such as lawful pending dues are payable or if any lawful claim lodged by the civil servant in his life time which is subject matter of appeal in which cause of action survives despite his death including pensionary benefits, gratuity or provident fund etc. if permissible and applicable under the law and rules to the deceased appellant. However, the facts of the present case are quite distinguishable wherein the Tribunal could not entertain the appeal which was originally filed by the widow herself after the death of civil servant and it was not a case of impleading the legal heirs in any pending appeal to ensure the payment of full and final settlement of dues.

6. The learned Tribunal has already considered all legal and factual aspects in the impugned judgment and to some extent also considered the representation of the petitioner being time barred, obviously for the reason that act of regularization was done in the year 2000 but no departmental appeal was filed within the specified period of limitation, and even the departmental appeal was filed by the widow and not by her husband during his lifetime.

PESHAWAR HIGH COURT

https://peshawarhighcourt.gov.pk/PHCCMS//judgments/Shafiqur-Rehman-vs.pdf

Shafiq-ur-Rehman vs The State

Whether sentences in two different trials, which were of course outcome of one and the same transaction, can be consolidated or for that matter run concurrently.

QAISER RASHID KHAN, CJ.

7. The moot question before us is that as to whether sentences in two different trials, which were of course outcome of one and the same transaction, can be consolidated or for that matter run concurrently. Section 397 CrPC deals with this proposition, which reads as under: -

397. Sentence on offender already sentenced for another offence. *When a person already undergoing a sentence of imprisonment or imprisonment for life is sentenced to imprisonment, or imprisonment for life, such imprisonment, or imprisonment for life shall commence at the expiration of the imprisonment, or imprisonment for life to which he has previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence.*

8. Granted that as per the first portion of the ibid section of law, the subsequent sentence to a convict already undergoing a sentence has to commence after the expiry of the previous sentence but simultaneously its later part leaves it to the discretion of the court whereby it may direct for treating the sentences to run concurrently.

9. Another crucial question is as to whether an issue, which was not addressed to by both the learned trial court and the learned appellate court can be tackled / resolved at this stage? The answer is "Yes". Section 397 CrPC attends to such a situation. In this respect, wisdom is safely sought from the judgments of the Hon'ble Supreme Court of Pakistan reported as Rahib Ali vs. the State (2018 SCMR 418); Sajjad Ikram & others vs. Sikandar Hayat & others (2016 SCMR 467) & Mst. Shahista Bibi & another vs. Superintendent, Central Jail, Mach & others (PLD 2015 SC 15).

10. On the touchstone of the supra judgments of the apex court and keeping in view the relevant provision of law, we have come to the safe conclusion that the convict- petitioner Shafiq-ur-Rehman is entitled to the relief, asked for within the meaning of section 397 CrPC.

11. Accordingly, we admit and partially allow this petition and in turn hold that the sentences of the convict petitioner Shafiq-ur-Rehman shall be deemed to have run 'concurrently' in both the trials. Cr.M is disposed of accordingly. A copy of this judgment be endorsed to the Superintendent, Central Prison, Mardan for information and compliance.

Amir Ullah vs Director Zamung kor

https://peshawarhighcourt.gov.pk/PHCCMS//judgments/Cr-A-No-1180-P-of-2021.pdf

Child Beggars: Parameters of protective custody.

ROOH-UL-AMIN KHAN, J.

7. It is uncontroverted fact that child begging has become a raising menace throughout the world. In the third world countries the main reason behind this menace is the poverty and lack of education facilities, particularly, in the rural areas. On one side stringent law is need of the time to curb the menace of vagrancy, while on the other side, Institutions Like "*Zamung Kor*" are required to be promoted, surely, the civil Society and the Government shall play greater role creating awareness in the masses about Muslim Laws and commandments regarding imperial effect of vagrancy. We appreciate the struggles and functions of "Zamung Kor" being conducted and carried out for rehabilitation of children. The Institution besides providing food, shelter and education is to train the children for their future life. In case in hand, parents of the child were summoned and informed about better welfare of their ward in Zamung Kor, however, their only request was that the child be allowed some time to stay with them. We are conscious of the love and affection of parents and children towards each other; however, welfare of the child is the prime consideration under the law. In view of the above discourse and report of "Zamung Kor, coupled with the feeble financial position of parents of the child and his welfare in the Institution "Zamong Kor" we are of the firm view to hold that it would be in the best interest of the child's future to stay in the above-named Institution instead of handing him over in the custody of the appellant, in which circumstances there is no guarantee of his better future. The learned trial court has rightly turned down the request of the appellant to which no exception can be taken, however, keeping in mind the love and affection of the parents, we deem it

appropriate and in the interest of justice to provide a visitation right to the child to stay with his parents on each off day in the week.

8. Accordingly, this appeal stands dismissed with the observation that parents of child Obaid Ullah shall be entitled to visit and see him in "Zamung Kor" on any day of the week inside the Institution, whereas, they would be entitled to his custody for shifting him to home on Saturday of each week after his school timing and shall be bound to return him to the Institution on coming Monday before 9.00 A.M. provided the petitioner furnishes a bail bond in the sum of rupees one lac with one surety in the like amount to the satisfaction of the learned Child Protection Court.

