Quarterly Case Law Update

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1. Syed Mureed Ali Shah v. Fed. of Pakistan and others

C.P No. D-3888/2020

http://43.245.130.98:8056/caselaw/view-file/MTUzMDEyY2Ztcy1kYzgz

Chief Justice Mr. Justice Ahmed Ali M. Shaikh,
Mr. Justice Yousuf Ali Sayeed.

1. Whether the F.M (frequency modulation) broadcasting of a foreign Radio Station which was meant to undermining national sovereignty can be blocked under the Constitutional jurisdiction of the Hon'ble High Court?

2. Whether non-disclosure of the outcome of the Petitioner's letter addressing to the respective Secretaries of the Ministries of Defence, Interior, and Information Technology & Telecommunication of Government of Pakistan, violates Article 19-A of the Constitution?

Honorable Court held that;

1. We are of the opinion that the subject (grivence) falls squarely within the domain of the executive branch as per the well-established principle of trichotomy of powers and does not call for any action/intervention on the part of the High Court.

2. As to the point raised with reference to Article 19-A of the Constitution, the Petitioner has not apparently made any information request under the relevant law, as could have been done had there been any grievance in that regard.

2. Akhlaque Hussain Memon & others v. Province of Sindh & others.

C.P No. D-1736 of 2013

http://43.245.130.98:8056/caselaw/view-file/MTUxNjk1Y2Ztcy1kYzgz

Mr. Justice Irfan Saadat Khan
Mr. Justice Adnan-ul-Karim Memon

1. Whether the post of Additional/Assistant Advocate General could be filled amongst District Attorneys as per the Sindh Law Officers (Conditions of Service Rules), 1940 as amended up to date?

2. Recommendations of the National Judicial Policy Making Committee (NJPMC) cannot supersede the particular Statutes.

3. Tow cadres cannot be merged, tenure posts (non-civilian savants) cannot be absorbed into Permanent positions (civil servants) save to appropriate legislation.

4. Earlier has preference over later law.

Proposition;

National Judicial (NJPMC) recommended that the post of District Attorneys (BS19) has deficient service structure, non-availability of promotion venue and discrimination in perks and privileges, so for, some posts of Assistant Advocate Generals and Additional Advocate Generals may be reserved for District Attorneys to be filled on a permanent basis. The then Advocate General, Sindh, also second the decision and recommendation of NJPMC. The cited matter was placed before the Chief Minister, Sindh with the proposal to reserve 10% posts of the sanctioned strength of the Assistant Advocate Generals BP-20(two posts) and Additional Advocate Generals for the District Attorneys BP-19(three posts), office of the Solicitor to the Government of Sindh to be filled on a permanent basis by way of promotion. Consequent to the decision of the NJPMC advice tendered by the then Advocate General, Sindh and with the approval of the competent authority, amendments were made in the Sindh Law Officers (Conditions of Service Rules), 1940, in the method, qualification and other conditions for appointment in respect of the post in the office of Advocate General, Sindh in consultation with the Services General Administration & Coordination Department (SGA&CD), however, the same could not be acted upon since its amendment for the reason that the aforesaid posts could only be filled under the Sindh Law Officers (Conditions of Service) Rules, 1940 and not under the

provision of Sindh Civil Servants (Appointment, Promotion and Transfer) Rules, 1974, it law department apprised the Chief Minister, Sindh that the posts of Additional/Assistant Advocate General are tenure posts; and, are purely at the discretion of the Government, whereas the District Attorneys are civil servants, as defined under the Sindh Civil Servants Act, 1973. Consequently, the proposal was declined by the competent authority and the learned Advocate General Sindh endorsed the proposal of administrative department of the summary for de-notifying the law department's notification.

Honorable Court held that;

1. It was/is not viable under the law to allow District Attorneys (BS19)/ civil servants to change their cadre and to become non-civil servants by their induction in the office of Advocate General Sindh, through the Law Department's notification dated 10.5.2016, which by virtue of the legal implication could not be implemented since its inception on the premise that the aforesaid posts were/are not existing on a regular budget in the office of the Advocate General, Sindh.

Streamlining the service structure of District Attorneys and Deputy District Attorneys, it would be more appropriate to take measures and initiate such legislative measures, as may be necessary, to frame the service structure for the post of Deputy/District Attorney (BS-18-19) in higher grade to avoid disparity amongst them.

2. NJPMC was constituted through National Judicial (Policy Making) Committee Ordinance, 2002; and, is the highest statutory judicial policy-making body, which consists of the Honorable Chief Justices of all High Courts and Chief Justice of Pakistan, as its Chairman. NJPMC attend all matters concerning with the judiciary' and in recent times has taken a bold initiative to bring reform in justice delivery mechanism and for framing coherent policy to combat delays, promote automation, and to bring out administrative reforms indeed an arduous responsibility that ensures free, fair, independent and conscious judiciary and in shortest time achieved enviable results. Its primary objective is to ensure timely justice for the general public and to decide voluminous litigation as soon as possible----the NJPMC had submitted its recommendations for the Petitioner's deficient service structure, non-availability of promotion venue and discrimination in perks and privileges vide its Minutes of meeting held on 20.9.2014, vide letter dated 27.9.2014--which proposal was declined by the competent authority vide summary dated 20.05.2019 (impression goes that Cannot supersede).

3. The term "Cadre" has been defined in rule 9(4) of Fundamental Rules, 1922.---The said Rule defines "cadre" to mean "the strength of the service or a part of the service sanctioned as a separate unit.---The terms "department" and "cadre" are not defined in the Sindh Civil Servants Act, 1973 and the term "cadre" given in the Fundamental Rules is not inconsistent with any of the provisions of the Sindh Civil Servants Act, 1973.---

What is of significance is that the cadre to which a civil servant belongs and the terms and conditions of his service or even the matter of promotion within his cadre can only be made by or under laws which are traced to and sourced in Article 240 of the Constitution.--- It is well-settled law that no department can absorb any employee to another cadre, as such the aforesaid two cadres could not be merged under the law which are distinct from each cadre and should continue their parallel existence.---

4. In case of conflict, preference is to be given to the new law, and the implied repeal of the earlier law could be inferred only when there was enactment of later law, which had the power to override the earlier law, however when there was two laws the earlier and later law could not stand together, therefore, later laws abrogate the earlier laws.