Abdul Ghaffar Versus Shoukaat

https://peshawarhighcourt.gov.pk/PHCCMS//judgments/WP860-P2022.pdf

Custody of Minor

Musarrat Hilali, J.

3. Decision on question of welfare of a minor child has to be considered on its own merit in the background of relevant facts and circumstances and other decided cases can hardly serve as binding precedent in so far as the factual aspects of the cases are concerned. As has been mentioned in the preceding para, the custody of the minor was refused to his biological father on the ground that in his statement before the learned Judge, the minor himself charged his father for the murder of his mother and that the respondents were financially better as one of the uncles of the minor was in Dubai and was paying for the education of the minor and also that mere acquittal in murder case would not entitle the petitioner for custody of the minor.

It is a settled principle of law that paramount consideration for the custody of a minor is the welfare and well-being of the child and other considerations are subordinate. According to the Courts, the welfare of the minor means a child's health, education, physical, mental and psychological development. Admittedly, the petitioner and respondents are inimical towards each other. As per the available record, the custody of the minor went to the respondents when he was one year of age. The most disturbing feature and fact upon which this court is required to make observation is that his statement was tutored as in his statement he has charged his father, the petitioner, for the murder of his mother. The question arises as to who put in to the child's mind that his mother was killed by the petitioner. Such statement of the minor at this age clearly indicates that he is being brought up in an hostile environment where respondents are sowing seeds of enmity and hatred in the mind of minor against his father which will not only result in imminent and long lasting mental and psychological harm and trauma to the minor child but will also be detrimental for the upbringing of the child. This aspect of the matter hints towards the criminal intention on the part of the respondents as instead of making the minor good member of the society, they are destroying his personality and, therefore, it will be disastrous for the child to stay at his uncles' house any longer.

For the sake of custody of minor's physical, mental health, education and psychological development, it is important that the custody of the minor Muhammad Hilal should be restored to the petitioner, who is biological father and the natural guardian of the minor. No doubt, choice of a minor is a factor to be taken into consideration but it cannot be made a decisive factor in matters relating to custody of minors as is seen from the record, the

facts of the instant case are different from those cases where the consent of the minor has to be considered while deciding issue of custody of minor as in the instant case, the minor has been influenced by the respondents to make a particular choice and, therefore, he is not in a position to form intelligent preference.

Accordingly, in view of the above, this court is of the view that welfare of the minor Muhammad Hilal lies with his father, the petitioner, and the courts below by giving his custody to respondent No. 2 have gone into wrong premises and when so the petition is allowed, accordingly, the judgments of both the courts below are set aside and as a consequence thereof by allowing the petition of the petitioner, custody of minor (respondent No.3) is granted/handed over to the petitioner.

Sardar Muhammad Khan VS Rais Khan Afridi

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

Requirement of Talb-e- Muwathibat in Pre-emption cases.

MOIIAMMAD IBRAHIM KHAN, J.

6. 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 pre-emption suit was mainly dismissed on the ground that persons who had conveyed information regarding sale and price to the brother of the said pre-emptor was not produced as a witness, hence, the elements of talb- e-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 pre-emptor or from the conversation in between those two persons who had learnt about the sale which was further communicated to the pre-emptor, must be examined.

7. 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 pre-emptor 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 pre-emptor obtain the first information of the sale and the immediate declaration of his intention by the pre-emptor to exercise his right of pre-emption there and then on obtaining such information. The making of talb-e-Mawathibat shall not be based on hearsay evidence of a witness as there would be scepticism that such information has been given in order to only fulfill the requirement of talb-e-Muwathibat. The veracity and truthfulness of the witness of talb-e-Muwathibat shall be of prime consideration.

2022 PCrLJ 1690

Doctor Khan Versus the State

Jurisdiction of High Court to entertain bail in case where appeal against the Judgment of a High Court is pending before the Hon`ble Supreme Court.

ISHTIAO IBRAHIM, J.

6. This Court derives its power to grant bail pending appeal before the Hon'ble Supreme Court against the judgment of this Court in a criminal case from section 426 (2-B) of the Criminal Procedure Code, which reads as follows:

"426. Suspension of sentence pending appeals-- Release of appellant on bail: (l) (2-B) Where a High Court is satisfied that a convicted person has been granted special leave to appeal to the Supreme Court against any sentence which it has imposed or maintained, it may, if it so thinks fit order that pending the appeal the sentence or order appealed against be suspended and, also, if the said person is in confinement, that he be released on bail."

7. The section indeed has a chequered history. It got enacted vide Act No. IV of 1946. Before that, the High Courts had varying interpretations of the bail power pending special leave to appeal. The Privy Council in Jairam Das V.s King Emperor, A.I.R 1945 PC 94 set at rest the conflicting viewpoints and concluded that the High Court lacked jurisdiction to entertain bail, in case where appeal against the judgment of High Court is pending before the Hon'ble Supreme Court. However, in the concluding para it suggested conferring such power on the High Court.