3. Tahira Hanif v. Province of Sindh and 04 others

C.P No. D –3184 of 2021

http://43.245.130.98:8056/caselaw/view-file/MTUxNzEzY2Ztcy1kYzgz

Mr. Justice Irfan Saadat Khan
Mr. Justice Adnan-ul-Karim Memon

1. Neither Competent Authority does have unbridled powers; nor can any department be allowed to absorb any employee (deputationist) of another department/cadre except with certain exceptions.

2. A deputationist has no vested right to remain on a post as deputationist forever or for a stipulated period and can be repatriated at any time to her parent department.

Honorable Court ruled that;

1. The procedure provided under the ESTACODE requires that a person, who is transferred and appointed on deputation, must be a Government servant, and such transfer should be made through the process of selection. For that purpose the Government has to establish the exigency in the first place, and then the person who is being transferred/placed on deputation in the Government must have matching qualifications, expertise in the field with the required experience. In absence of these conditions, the competent authority cannot appoint anyone by transfer on deputation.

The Competent Authority does not have unbridled powers to first appoint on deputation and then absorb any civil servant in the department/establishment/organization/agency, without fulfilling the conditions as outlined in the Recruitment Rules; thus, prima-facie the word "absorption" is not akin to the word-initial appointment /confirmation, in service, which has its meaning and procedure provided in-service law, there is no proper mechanism provided either under the Sindh/ Civil Servant Act, 1973.

2. A deputationist could not be treated as an aggrieved person, because she has no vested right to remain on a post as deputationist forever or for a stipulated period and can be repatriated at any time to her parent department; Even otherwise, she cannot continue to serve on deputation in Sindh Government after her removal from service by the parent department. It is well-settled law that "deputation" is an administrative arrangement between borrowing and lending. Authorities for utilizing the services of an employee in the public interest and exigency of services against a particular post against which the deputationists cannot claim any right of permanent absorption. Petitioner does not have any vested right to remain on the post as deputationist for an indefinite period or to get absorption in the other department.

No department can be allowed to absorb any employee of another department/cadre except with certain exceptions.

4. Dewan Cement Ltd and others Vs. Federation of Pakistan and Others

Const. P. D. No. 476 of 2020

http://43.245.130.98:8056/caselaw/view-file/MTUyNzg0Y2Ztcy1kYzgz

Mr. Justice Syed Hassan Azhar Rizvi
Mr. Justice Zulfiqar Ahmad Khan

Past determination of the monthly Fuel Charge Adjustment (FCA) applied by Karachi Electric (K.C) of previous three years retrospectively in one go cannot be hit by the statutory duty of protecting the interest of consumers under Section 7(6) of the Act, 1997 and nor it has effects to impair an existing or vested right; if it was delayed due to the fault of the Court. So such determination of FCA within time was beyond the control of K.C

Honorable Court ruled that:

25. As it could be seen, in terms of Section 31(7) of the Act of 1997, a licensee can, on a monthly basis, file petition with NEPRA to adjust and revise the approved tariff to account for fuel cost component due to variation in fuel prices and generation mix and thereafter pass the same to the consumers in the form of FCAs. The Respondent NEPRA admittedly allowed and issued five (05) monthly provisional FCA decisions from July 2016 to November 2016 but from December 2016 onwards it directed K-Electric that further FCA decisions will only be issued after new MYT is implemented, which

for one reason or the other could not be finalized for more than two years.---

28. --- the Decision for FCA for December 2016 was issued after public hearing and Public Notice whereby NEPRA directed that FCA going forward will only be determined after Notification determining KE's new MYT. Thus, the Petitioners were aware that FCAs pertaining to such months will be charged subsequent to determination and notification of KE's new MYT, hence in our view such FCA remained as a debt on the petitioners and at this belated stage the Petitioner's cannot sustain their plea of not paying it. It is also important to note that the Petitioner never impugned NEPRA"s decision dated 12.04.2017 passed on KE"s FCA application for the month of December 2016 hence the same attained finality and the question of applicability of FCA for the months of July 2016 to June 2019 did not turn into a past and closed transaction either.

31. With regards petitioners" claim that K-Electric could have applied for FCA on monthly basis during the pendency of the Suit No. 1467 of 2018 whereby KE had challenged the MYT determination dated 05.07.2018, it is to be noted that K-Electric being aggrieved with MYT decision dated 05.07.2018 initially filed an Appeal before the Appellate Tribunal as a first remedy. However, as no Bench for the said Tribunal was constituted by the Federal Government, K-Electric filed Civil Suit No. 1467 of 2018 before this Court. --- Stay order passed by a Hon"ble Single Bench of this Court while at one hand suspended the operation of the impugned determination of NEPRA dated 05.07.2018 but it also did not allow charging of provisional FCA by K-Electric, which hurt cashflows hence K-Electric withdrew the said Suit on 03.04.2019 and decided to continue with their case before the statutory Appellate Tribunal. Effect of said withdrawal (and recall of the inunction) was that NEPRA determined MYT for the period of July 2016 to June 2023 along with new mechanism for FCA pending since July 2016 vide its MYT determination dated 05.07.2018 which was duly notified in the official gazette on 22.05.2019.

33. With regards timeframe provided in Section 31, in our view in all practical terms it could not be construed as mandatory or carved in stone. Whatever it is, it never proposes that if there is a failure in adhering to the said timeline for reasons beyond the control of the licensee, no FCA charges will have to paid by the consumer. Thus---FCA could not be applied to the consumer bills due to the fact that the K-Electric was restrained by an order of this Court.

36.--- a party cannot be prejudiced by an act of Court or public functionary, the fault in this cases does lie with the Court and not with the litigants and no litigant should suffer on that account unless he/they are contumaciously negligent and have deliberately not complied with a mandatory provision of law.

39. With regards Petitioners" counsel argument that the impugned determination purported to impair an existing or vested right, hence cannot be applied or given retrospective effect, we beg to differ from such an assertion. Not paying FCA component of a consumer"s electricity bill could never be held as a vested or existing right. To us, it remains a debt and unless satisfied, there would be no release.

40. In light of the foregoing, we reach to an irresistible conclusion that the exercise of passing monthly FCA on to the petitioners on the basis of NEPRA"s determination dated 27.12.2019 is in accordance with law and the timeline provided under Section 31(7) of the Act, 1997 be adhered to, unless any party is restricted for a reason beyond its control, which is a case at hand. The Petitioners clearly failed to avail statutory remedies under the law while the impugned determination was being made and even thereafter, nonetheless there is no cavil that the petitioners owe FCA component to K-Electric and liable to satisfy this debt. These instant Petitions being devoid of merit are accordingly dismissed.

5. Sharafat Ali Vs. Shah Jahan Begum & Another

https://caselaw.shc.gov.pk/caselaw/view-file/MTUxODE3Y2Ztcy1kYzgz

Mr. Justice Nadeem Akhter

"Deliberate non-appearance of the Plaintiff in a suit for specific performance of the contract at the stage of settlement of issues, with non-compliance of the court order to deposit the balance sale consideration amount, the restoration of such Suit would not serve any purpose but a futile exercise.

Honourable Court held that:-

10. Record shows that the Suit came up before this Court on 16.11.2015, 15.01.2018, 06.04.2018 and finally on 21.05.2018 for examination of parties and settlement of issues, but on all the above mentioned dates the Plaintiff and his counsel were absent without any intimation. The above conduct of the Plaintiff and his counsel was noted by this Court in the order passed on 21.05.2018 when the Suit was dismissed. As noted above, indulgence was shown by this Court even on that date as instead of dismissing the Suit in the first call when the Plaintiff and his counsel were absent, the matter was kept aside and was eventually dismissed after the second call when again no one was present on behalf of the Plaintiff. It is an admitted position that there was nothing on record before this Court on the relevant date to show that the Court was informed about the reason of the absence of the Plaintiff and his counsel. It is well-settled that when a Suit is fixed for examination of parties and settlement of issues, a plaintiff is required to be present along with his evidence and witnesses; and, in case of his failure, the Suit is liable to be dismissed. Therefore, no exception can be taken to the dismissal of the present Suit due to the continuous and unexplained absence of the Plaintiff and his counsel on the above mentioned four dates, particularly the relevant date, when the Suit was fixed especially for examination of parties and settlement of issues.

11. Regarding the contention of learned counsel for the Plaintiff that the objections filed by the defendants are not supported by their affidavit and they have not filed any counter affidavit, it may be noted that the counter affidavit of the defendants would have been relevant if any factual controversy had been raised in this application by the Plaintiff which would have required specific denial by the defendants. The non-deposit of the balance sale consideration by the Plaintiff despite this Court's order and the continuous and unexplained absence on his behalf on the above mentioned dates, particularly the relevant date, is a matter of record. Therefore, filing of counter affidavit by the defendants was immaterial.

12. I have already rejected the explanation offered by and on behalf of the Plaintiff for the absence on the relevant date. However, it is necessary to observe that had the said explanation been accepted for the sake of argument and had the Suit been restored, even then no useful purpose would have been achieved and such exercise would have been completely futile as the dismissal of the Suit was inevitable. The Suit was liable to be dismissed in any event in view of the above-cited law laid down by the Hon'ble Supreme Court due to the Plaintiff's admitted failure in depositing the balance sale consideration in Court despite this Court's order. Thus, the order dated 21.05.2018 of the dismissal of the Suit on both the grounds was fully justified, and the same is not liable to be recalled.

6. Pakistan Broadcasters Association Vs. Federation of Pakistan & another.

http://43.245.130.98:8056/caselaw/view-file/MTUyNTE2Y2Ztcy1kYzgz

Mr. Justice Muhammad Ali Mazhar
Mr. Justice Arshad Hussain Khan

"Law can be struck down if it is found to be offending against the Constitution for absenteeism of lawmaking and jurisdictive competence or found in violation of fundamental rights; declaring it ultra vires."

Honourable Court ruled that : -

9.---So far as the challenge to the vires of amendment made in the proviso attached to Section 13 of Pakistan Electronic Media Regulatory Authority (PEMRA) Ordinance, 2002, is concerned, we are sanguine and mindful that while declaring any law intra vires or ultra vires, the Court has to analyze and explore the doctrine of ultra vires which envisages that an authority can exercise only so much power as is conferred on it by law. An action of the authority is intra vires when it falls within the limits of the power conferred on it but ultra vires if it goes outside this limit.

The law can be struck down if it is found to be offending against the Constitution for absenteeism of lawmaking and jurisdictive competence or found in violation of fundamental rights. At the same time, it is also well-known through plethora of dictums laid down by the superior courts that the law should be saved rather than be destroyed and the Court must lean in favour of upholding the constitutionality of legislation unless ex facie violative of a Constitutional provision.

We do not subscribe the stance articulated by the learned counsel for the Petitioner insofar as to declare the amendment made in the proviso ultra vires. Neither the delegation of powers by Authority subject to such conditions as it may by rules prescribe as envisaged under Section 13 of the PEMRA Ordinance 2002 is ultra vires to the Constitution or PEMRA Ordinance 2002 nor it is discriminatory or colourable nor does this infringe fundamental right of any citizen of Pakistan.

7. Syed Ghulam Mohiuddin & another v. Province of Sindh & others

C.P. No.D-4371 of 2020

http://43.245.130.98:8056/caselaw/view-file/MTUxOTg3Y2Ztcy1kYzgz

Mr. Justice Muhammad Ali Mazhar

What is the compass and magnitude of judicial review of a Governmental policy?

Honorable Court ruled that;

The compass and magnitude of judicial review of governmental policy is now well settled and defined in which neither we can act out or represent as appellate authority with the aim of scrutinizing the rightness, fittingness and aptness of a policy nor may act as advisor to the executives on matters of policy which they are entitled to formulate. The extensiveness of judicial review of a policy is to test out whether it violates the fundamental rights of the citizens or is at variance to the provisions of the Constitution or opposed to any statutory provision or demonstrably arbitrary or discriminately. This can be sought on the grounds that a decision arises when a decision-maker misdirects itself in law, exercises a power wrongly or improperly purports to exercise a power that it does not have, which is known as acting ultra vires. A decision may be challenged as unreasonable if it is so unreasonable that no reasonable authority could ever have come to it or a failure to observe statutory procedures. The dominance of judicial review of the Executive and legislative action must be kept within the precincts of constitutional structure so that there may not be any incidence to give thought to misgivings concerning the role of judiciary in 16 [C.P.No.D-4371 of 2020] outstepping its bounds by uncalled-for judicial activism.