8. Significantly, while the Privy Council ruled that the High Court lacked jurisdiction to grant bail, it did not suspend the sentence in any of the cases. Instead, it referred to Section 401 Cr. PC about the provincial government powers to be exercised in appropriate case for the ends of justice.

9. After independence of India and Pakistan, being alive to the situation, the **Indian Law Commission recommended in forty-first report published in 1969**, that the ibid section needs omission from the statute. The relevant passage from the law commission report is as follows:

"Sub-section (2-B) was inserted in 1945' when special leave could be granted only by the Privy Council which was far away. The Adaptation Order of 1950 substituted "Supreme Court" for "Privy Council" without considering whether there is any practical need for the provision. The Supreme Court is not far away, and when the party has taken the trouble and incurred the necessary expense in obtaining special leave from the Supreme Court, he could easily request that Court, while granting special leave to be given appropriate interim relief, we recommend the omission of the sub-section (2B).

We have also considered the suggestions to amend sub-section 2B enabling the High Court to grant interim relief to a person during the interval between the date of the dismissal of his appeal by the High Court and the date of grant of special leave by the Supreme Court. In our view any such widening of the scope of the sub-section is neither necessary nor desirable. With the quick means of transport available nowadays. it should not be difficult for a party to approach the Supreme Court and obtain appropriate interim relief without delay." (Emphasis provided)

Given the above suggestion, the law was amended, and now the relevant section of the Indian Criminal Procedure Code reads as follows:

"389. (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court subordinate thereto.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,

(i) Where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

(ii) Where the offence of which such person has been convicted is a bailable one, and he is on bail.

Order that the convicted person be released on bail, unless there are special reasons for refusing bail, for

such period as it affords sufficient time to present the appeal and obtain the orders of the Appellate Court under sub-section (1); and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentence,"

10. It is clear that the reasons cited in the ibid judgment do not apply in the post-independence period. Similarly, Hon'ble Supreme Court of Pakistan has taken care of the matter in question while framing its Rules as mandated by Article191 of the Constitution of Islamic Republic of Pakistan, 1973.

Chapter-XXII [Rule-l1 of the Supreme Court of Pakistan Rules, 1980, which reads as under;

"11. Pending the disposal of any appeal under this Order the Court may order that the execution of the sentence or order appealed against be stayed on such terms as the Court may think fit."

In several cases, Honorable the Supreme Court of Pakistan suspended the sentence: see for instance, Anwarul Huq v National Accountability Bureau, (PLD 2009 SC 388), and Sattu Khan v the State, (1988 SCMR 24).

11. But as is clear from the verdict, the preposition was not resolved. Doubtlessly, the High Court becomes functus officio after ruling on it. Until and unless it can be shown why a petition for the suspension of the sentence could not be lodged in the first instance before the Honourable Supreme Court, the High Court's seisin does not revive.

12. From the above discussion, when the Hon'ble Apex Supreme Court has already taken cognizance of the matter and while this Court has already dismissed the appeal and has maintained his conviction recorded by the learned trial court and when there is no legal impediment in the way of the petitioner to approach the Hon'ble Apex Court, we deem it not proper to suspend the sentence awarded to the petitioner and confirmed by this Court. Hence, the instant Criminal Miscellaneous Petition / Bail application under section-426 (28) Cr. PC filed by the petitioner for suspension of his sentence is dismissed.

Irfan Ullah Vs Federation of Pakistan

https://peshawarhighcourt.gov.pk/PHCCMS//judgments/wp--2838-p2021===.pdf .

Art:25A (Eighteenth Amendment) Right to Education Discussed

IJAZ ANWAR, J:

7. This Court, under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 can issue a writ in the form of prohibition or mandamus only where petition is filed by an aggrieved person and seeks direction against a 'person' performing within the territorial jurisdiction of this Court, functions in connection with the affairs of the Federation, a Province or a local authority. The word "person" used in Article 199 of the Constitution has been defined by the Hon'ble Supreme Court of Pakistan in numerous landmark judgments while for the purpose of enforcement of certain rights of the employees serving under such "persons", the consistent view of the Superior Courts is that the "person" against which a writ is to be issued must be either Government, a body creation of an Act of Parliament or Provincial Assembly and the rules governing their rights and obligations must have statutory status in the eyes of law. The Hon'ble Supreme Court of Pakistan in the case titled "Pakistan Defense Officers' Housing Authority and others Vs. Lt. Col. sped Jawaid Ahmed (2013 SCMR 1707), while commenting

upon the jurisdiction of the High Court, has enunciated certain principles of law for maintainability of a writ petition as follows: -

(i) Violation of Service Rules or Regulations framed by the Statutory bodies under the powers derived from Statutes in absence of any adequate or efficacious remedy can be enforced through writ jurisdiction.

Where conditions of service of employees of a statutory body are not regulated by Rules/Regulations framed under the Statute but only Rules or Instructions issued for its internal use, any violation thereof cannot normally be enforced through writ jurisdiction and they would be governed by the principle of 'Master and Servant'.

(iii) In all the public employments created by the Statutory bodies and governed by the Statutory Rules/Regulations and unless those appointments are purely contractual, the principles of natural justice cannot be dispensed with in disciplinary proceedings.

(iv) Where the action of a statutory authority in a service matter is in disregard of the procedural requirements and is violative of the principles of natural justice, it can be interfered with in writ jurisdiction.

(v) That the Removal from Service (Special Powers) Ordinance, 2000 has an overriding effect and after its promulgation (27th of May, 2000), all the disciplinary proceedings which had been initiated under the said Ordinance and any order passed or action taken in disregard to the said law would be amenable to writ jurisdiction of the High Court under Article 199 of the Constitution.

8. In the instant case, the petitioner claims that his rights to employment in the respondent-University have been violated. To ascertain the status of the respondent University, we may refer to the National University of Computer and Emerging Sciences Ordinance, 2000 (hereinafter to be referred as "the Ordinance"), whereunder, the University has been created. The relevant para of its preamble is reproduced: -

"Whereas it is in the interest of the country to establish centers of excellence in the emerging disciplines of Science and technology to provide a strong base for economic growth and human development and to provide quality education to talented students".

9. By the very name of the University and the preamble above referred, it appears that it was the decision of the Federal Government to establish an Institute/University in the interest and betterment future of this country. Article 25A of the Constitution of Islamic Republic of Pakistan, 1973 was inserted through Constitution (Eighteenth Amendment) Act, 2010 (Act No.X of 2010) which provides for right to education. Article 25A has been added which identifies the education as one of the fundamental rights of the people. Though, the said Article provides for free and compulsory education to all children of the age of 5 to 16, however, provision of educational facilities is also the function of the State from Primary to Secondary and Higher Level as it is an established fact that human resource development is key to all successes and in order to compete with the modern world, the youth of this country must be well equipped with the skill of self-employability and as such, the Government has to establish such Institutes/Universities for the purpose of research, professional or technical training or the promotion of special studies. We are thus of the considered opinion that providing venues to the youth of this country for higher education in all fields and industrialization is one of the core functions of the State and thus can be conveniently termed as the University is functioning within the affairs of the

Federal Government. Reference can be made to the case titled "Fiaqat

Hussain and others Vs. Federation o/ Pakistan through Secretary. Planning & Development Division, Islamabad and others (PLD 2012 SC 224)

10. In terms of Section 9 of "the Ordinance", the President of Pakistan shall be the "Patron" of the University; similarly, under Section 8 of 'The Ordinance", the Chancellor of the University is to be appointed by the Patron on the recommendation of the Foundation; while "Foundation" has been defined under Section 2(h) of "the Ordinance" as "Foundation for advancement of Science and Technology (FAST)". Under Section 12 of "the Ordinance", the "Board of Trustees" is constituted which consists of the following members: -

i. The Chancellor who shall be its Chairperson;
ii. Chairman, University Grants Commission or his nominee not below the rank of an officer of Basic Pay Scale 20;
iii. a retired judge of the Supreme Court of Pakistan or a High Court;
iv. a retired vice-chancellor or an eminent scholar;
v. two eminent scientists;
vi. two nominees of the Foundation;
vii. Rector;
viii. one nominee of the Board; and
ix. Secretary, Ministry of Education.

11. Similarly, under Section 13 of "the Ordinance", "Powers and functions of the Board of Trustees" are provided which has, besides the other functions, also the powers and functions "to approve the draft statutes proposed by the Board of Governors"; while Section 14 of "the Ordinance" provides for the constitution of the "Board of Governors" who will be having the general supervision and control of the administrative, academic and financial affairs and the power to lay down the policies of the University. The "Board of Governors" consists of the following members: -

a) Rector who shall be the Chairperson of the Board;
b) one retired judge of the Supreme Court of Pakistan or a High Court, to be nominated by the Foundation;
c) Chairman, University Grants Commission, or his nominee not below the rank of an officer of Basic Pay Scale 20;
d) one vice-chancellor of a university to be nominated by the Foundation;
e) Secretary, Ministry of Education, or his nominee not below the rank of an officer of Basic Pay Scale
f) one Dean to be nominated by the Board of Trustees in consultation with the Rector;
g) three persons, prominent in the field of their specialization because of their experience and achievements, to be nominated by the Board of Trustees; and
h) Registrar of the University shall act as Secretary of the Board".

12. It has also been provided in the powers and functions of the Board in Section 15(b) and (c) of "the Ordinance" "to make rules and regulations" and "to prepare or have prepared and revised from time-to-time rules and regulations for the efficient and effective operation of the University"

13. Thus, in terms of Section 15(b) and (c) of "the Ordinance", the Board of Governors are empowered to make rules and regulations and to prepare or have prepared and revised from time-to-time rules and regulations for the efficient and effective operation of the University which will be then placed before the Board of Trustees which has under Section 13(c) of "the Ordinance" the powers and functions "to approve the draft statutes proposed by the Board of Governors".