8. Sohail Hameed v. Federation of Pakistan & others

C.P. No.D-4604 of 2021

http://43.245.130.98:8056/caselaw/view-file/MTUyMjkyY2Ztcy1kYzgz

Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Agha Faisal

The imposition of the conditions of vaccination mandatory for domestic travel by the Government (s) does not amount to arbitrarily excess, harassment, or transgression of authorities, nor does it defray the ordain of Article 2-A and 4 ((1) (2) (b) of the Constitution of Pakistan.

Honorable Court ruled that;

Petitioner is being troublesome in the smooth operation of effective measures undertaken by Government. Government is primarily

responsible to take care of health of 220 million citizens of Pakistan and hence the desire of one person being Petitioner cannot supersede the demand of ever-growing spread of pandemic Covid-19. This Covid-19 is exceeding and spreading for a number of reasons that it is new virus meaning that no one has immunity for this virus. It is highly contagious, meaning it spreads fast. Its novelty meaning scientists are still not completely sure as to how it behaves since it is changing its form and producing different variants and since they have a very limited history to go on. It is being reported worldwide that Covid-19 will have its short medium and long term effects for general population, health care workers, patients and other citizens. As our general responsibility. we need to think ahead of ourselves and think beyond and stop being selfish, not only for our survival but for the survival of our population. The only way is to support the health care system.

9. Messers Jiangsu Heavy Industry Co, Ltd. Vs. Port Qasim Authority & Others

http://43.245.130.98:8056/caselaw/view-file/MTUxNjk2Y2Ztcy1kYzgz

Mr. Justice Muhammad Shafi Siddiqui

"Whether modification of tender documents or Bid Security after the opening of Bids is permissible under Rule 31 of Public Procurement Rules 2004"?

Honourable Court held that:-

19. Indeed, it appears that it was more than a month after opening of the bid that the appellant made an attempt to rectify its material inability by furnishing a separate/counter bank guarantee from Bank Al-Habib for both the tenders. This deficiency could not have been resurrected as by then the ship sailed. These belated attempts would have amounted to a modification of the tender documents, which is not permissible under Rule 31 of Rules 2004. Eventually only those whose technical bids were found to be in consonance with the terms of the invitation, were liable to be considered for further steps and were considered accordingly.

20. The appellant was accordingly informed on 13.11.2020 whereafter two separate applications were filed as grievance applications in respect to such rejection of technical bids. In response to said complaint respondent No.1 formed a redressal committee and despite this Suit was filed by the appellant which was then disposed of accordingly. An immediate response to the complaint was given after hearing the appellant when detailed reasons were addressed to the appellant for the rejection of their technical bids which satisfied Section 24A of General Clauses Act. It claimed to have been passed on 09.12.2020 whereas it is claimed to have been received on 21.12.2020 but for the purposes of this statutory appeal it is not material.

24. Petitioner being aware of the said tender conditions participated and having participated in the tender cannot challenge or dislike 9 prerequisites meant for technical qualification. He could only expect judicious treatment within the playing rules however, it was too late for appellant when it realized that playing conditions were not palatable to it. The situation faced by appellant based on the aforesaid facts is not res integra as a number of judgments are in the filed covering the issue as settled law.

25. Even if I have to measure bidding terms on the touchstone of malice and mala fide, I would come out with understanding that these terms are for every one and not to exclude anyone. These are commercial transactions and decisions in this regard should base on strict compliance of terms of tenders whereas equity and fair play based on financial offer is not primary concern. Even if someone intends to impress by showing better financial offer, he has to qualify first on technical grounds. It is the overall impact till completion of job that needs serious consideration by procuring agency. Whether a bidder has the ability to deliver as per terms of tenders and having capacity to ensure project's completion should be the primary concern of procuring agency. There is

thus nothing which could lead to conclude that the process ended up in a decision of rejecting technical bid of appellant was flawed.

28. In view of above, I am of the firm view that the appellant has failed to make out a case calling for interference in the tender process which led to award of the tender in favour of respondent No.3. Consequently instant appeal merits no consideration which is accordingly dismissed along with pending applications.

10. Muhammad Tobria & others v. The Board of Trustees KPT & others

http://43.245.130.98:8056/caselaw/view-file/MTUwOTExY2Ztcy1kYzgz

Mr. Justice Muhammad Shafi Siddiqui

"Whether a person who is lessee can be evicted from the property in possession pertaining to KPT without due process of law?

Honourable Court held that:-

In this primary examination perhaps the respondents have not demonstrated to have passed the criteria and test to adjudge them (applicants) as licencees. Since the rental receipts were issued for a lease period, as available on record, therefore, notice under section 87 of the KPT Act for the eviction cannot be read to have been issued in pursuance of the aforesaid Act as a lessee cannot be evicted without due process of law. Hence, such action is not deemed to have been taken or purported to have been taken under the ibid Act. Similarly on account of urgency anticipating alleged eviction, Suit ought to have been filed for the security of interest in the property. When an action was not deemed to have been taken under the Act, the barring provision of Section 87 would not apply and plaint in this regard for a colourable exercise of powers by official of KPT cannot be rejected under order VII rule 11 CPC. It requires a trial as to whether action was in accordance with law or otherwise. The appeal preferred by the applicants met the same fate as it was dismissed. There is a very thin line margin between a lease and licence and irrespective of as to what is defined in the documents itself, it is the intention of the parties which could ultimately determine relationship and status.

The only question before this Court is whether in view of facts and circumstances of the case plaint was rightly rejected or the trial Court and the appellate Court erred in law while rejecting the plaints.

I am of the firm view that the issue of notice of eviction to an occupant of the nature as described above is not warranted under the law and on such threat of eviction he cannot wait for a period mentioned in the barring section i.e. Section 87 of KPT Act and is not covered by any of the provisions of Act when status of applicants is adjudged as lessee in the last challan issued. It needs trial for a conclusive determination. When the applicants claimed to have been in occupation as lessee by virtue of challan issued to them the status of licencee was not carried forward and altered to a status of lessee by virtue of such challan and the descriptions provided therein. This is at least tentative view which should have been formed. Be that as it may, it is only a tentative analyses and it is premature stage for a conclusive determination as trial Court should have commenced, by enabling/allowing parties and disposing of the lis in accordance with law.