14. In the case of "Pakistan Defense Officers' Housing Authority and others (2013 SCMR 1707), it is one of the principles enunciated from the case law for the maintainability of the writ petition that

"violation of service rules or regulations framed by the statutory bodies under the powers derived from statutes in the absence of any adequate or efficacious remedy can be enforced through writ jurisdiction".

15. The Hon'ble Supreme Court of Pakistan in the case titled “Masood Ahmad Bhatti and others Vs Federation of Pakistan through Secretary, M/o Information Technology and Telecommunication and others (2012 SCMR 152)” while distinguishing its earlier judgment pertaining to the status of statutory rules i.e. Pakistan International Airlines Corporation and others Vs. Tanweer-ur-Rehman and others (PLD 2010 SC 667), held as under: -

Since the judgment of the High Court is based on the case of Tanweer-ur-Rehman supra, it firstly is to be seen if indeed the principle of law enunciated therein supports the conclusion in the impugned judgment. Para 18 of the cited precedent is of particular relevance in this context. It sets out the circumstances which led to the Court's finding that the regulations which were under consideration in the said case could not be treated as being statutory in nature. The test laid down for deciding if the regulations were in fact statutory, was stated with great clarity. These regulations had been framed by the Board of Directors of the Pakistan International Airlines Corporation ('PIAC') under the PIAC Act 1956. It was observed by the Court that "if the relationship between the [PIAC] and its employees is regulated by statutory provisions and if there is any breach of such provisions, an employee may maintain an action for reinstatement". It was further observed that "the PIAC has regulations which have been framed by the Board of Directors of the PIAC pursuant to the power contained in section 30 of the [PIAC] Act; however, there is nothing on record to indicate that these regulations have been framed with the previous sanction of the Central Government or that they were gazette and laid before the National Assembly in terms of section 31 of the [PIAC] Act". This finding of the apex Court was, in turn, based on the case titled Raziuddin v. Chairman, PIAC (PLD 1992 SC 531). In short, the reason for holding that the regulations in question were not statutory was that the requirements of sections 30 and 31 of the PIAC Act had not been complied with.

16. The observations in the case of Tanweer-ur Rehman supra have necessitated an examination of sections 30 and 31 of the PIAC Act to see if these provisions have any parallel or relevance in the present appeals. It is quite clear from the PIAC Act that in order for the regulations to have statutory force, it was necessary that the same be framed "with the previous sanction of the Central Government". Additionally, under section 31 of the PIAC Act, the regulations were required to be gazetted and laid before the National Assembly. It is only because these contentious regulations had not been framed with the previous sanction of the Central Government and had not been published in the official Gazette, that the Court came to the conclusion the regulations were not statutory in nature. It follows from the cited judgment that if in fact the regulations had fulfilled the requirements of sections 30 and 31 of the PIAC Act, there would have been no dispute or contention as to the statutory status of the said regulations. The circumstances of the present appeals (considered below) are very different from the facts Tanweer-ur-Rehman 's case".

17. In the instant case too, we find that the HR Manual placed on file was framed in accordance with the procedure prescribed under "the Ordinance", which nowhere has provided for framing of the rules by the Government or its placement before the Federal Government; as such, it is held that the rules, framed by the Board of

Governors and duly approved by the Board of Trustees, have the statutory status.

18. The judgments of the Single Bench of the Hon'ble Islamabad High Court, Islamabad passed in the cases titled "Ms. Tauheed Sohail Vs. National University of Computer and Emerging Sciences FAST House, Islamabad and others (W.P. No.1012/2016 decided on 13.042016) and Ms. Sidra Irshad Vs Dr. Amir Muhammad and others P. No. 27100 2015 decided on 04.02.2016)" are distinguishable as it has relied upon the judgment of the apex Court in Tanweer-ur Rehman case and as referred to above, probably the judgment of the Hon'ble Supreme Court of Pakistan reported as "Masood Ahmad Bhatti and others Vs. Federation of Pakistan through Secretary, M/o Information Technology and Telecommunication and others (2012 SCMR 152)". was not brought into the notice of the Hon'ble Court, wherein, the apex Court has clarified the effect of Tanweer-ur-Rehman case on the status of the Rules.

19. Now coming to the merit of the case, the record transpires that petitioner was initially appointed vide Office Order dated 02.07.2020 as Manager (Admin & Finance) and was duly confirmed after satisfactory completing his probationary period vide Office Order dated 08.022021. The order terminating the services of the petitioner dated 25.062021 under the subject "service no more required" is though argued to be in terms of the initial appointment letter dated 02.07.2020, according to which, in case of confirmation of his services, his services can be liable to be terminated on one month notice or payment of one month salary in lieu thereof, however, in the instant mater, the reason given as 'unsatisfactory performance' after his confirmation becomes redundant, as the very termination order carries a stigma in the shape of "unsatisfactory performance" which ultimately would be hurdle for the petitioner while applying to other departments in future. It is pertinent to mention here that from the comments, it can be gathered that the allegations against the petitioner pertain to bypassing a channel in the matter of correspondence and nowhere, it has been alleged that the interest of the University, at any stage, has been compromised. Even otherwise when there were allegations of any kind against the petitioner, the respondent-University was required to have allowed him proper opportunity to defend himself.