11. M/s. Sui Southern Gas Company Limited v. The Registrar of Trade Unions and 07 others.

C. P. No. D– 6261 of 2020

http://43.245.130.98:8056/caselaw/view-file/MTUyNTMyY2Ztcy1kYzgz

Mr. Justice Salahuddin Panhwar
Mr. Justice Adnan-ul-Karim Memon

The Scope of the Constitutional Petition is very limited to avail it as remedial; if no other is provided in law, intend to prevent unnecessary litigation before the High Court.

Honourable Court observed that:-

Primarily this is one of the reasons for introducing the doctrine of alternate remedy was to avoid and to reduce the number of cases

that used to be filed directly before this Court and at the same time to follow the prescribed lower forum to exercise its jurisdiction freely under the law. Moreover, if a person moves this Court without exhausting the remedy available to him under the law at a lower forum, not only would the purpose of establishing that forum be completely defeated, but such person will also lose the remedy and the right of appeal available to him under the law. Under Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973, for the determination of civil rights and obligations or in any criminal charge against him, every citizen is entitled to a fair trial and due process, therefore, it follows that fair trial and due process are possible only when the Court/forum exercises the jurisdiction strictly under the law. It further follows that this fundamental right of fair trial and due process in cases before this Court is possible when this Court exercises jurisdiction only in cases that are to be heard and decided by this Court and not in such cases where the remedy and jurisdiction to lie before some other forum. If the cases falling under the latter category are allowed to be entertained by this Court, the valuable fundamental right of fair trial and due process of the persons/cases falling under the formal category certainly be jeopardized.

12. Suresh Kumar Hindu Vs. P.O Sindh & Others

C. P. No 1094/2020

http://43.245.130.98:8056/caselaw/view-file/MTQ5NTc2Y2Ztcy1kYzgz

Mr. Justice Aftab Ahmed Gorar
Mr. Justice M. Faisal Kamal Alam

1. Mills cannot be deprived of wheat quota on the instance of a plea bargain; since the lessee was the accused who entered into a plea bargain with the NAB court, not the mills or their owner; if so, it would be against the doctrine of proportionality.

2. While the Executive has sole authority over policy formulation, if a policy is infringing on a constitutional right or violating a statutory provision, then constitutional jurisdiction may be invoked.

Honourable Court ruled that:-

6. The Orders of the learned Accountability Court passed in respect of private Respondents who were leased out the aggrieved Flour Mills have been referred to as lessees of the Mills. These private Respondents / accused since had entered into plea bargain with NAB, therefore, they were released from jail but the disqualification of ten years for holding any public office from the date of conviction, besides embargo upon these accused persons from availing any loan facility from financial institutions, was imposed. In different Orders of the learned Accountability Court, no finding is given against the owner of Mills and their Flour Mills.

--at the relevant time when misappropriation of wheat bags was reported, which resulted in the afore referred Reference Proceedings under the NAB Law and decisions of learned Accountability Court, Petitioners' Flour Mills were leased out to the said private Respondents under UNDERTAKING that they will be personally liable for any shortages, losses, damages, misappropriations. --- at the relevant time when misappropriation of wheat bags occurred, the Flour Mills were in the custody of different lessees / accused persons. Thereafter, possession of respective Flour Mills was taken back from the accused persons / former lessees after handing down of decisions against them by the learned Accountability Court.

---in fact these lease agreements were license agreements, enabling the accused persons to run and operate the Flour Mills.---They were neither in the past or present partners of the Firms or owners who have been issued License under the Food grains (Licensing Control) Order, 1957, for operating the Flour Mills.

When in the Wheat Policy have, in fact, created a separate class / category of Flour Mills by adding Clause (xii), forbidding that those Flour Mills who have entered into plea bargain

with NAB, cannot buy Government wheat; then in it a condition should have been introduced for those Flour Mills which have entered into plea bargain with NAB, are not allowed to take Government wheat as well, to notify; and published under proper authority in the official gazette.

Moreover; none of the Orders passed by learned Accountability Court in respect of different accused persons / private Respondents, there is any adverse finding against the aggrieved Flour Mills, specifying that they have entered into any plea bargain with NAB; thus, act of not supplying the Government wheat to Petitioners and their Flour Mills, is illegal and cannot be sustained.

As the possession of the Flour Mills were taken back by the owners.---

Ordinarily under Article 199 of the Constitution, High Court cannot interfere in the policy matters of the Executive, except if it is violative of law or is product of mala fide --- formulating a policy is the exclusive domain of Executive, but at the same time, when such policy violates any statutory provision or does not fulfill any condition mentioned in the statute and more so adversely affect a person's right to do lawful business and trade (as guaranteed by Article 18 of the Constitution), then such executive actions and policies can become subject matter of a Constitution Petitions of the nature. By virtue of the impugned Policy, Respondents are not releasing Government wheat to Petitioners--. Consequently, this action adversely affects the business activities of Petitioners. If the Petitioners / Flour Mills would have entered into plea bargain with NAB themselves, then Clause (xii) might have become applicable, but subject to other legal implications. ---It is a cardinal principle of jurisprudence that punishment should correspond to the offense under the doctrine of proportionality'. The crux of which is that punishment must fit the crime. When on the record there is no evidence that Petitioners / Flour Mills have entered into plea bargain with NAB, then Clause (xii) cannot be stretched to include Petitioners / Flour Mills, and such an action of Respondents is hit by this doctrine of proportionality also and is unreasonable and discriminatory.

The Wheat Policy is not applicable to the present Petitioners / Flour Mills and they are entitled to get their respective share / quota of wheat in accordance with the present Wheat Policy 2020-21 like other Flour Mills established and operating in the Province of Sindh.

13. Muhammad Rafiq Vs. Habib Bank Limited

Suit No.215 of 2015

file:///C:/Users/shcadmin/Downloads/Suit%20No.215%20of%202015%20(Malicious%20Prosecution)%20(1).pdf

Mr. Justice M. Faisal Kamal Alam

"Damages against malicious prosecution due to negligent act (Special and General Damages explicated)".

Proposition;

Before evaluating the evidence of both Plaintiff and Defendant in support of and against award of damages, it is necessary to state that broadly, damages are of two kinds; general and special. Special damages are awarded only when a party successfully proves actual losses suffered by him / her. This is where Section 73 of the Contract Act becomes applicable, which prohibits "……compensation for any remote and indirect loss or damage sustained by reason of the breach."; whereas, for general damages the Superior Courts have held in number of decisions, Abdul Majeed case [supra] 2012 CLD page-6 Supreme Court of Pakistan, being one of the leading cases, that if circumstances so warrant, general damages can be awarded by invoking the rule of thumb; particularly where violation of legal rights exists. Similarly, in the case of Sufi (ibid) [PLD 1996 Supreme Court 737], the damages vis-à-vis mental agony has been discussed and the conclusion is that there can be no yardstick or definite principle for assessing damages in such cases, which are

meant to compensate a party who suffers an injury. The determining criteria should be such that it satisfies the conscience of the Court, depending on the facts and circumstances of the case.

Honourable Court ruled that:-

20. Basically there are three parts of claim of Plaintiff. The first part about the litigation initiated by Defendant has already been discussed above. The second part or category of claim is the business losses that Plaintiff is claiming to have suffered due to the acts and omissions of Defendants, inter alia, in the shape of cancellation of orders by customers of Plaintiff and the third part is that his health also deteriorated in this entire saga. Plaintiff has produced number of documents relating to orders he received from his foreign buyers. He 14 has produced LC documents and different notices of claim, which the Plaintiff has written to Defendant as Exhibits „PW-20 to P-31" and documents marked as „X-3" to „X-6" (various letters of claims sent by Plaintiff to Defendant). All the Exhibits are examined carefully. They all relate to the period before passing of first decree. None of these documents show or corroborate the claim of Plaintiff, that due to decretal amount and litigation initiated by Defendant, business orders were cancelled or Plaintiff was exposed to third party claims from his buyers. Since claim of Plaintiff in this regard falls within the category of special damages, as he has quantified the losses by claiming rupees one hundred and thirty million (approximately), therefore, the onus is on Plaintiff to prove the same, because special damages cannot be awarded in absence of positive evidence. Taking into the account of testimonies of Plaintiff and Defendant so also the documents produced in support thereof, I am of the considered view that Plaintiff has failed to prove his claim for grant of special damages of Rs.128,153,640/- as mentioned in his plaint and Affidavit-in-Evidence / examination-in-chief excluding the claim of mental agony and hypertension, which is discussed in the following paragraphs. 21. Adverting to the last category of claim of mental anguish and hypertension, regarding which, the Plaintiff has requested to award damages of Rupees Five Million. The three Medical Reports are produced in the evidence by Plaintiff"s witness, viz. Exhibits PW-32, PW-33 and PW-34 are of 09.02.2005, 14.11.2005 and 02.12.2005. The first Exhibit is the opinion of Dr. Obaid-ur-Rehman. Since the Doctor was never examined 15 as a witness, who is author of this opinion, hence, this Exhibit losses its evidential value. The other two Exhibits were not specifically challenged in the cross examination of Plaintiff. These two Exhibits are the Reports of Karachi Institute of Heart Diseases and the Conclusion drawn in it was that during his stress test, the Plaintiff suffered angina. But at the same time it did not justify to award damages of Rupees Five Million (as claimed), which again falls within the category of special damages. In this regard testimony of Plaintiff is not that convincing which discharges the onus of proof, thus the amount as claimed towards health deterioration cannot be awarded. Hence, Issues No.2 and 3 are answered in negative.

22. In view of the well-known Judgments handed down by Hon"ble Supreme Court in Sufi and Abdul Majeed cases (supra), the undisputed facts as discussed in the foregoing paragraphs, however, justify, that Plaintiff be given general damages. No doubt his two immovable properties, viz. C-146, Sector 44-A, Korangi No.6, Karachi and A-566, K No.6 Karachi were mortgaged with Defendant and as already discussed above would have been sold in satisfaction of the first decree, had the Plaintiff not taken remedial steps in a diligent manner. Although the First Decree was overruled by the Second decree, but, after intervention of this Court in the above First Appeal. Defendant Bank is saddled with an obligation to ensure that whenever it initiates a litigation against a customer, the proper accounts are filed in the Banking Court, so that

a customer is not made to suffer at the hands of a bank, as has been witnessed in the present case. It is also necessary because the present 16 scheme of Banking Law, in order to fulfill its objective, is such, that unless a strong case for leave to defend is made out by a customer, usually a judgment and decree follows in favour of a bank. In the present case it is a proven fact that Plaintiff Bank did not file true and fair accounts before the learned Banking Court, which resulted in first Judgment and Decree, given on 24.12.2009 for a sum of Rs.19,67,076.62/- whereas, the Suit was instituted in the year 2000, whereafter, the Second Decree was passed on 3-05-2011. For eleven years Plaintiff was entangled in a litigation. Although his claim towards mental anguish is not accepted, but, it is also not denied that he suffered adverse health condition [angina] during the same period. If Plaintiff above medical reports are excluded from consideration, even then this factor cannot be ignored that a litigation of the nature where assets of Plaintiff was also at stake, was itself is a continuous cause of mental anguish and torture. To the facts of present case well known rules of "foreseeability", 'causation" and "but for" test are also applicable here, which was discussed in the Premier case [supra], because Defendant can easily foresee that if due to negligence of Defendant, an incorrect Statement of Account is filed, then Plaintiff is saddled with an enhanced liability, which otherwise he was not liable to pay, but, would and actually had suffered due to the same, which could have been avoided, had Defendant followed the provisions of Banking Law, as already discussed in the foregoing paragraphs. The logical conclusion of all these undisputed facts is that at least Plaintiff is entitled for general damages for a sum of Rupees One Million.

14. Manzoor Hussain & Shahbaz Ali Saleero v. The State

http://43.245.130.98:8056/caselaw/view-file/MTUyMzk4Y2Ztcy1kYzgz

Mr. Justice Adnan-ul-Karim Memon

What is efficacious FIR or Direct Complaint when while investigation in these have no distinction?