20. In the case titled the Punjab Health Department, Lahore and others Vs. Riaz-ul Haq (1997 SCMR 1552)". the apex Court, while relying upon different judgments of the Hon'ble Supreme Court of Pakistan, held that "terminating the services of a probationer on the ground of unsatisfactory work will not amount to dismissal or removal (rom service: however, if such employee is to be terminated on account of certain allegations, then even if such employment is contractual, pet holding proper departmental proceedings would be mandatory".

21. In view of the above, we find that the petitioner has not been treated in accordance with law and being a confirmed employee, he has been condemned unheard. Accordingly, the impugned termination order dated 25.06.2021 is set-aside and the petitioner is reinstated in service, allowing the respondent-University to proceed afresh against the petitioner strictly in accordance with law if they are so advised. It is further clarified that the question of back wages and benefits of the petitioner shall be decided by the respondent-University after the outcome of any such departmental proceedings, if so conducted.

22. This writ petition is allowed in the above terms.

Fazl-e-Khaliq vs. Dr. Neloofar Yousafzai

https://peshawarhighcourt.gov.pk/PHCCMS/
/judgments/CR-140.2021-06.10.2022-.pdf

Application/Requirement of S.12(2) CPC

Withdrawal of appeal by the counsel without authorization and consent of the principal falls within the ambit of fraud, misrepresentation and collusion as it gives undue advantage to the opposite party.

SHAKEEL AHMAD, J.

10. Before proceeding further, it is appropriate to know the meaning of the words 'fraud" or "misrepresentation" used in section 12(2) CPC in the light of the judgments of the superior Courts in Pakistan. In the case reported as "Mst. Izat Begum and another vs. Kadir Bux" (PLD 1959 Karachi 221) fraud was defined as under:

"Every representation made to a Court which is deliberately false amounts to a fraud and would vitiate a decree".

11. In this context, reference may also be made to the case reported as "Allah Wasaya and 5 others vs. Irshad Ahmad and 4 others" (1992 SCMR 2184), wherein, it was held as under:

"Whenever a person intentionally deceives another with the motive having some illegal gain or advantage for with the purpose of putting the person so deceived or cheated in wrongful loss and or disadvantage, he is said to have committed fraud. It means and includes, inter alia, the suggestion, as a fact, of that which is not true, by one who does not believe it to be true, or the active concealment off act by one having knowledge or belief of the fact"

12. In this behalf further reliance can be placed on the case reported as "Khadim Hussain vs. Abid Hussain and others" (PLD 2009 SC 419), wherein, it was observed that ***bad "faith" and "fraud" are synonymous. Fraud is an intrinsic, collateral act, which violates the most solemn proceedings of Courts o justice.***

13. Black's Law Dictionary Ninth Edition defines the word "Fraud" as under:

"A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment Fraud is usually, a tort, but in some cases (esp, when the conduct is willfully it may be a crime. Also termed intentional fraud. A misrepresentation made recklessly without belief in its truth to induce another person to act A tort arising from a knowing misrepresentation, concealment of material fact, or reckless misrepresentation made to induce another to act to his or her detriment Unconscionable dealing; esp, in contract law, the unfair use of the power arising out of the parties' relative positions and resulting in an unconscionable bargain".

14. Now turning to misrepresentation, the Hon'ble Supreme Court of Pakistan in its most celebrated judgment "Lahore Development Authority vs. Firdous steel Mills (Pvt) Ltd" (2010 SCMR 1097), after consulting Blacks' Law dictionary held as under:

"Any manifestation by words or other conduct by one person to another that under the circumstances, amounts to an assertion not in accordance with the facts. An untrue statement of fact an incorrect or false representation. That which, if accepted, leads the mind to an apprehension of a condition other and different from that which exists. Colloquially it is understood to mean a statement made to deceive or mislead'

15. For the purpose of sub-section (2) of section 12 of the CPC, the plea of collusion is as good as the plea of fraud as held in the case reported as

"Zafqrullah and 3 others vs. Civil Judge. Hafizabad and 3 others" (PLD 1984 Lahore 396).

16. In ordinary common parlance, collusion is defined as a secret combination, conspiracy, or concert of action between two or more persons for fraudulent or deceitful purposes.

17. In the case reported as "Munir Ahmad Khan vs. Sameeullah Khan and 7 others" (1986 CLC 2655), it was observed that:

"The collusion, no doubt, is a species of fraud. The collusion in Judicial proceedings is a secret agreement between the two persons that one should institute a suit against the order in order to obtain the decision of a judicial tribunal for some sinister purpose".