Honourable Court ruled that:-

7. Primarily, the insertion of subsection (6) in Section 22-A and Section 25 of Cr.P.C. whereby Sessions Judges and on nomination by them the Additional Sessions Judges became the Ex-officio Justices of Peace, has advanced and speeded the dispensation of justice. The object of insertion of subsection (6) was that an aggrieved person could get remedy in time at his doorstep, earlier what he could not get despite approaching this Court. The grievance of a person having no means and resources went unattended and un-redressed altogether. Wealthy, well off and well-connected people exploited this situation. They committed the crime and yet went scot-free. But ever since the day the Sessions Judges and on nomination by them the Additional Sessions Judges became the Ex-officio Justices of Peace, no rich and well off person could break the law with impunity or obstruct the person oppressed and assaulted from seeking remedy at his doorstep. If the SHO of a Police Station, owing to the influence and affluence of any, refused to register a case, a resort could be had by moving a simple application to the Ex-officio Justice of Peace for issuance of an appropriate order or direction. Aggrieved person, who could not afford the luxury of engaging a lawyer in the past for filing a writ petition in this Court to get the desired relief, could seek an order or direction from the Ex-officio Justice of Peace without spending much. He could complain against the neglect, failure, or excess committed by the Police Authorities concerning its functions and duties which in the past was no less than living in Rome and fighting with the Pope.

13.---- By the provisions of section 202(1), Cr.P.C. a Court in a private complaint can direct an inquiry or investigation to be made by any Justice of the Peace or by a Police Officer or by

such other person as it thinks fit. If in a given case the Court in a private complaint deems it appropriate can direct an investigation to be carried out in respect of the allegations made then the powers available during an investigation, enumerated in Part V, Chapter XIV of the Code of Criminal Procedure, 1898 read with section 4(1) (l) of the same Code, including the powers to arrest an accused person. Such powers of the Investigating Officer or the investigating person recognize no distinction between an investigation in a State case and an investigation in a complaint case.

14. The object of investigation under section 202 of the Code is to enable the Court to scrutinize the allegations to protect a person complained against from being summoned to face frivolous accusations. Section 202 of the Code is an enabling provision to empower the Court to hold an effective inquiry into the truthfulness or otherwise of the allegations leveled in the complaint to form an opinion whether there exist sufficient grounds to proceed further or not. Therefore, inquiry/investigation under section 202 of the Code is not a futile exercise and is to be taken into consideration by the Court while deciding whether the process is to be issued or not. 15. Before dilating further on the aforesaid proposition, it does not, in any way, take away or affect the powers of Justice of Peace to order for registration of criminal case as provided under Section 22-A & B, Cr.P.C. Therefore it would be appropriate for Ex-Officio Justice of Peace before issuance of such direction for registration of the criminal case to satisfy him from the available record regarding registration of the criminal case thus; he has rightly declined the request of the applicant for registration of the criminal case under the peculiar circumstances of the case. 16. The object and purpose of registration of a criminal case is to probe and find evidence and place all such material before a Court of competent jurisdiction and not to satisfy the complainant/aggrieved person and if any such material is provided by the investigating agency, that would help the Court for arriving at just conclusion.

15. Syed Khursheed Ahmed Shah V. The State

C. P.No. D- 4048 of 2021 {Karachi}

C.P. No.D- 1030 of 2021 {Sukkur}

http://43.245.130.98:8056/caselaw/view-file/MTUyNDUzY2Ztcy1kYzgz

Mr. Justice Shamsuddin Abbasi
Mr. Justice Amjad Ali Sahito

1. "When and under what circumstances the bail negates on the grounds of the "hardship and statutory delay in the trial."

2. "The concept of criminal misconduct which led to corruption, the apex Court in recent past has imposed a special duty upon the Courts to perform their duties actively, diligently to eliminate corruption and corrupt practices".

Honourable Court ruled that:-

10.---It is, however, surprising to note that a person who is enjoying all possible facilities in the hospital since the date of his judicial remand {09.11.2019} has not urged any ground of ill-health for his release on bail, which shows that the Petitioner is not suffering from any life threatening disease and he is enjoying normal life in NICVD Sukkur, which has been declared as Sub-jail by the Government perhaps due to his political influence. In the mentioned circumstances, how we can consider the case of the Petitioner on the ground of hardship like any other case wherein the accused is rotten in jail and facing real hardship inside prison more particularly when Petitioner did not remain inside jail for a single day which question mark over our system that how a person can take undue advantage owing to his political influence.

11.---It is high time that standards are set and system put in place to develop a culture of accountability at all level in order to cleanse over system and institutions from the evil of corruption, loot and plunder of national resources by a few irrespective of their status in

the system. At this juncture, we are of the considered view that the Petitioner has not been able to make out a case for grant of bail on the ground of hardship. As to the delay in the trial is concerned, suffice it to say that from the facts and circumstances of the case, discussed herein above, the delay is attributed to the Petitioner and other co-accused, who are closed relatives/benamidars and front men of the Petitioner, therefore, on this score also the Petitioner is not entitled to the grant of post-arrest bail.

12. The documentary as well as oral evidence in the shape of 161, Cr.P.C. statements of witnesses collected by NAB, and referred by learned Special Prosecutor NAB is sufficient to connect the Petitioner, prima facie, with alleged offence. No malafide or ulterior motive affecting the outcome of investigation on the part of NAB has been established. NAB has acted against the Petitioner only after receiving complaints against him highlighting corruption and corrupt practices and accumulation of assets beyond his known source of income. The resultant reference does not appear to be influenced by personal motive of the investigating officer to consider extending concession of bail to the Petitioner even on hardship ground.

13. For the foregoing reasons, we are of the considered view that the Petitioner has not been able to make out a case for grant of bail on the ground of hardship and delay in the trial.

16. Mr. Mehtab Tahir Niazi v. M/s Al-Qasmia Properties & others.

http://43.245.130.98:8056/caselaw/view-file/MTUyMzY3Y2Ztcy1kYzgz

Mr. Justice Nazar Akbar

1. "--Mere deposit of sale consideration in instalments in court is not enough to decree a suit for specific performance of a contract of sale of the immovable property on the basis of the report of Nazir."

2. "---Every plaint should be examined from the point of view that whether the original claim emerging from the substance of the plaint falls within the pecuniary jurisdiction of this court or not."

3. "---The plaintiff's claim of damage to his unknown reputation amongst his friends, family, and well-wishers etc., is not a loss or damage which naturally arose in the usual course of things from breach of a contract of sale of an immovable property."