18. It is by now settled that fraud cannot be directly proved, it has to be inferred from the surrounding circumstances. It is also well settled law that fraud vitiates the most solemn proceedings as held by the superior Courts of Pakistan in the following judicial pronouncements. Lal Din and another vs. Muhammad Ibrahim (1993 SCMR 710) (ii) Commissioner. Lahore vs. Raja Mohammad Fazil Khan and others (PLD 1975 SC 331) and(iii) Talib Hussain and others vs. Member. Board qf Revenue and others (2003 SCMR 549).

From the contents of the petition filed under section 12(2) of the C.P.C. before the learned appeal Court, it is discerned that allegation of the respondent was that her counsel withdrew the appeal filed by her without authorization and consent and the act of withdrawal by her counsel namely Zafar Ayub, Advocate is fraudulent, result of collusion and misrepresentation, and concealment of fact. In her statement recorded before the Court as PW-1, the respondent deposed that she had not authorized her said counsel to withdraw the appeal, during pendency of appeal. She left for USA and in her absence, he withdrew her appeal fraudulently and malafidely having hands with the defendant. According to her, on 05.05.2020, she sent text message to her advocate informing him that he is no more her counsel as she has lost trust in him.

21. It is an admitted fact that the respondent filed her appeal by appointing him as her counsel and his act of withdrawal was without her consent and authorization, which gave undue advantage to the petitioner and he became the sole beneficiary on the withdrawal of appeal.

22. After considering the material on record, I am of the view that all the essential ingredients of collusions are proved in the present case, wherein, the verdict of the learned trial Court dated 13.02.2020 in favour of the petitioner remained intact due to withdrawal of appeal by the counsel of the respondent unilaterally and making a false statement in the petition that he is under instruction of her client to withdraw the same and withdrawal application was accepted by the learned Court below in violation of ground realities, existed on the spot. As discussed above, this fact alone is sufficient to establish that petitioner is a beneficiary and secured order of withdrawal in connivance with her counsel. In this behalf, reference may be made to the case reported as "Messrs Walia Steel Industries PLC v. Messrs SAGA Shipping and Trading Corporation Ltd. and others" (PLD 2019 Sindh 22)

23. Before parting with the judgment, it is observed that duties of the Muslims and their conduct in assisting the Court to do justice are also reflected in the various Ayat of the Holy Quran. The Hon'ble Supreme Court of Pakistan, keeping in view the principles enunciated in Surah Al-Nisa IV Ayat No.135 while discussing the duties of counsel to the Court of law and procedure in the case reported as "Shukar Din v.

Inamullah and another" (PLD 1992 SC 67) observed as under:

"All the parties and their counsel were bound to assist the Court in pursuance of the rule of good conduct in the Court; namely, when seeking justice do justice".

24. In the facts and circumstances of this case, the doctrine of ubi jus ibi remedium was rightly pressed into service to hold that the order of withdrawal of appeal of the respondent by her counsel was without authorization and consent and the same is the result of fraud, misrepresentation and collusion with the petitioner. I find no illegality, irregularity or jurisdictional defect in the impugned judgment; therefore, it will be just and proper to maintain the same.

25. In this view of the matter, I find no merit in the civil revision in hand, which is accordingly dismissed with no order as to costs.

Mst. Naseem Ishaq and others Versus Khizar Hayat and others.

https://peshawarhighcourt.gov.pk/PHCCMS//judgments/FAO158P2021-pecuniary-jurisdiction.pdf

Statute providing change of forum: Effect whether prospective or retrospective?

ARSHAD ALI, J.

Amendment through Section 3 of the Act, 2020, whereby Section 6 of the CPC was substituted, whereby the pecuniary jurisdiction of Civil Court viz-e-viz the District judge has been determined has a retrospective effect and the requirement of law is that any matter which was pending before the Civil Court where the value of the subject-matter of the suit is more than rupees fifty million it should be transferred to the respective District Judge, who has the pecuniary jurisdiction under Section 6(b) of the Act, 2020.

14. Moving on to the crucial issue which is raised in this appeal by the appellants. It is the contention of the appellants that since amendment made in Section 6 of the CPC through Section 3 of Act, 2020 relates to a forum, therefore, it has retrospective effect whereas it is the case of respondents that since all the proceedings which were pending before the Civil Court were protected through saving clause provided under Section 19 of Act, 2020, therefore, this amendment is not applicable to the present case. The law is by now settled that all laws are prospective in nature law unless provided otherwise by the lawmakers. The exception to the said rule is the amendment in procedural law, which may operate retrospectively for the obvious reasons the no person has a vested right in any procedural law. The question of applicability of law with retrospective effect has been dealt with by this Court in the case of Gul Hassan and Co. vs. Allied Bank of Pakistan (1996 SCMR 237) wherein after examining plethora of case law, Mr. Justice Saleem Akhtar, as he then was, observed that Statute providing change of forum, pecuniary or otherwise, is procedural in nature and has retrospective effect unless contrary is provided expressly or impliedly or it effects the existing rights or causes injustice or prejudice. The relevant para from the said judgment is reproduced herein below: -