Honourable Court ruled that:-

2.---I was stunned the Plaintiff was insisting for a discretionary relief merely because he has deposited monthly installments of sale consideration in Court without showing the circumstances through positive evidence to justify such an order as a reward for depositing sale consideration in Court. The order dated 31.08.2016 whereby the Plaintiff was allowed to deposit sale consideration in Court was not to the effect that once the sale consideration is deposited in Court his Suit shall stand decreed. In my humble view mere deposit of sale consideration in installments in Court is not enough to decree a suit for specific performance of contract of sale of immoveable property on the basis of report of Nazir. In my humble view such an order will be against the law laid down by the Hon'ble Supreme Court in number of authoritative judgments that the decree of specific performance of an agreement cannot be claimed by the Plaintiff as a matter of right.

12---The legislature by using the term "Save as otherwise provided" in Order II Rule 3 CPC has protected pecuniary jurisdiction of Court from misuse by over-smart litigant to oust the jurisdiction of one Court for a particular cause of action and take it to another court in the name of joinder of several causes of action against the same defendant. It is manifest from reading of Section 6 with Order II Rule 3(1) of the CPC that the Plaintiff may unite several causes of action in the same Suit but it should be without offending the provisions of law conferring pecuniary jurisdiction on Court to try a particular cause of action. The Plaintiff cannot combine several causes of action of different pecuniary value in a court which lacks

pecuniary jurisdiction to try any one of the causes of action. The Plaintiff may unite several causes of action but he cannot unite several courts into a court of his choice for trial of different and distinct causes of action by ignoring pecuniary value of even one of the causes of action. When it is provided under Section 6 of the CPC that nothing herein (in CPC) contained shall operate to give any court jurisdiction over suits the amount or value of subject matter of which exceeds (or falls below) the pecuniary limit, (if any) of its ordinary jurisdiction. However when a court seized of a multifarious suit comes to the conclusion that one cause of action out of the several causes joined by the Plaintiff in one Suit does not fall within its pecuniary jurisdiction, the Court should immediately stop its proceeding insofar as it relates to the cause of action which does not fall within its pecuniary jurisdiction. In a situation where a plaintiff has several causes of action, including a cause of action for specific performance the Plaintiff, should not file the Suit for specific performance in a court lacking pecuniary jurisdiction by combining it with other distinct and separate causes of action. Instead he should file a separate suit for the other distinct and separate causes of action in the Court having pecuniary jurisdiction to try such "causes of action". The Court, in a situation where one of the causes of action joined by the Plaintiff in a suit falls out-side its pecuniary jurisdiction has the power to order separate trial of such cause of action or pass such other order as may be expedient by invoking power of Court under Order II Rule 6 of the CPC.

---It goes without saying that when a court lacks territorial or pecuniary jurisdiction to try and dispose of a cause of action, it cannot decide such a cause of action. The Court has no power to assume "jurisdiction over suits the amount or value of subject matter of which exceeds its ordinary pecuniary jurisdiction" (Section 6 of CPC) even if it is convenient to try it alongwith other causes of action for the simple reason that an order of a court on any subject matter without jurisdiction is nullity in the eyes of law.

15---According to Section 73 ibid only one of the two types of loss or damage can be claimed by the Plaintiff in case of breach of a contract, (1) naturally arose in the usual course of things or (2) which the parties knew to be likely to result from such breach, and there is a strong embargo on Court to grant any remote and indirect loss or damage sustained by reason of the breach of contract. The plaintiff's claim of damage to his unknown reputation amongst his friends, family and well-wishers etc. is not a loss or damage which naturally arose in the usual course of things from breach of a contract of sale of an immoveable property. Neither would a prudent mind believe that at the time of entering into a contract of sale worth only Rs.5500,000/- the Plaintiff has put his reputation at stake and on refusal of the defendant to perform his part of the contract the Plaintiff would suffer loss or damage to the tune of Rs.500,000,000/- as prayed in prayer clause (iv). Though the Plaintiff has not prayed for award of any compensation for alleged breach of contract in his plaint, if we examine the provisions of Section 19 of SRA, 1877 we will notice that legislature has not use the word "damages" in case of any complaint of breach of contract. The perusal of above quoted provision reveals that the Plaintiff cannot ask for compensation in every case of breach of a contract.

17. Selected Articles

DNA Evidence in Pakistani Courts: An Analysis

By ***Dr. Shahbaz Ahmad Cheema***, Assistant Professor, Punjab University Law College, University of the Punjab, Lahore.

DNA evidence is admissible in two distinct streams of cases - paternity/legitimacy of children and sexual offences. In the first, courts are reluctant to question paternity on the basis of DNA evidence due to a legislatively enforced

conclusive presumption under Qanun-e-Shahadat Order 1984.
Published by: LUMS LAW JOURNAL, available at: https://sahsol.lums.edu.pk/law-journal/dna-evidence-pakistani-courts-analysis

18. Imposition of Ban u/s. 144 CrPC: Offence & Prosecution

By ***Mr. Waseem Ahmed Phulpoto*** Senior Civil /Assistant Sessions Judge, Karachi East.

The author's intention is neither to support nor oppose the prosecution of violators but to invite the attention of all concern to secure the principle of legality, protect constitutional guarantee, and to provide an effective, valid, and coordinating prosecution procedure if legislative authorities intend to treat violation of ban under section 144 Cr.P.C as a cognizable offence.
Published by: JURIST.PK, available at: https://jurist.pk/blog/show/17

19. DAMAGES AGAINST FALSE FIR (Malicious Prosecution)

By ***Mr. Naeem Akhtar***, Civil Judge / Research Officer, Legal Research Cell, High Court of Sindh.

Published by: P L D, May 2021, Page No. 78 (Journal Section)

20. The Doctrine of Mutuality, its Status, and Applicability in Pakistan

By ***Mr. Asghar Ali Mahar***, Civil Judge/ Research officer, Legal Research Cell, High Court of Sindh

The aim of this article is to educate the general public in Pakistan about the concept of mutuality. The article would investigate the existence and exceptions to the applicability of the mutuality principle, as well as the doctrine's precedential or statutory status.
Available at: https://www.academia.edu/49018290/The_Doctrine_of_Mutuality_its_Status_and_Applicability_in_Pakistan

21. Headnote Prediction Using Machine Learning

By ***Mr.Sarmad Mahar***, I.T engineer, Expert in software designing, Coordinator with Legal Research Cell, High Court of Karachi Sindh

This article provides information about Headnotes that how are these precise explanation and summary of legal points. Help the reader quickly determine the issue discussed in the case. These are design, develop and evaluate prediction using machine without human involvement.
available at https://www.academia.edu/51024529/19450_pdf