"7. It is well-settled principle of interpretation of statute that where a statute affects a substantive right, it operates prospectively unless "by express enactment or necessary indictment" retrospective operation has been given. (Muhammad Ishaq V. State PLD 1956 SC (Pak) 256 and State v. Muhammad Jamil (PLD 1965 SC 681). This

principle was affirmed in Abdul Rehman v Settlement Commissioner (PLD 1966 SC 362). However, statute, which is procedural in nature, operates retrospectively unless it affects an existing right on the date of promulgation or causes injustice or prejudice the substantive right. In Adnan Afzal v. Capt. Sher Afzal (PLD 1969 SC 187). Same principle was re-affirmed and it was observed: - "The next question, therefore, that arises for consideration is as to what are matters of procedure. It is obvious that matters relating to the remedy, the mode of trial, the manner of taking evidence and forms of action are all matters relating to procedure. Crawford too takes the view that questions relating to jurisdiction over a cause of action, venue, parties pleadings and rules of evidence also pertain to procedure, provided the burden of proof is not shifted. Thus, a statute purporting to transfer jurisdiction over certain causes of action may operate retrospectively. This is what is meant by saying that a chance of forum by a law is retrospective being a matter of procedure only. Nevertheless, it must be pointed out that if in this case process any existing rights are affected or the giving of retroactive operation cause inconvenience or injustice, then the Courts will not even in the case of a procedural statute, favour an interpretation giving retrospective effect of the statute. On the other hand, if the new procedural statute is of such a character that its retroactive application will tend to promote justice without any consequential embarrassment or detriment to any of the parties concerned, the Courts would favourably incline towards giving effect to such procedural statutes retroactively".

Similar law has also been laid down in Ch. Safdar Ali v. Malik Ikram Elahi and another (1969 SCMR 166) and Muhammad Abdullah v. Imdad Ali (1972 SCMR 173), which was followed in Bashir v. Wazir Ali (1987 SCMR 978), Mst. Nighat Yasmin v. N.B. of Pak. (PLD 1988 SC 391) and Yusuf Ali Khan v. Hongkong and Shanghai Banking Corporation, Karachi (1994 SCMR 1007). From the principle enunciated in aforesaid judgments it emerges that statute providing change of forum pecuniary or otherwise is procedural in nature has retrospective effect unless contrary is provided expressly or impliedly or it affects the existing right or causes injustice or prejudice". Muhammad Shabbir and another vs. Quaid-e-Azam University through Vice-Chancellor, Islamabad and others (2022 SCMR 487).

15. Similarly, in the case of Bashir vs. Wazir Ali (1987 SCR 978), the Apex Court has held that the change of forum during the pendency of appeal would operate retrospectively in the following words: - *"Before us the learned counsel for the appellant raised the same objection as before the High Court. It was, however, pointed out to him that the relevant provision of the amending Act V of 1986 had merely changed the forum in which the appeal was to be heard and did not affect any vested right of appeal and that, as held by this Court in Adnan Afzal vs. Capt. Sher Afzal PLD 1969 SC 187, such amendments are merely procedural in nature and are, therefore, operative retrospectively".*

Thus, I have no doubt in my mind that amendment through Section 3 of the Act, 2020, whereby Section 6 of the CPC was substituted, whereby the pecuniary jurisdiction of Civil Court viz-e-viz the District judge has been determined has a retrospective effect and the requirement of law is that any matter which was pending before the Civil Court where the value of the subject-matter of the suit is more than rupees fifty million it should be transferred to the respective District Judge, who has the pecuniary jurisdiction under Section 6(b) of the Act, 2020.

Muhammad Saeed and others v. Haidar Ali and others.

https://peshawarhighcourt.gov.pk/PHCCMS//judgments/Cr.A-278-M-of-2019.pdf

The use of certain imputations against a person in an application before an executive authority for looking into certain issues, such as drinking water, irrigation and Shamilat land in a village, would not be defamation.

Dr. Khurshid Iqbal, J.

7. It appears that the respondents actually wanted to press into service the factual aspect of the controversy between them and the appellants in their application addressed to the Deputy Commissioner, Swat. In other words, as the inquiry report notes their intention of harming the appellants could not be gathered from the contents of the application of the respondents. It appears that the respondents made imputation for protection of their own interest and the application being on behalf of the residents of the village, the imputation appears to have been made for the public good. Moreover, the appellants failed to show as to what action, particularly in respect of the imputation has been initiated against them by the Deputy Commissioner, Swat. In short, the imputations whatsoever were leveled in connection with the dispute over irrigation and drinking water and use of Shamilat land. According to eight exceptions to section 499, PPC, an accusation made in good faith against any person to lawful authorities does not constitute defamation. Similarly, as noted above, an accusation in good faith for protection of the interest of the person making it or of any other person or for the public good also do not constitute the offence of defamation. The issues of irrigation and drinking water and the use of Shamilat land including the protected forest, pertain to the duties of the Deputy Commissioner to whom the application was made. The contents of the application categorically reflect that the imputations were not independent, rather, the main issue between the parties was over the enjoyment of drinking and irrigation water and the use of Shamilat land. Moreover, there is nothing on the record that the application was put in the public domain through publication.