MONTHLY CASE LAW UPDATE

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CONSTITUTION

1) Ghulam Rasool vs. Government of Pakistan etc.

   (PLD 2015 S.C. 6)

Nasir ul Mulk, C.J., Amir Hani Muslim and Ijaz Ahmed Chaudhry, JJ

In this verdict it was laid down that employees of Inter-Services Intelligence (ISI), belonging to surveillance cadre enjoyed the status of civil servants in terms of S.2(b) of the Civil Servants Act, 1973. Appointment letter of such employees/petitioners had also been issued under the said Act and the proper forum for redressal of their grievance was the Federal Service Tribunal.

During the proceedings, the apex court noticed that specific posts under the Constitution and under various statutes were pending and had not been filled up. Federal Government also filed an application in this context and took plea that it was facing difficulties in appointments to such offices in view of the direction given by the Supreme Court in the judgment Khawoja Muhammad Asif v. Federation of Pakistan (2013 SCMR 1205), wherein it was directed that a Commission should be constituted for appointments to certain offices in statutory bodies, autonomous bodies, semi-autonomous bodies, regulatory bodies etc; that some of said offices were created by statutes providing their own procedure for appointment, and, therefore, anomalies would arise in case such appointments were made by a Commission in accordance with the directions given by the Supreme Court.

It was held that in view of Art. 90 of the Constitution it was the exclusive preserve of the Federal Government to appoint heads of , statutory bodies, autonomous bodies, semi-autonomous bodies, regulatory bodies etc. and also to make appointments on merit under the Acts/Ordinances. Appointments of heads of statutory bodies, autonomous/semi-autonomous bodies, corporations, regulatory authorities etc. were governed under specific statutory provisions which could not be overlooked or substituted by some other mechanism. In light of the observations / directions given in the judgment Khawaja Muhammad Asif v. Federation of Pakistan (2013 SCMR 1205), the legal authority for appointments had been vested in a Commission and its recommendations were made binding upon the Prime Minister, which was not in accordance with Art. 90 of the Constitution. Supreme Court while making directions for the formation of a Commission in the case Khawoja Muhammad Asif v. Federation of Pakistan (2013 SCMR 1205), overlooked provisions of Art.90 of the Constitution. Application was allowed accordingly with the observation that no statutory Commission had been created in Pakistan for examining suitability of persons for appointment to high public offices, thus the Government may consider the establishment of such a Commission through legislation in order to ensure transparency which would also enable the executive authority to make an informed decision while making appointments.

2) Zubair Ahmed Khaskheli vs. Federation of Pakistan and 2 others

(PLD 2015 Sindh 118)

Faisal Arab and Shaukat Ali Memon, JJ

It was observed that Constitutional provisions were to be read harmoniously with one another and if Art. 25-A was read with Arts. 37(a), (b)(c) & 38 of the Constitution for promotion of social and economic well-being of the people, it was clear that contents of curriculum had to be such that they raise younger generation of country with awareness of their Fundamental Rights. If future generation was grown with knowledge of its Fundamental Rights, it would help to remove illiteracy, raise awareness and improve basic quality of life. Pakistan being signatory to Universal Declaration on Bioethics and Human Rights was to ensure dissemination of information. It was obligation of the State to ensure enforcement of fundamental rights guaranteed under the Constitution and to apprise its citizens, in particular the students, of such rights and mythology for their enforcement. High Court directed the provincial government to introduce fundamental rights/human rights as compulsory subject in higher secondary education from academic year, 2015 and onwards.

3) Junaid Jamshed vs. University of Health Sciences and others

(2015 CLC 65)

Mamoon Rashid Sheikh, J

Petitioner was candidate for admission to medical college and due to mistake of authorities incorrect examination centre was mentioned in admission card and on the day of examination petitioner had to rush to proper examination center. It was held that educational institutions were the best judges of their rules and regulations. High Court in exercise of its Constitutional jurisdiction normally did not interfere in such like matters as its jurisdiction could not be invoked for obtaining decisions on merits which functionaries alone WERE entitled to take under law. Jurisdiction of High Court under Art.199 of the Constitution was principally meant for correcting jurisdictional errors in orders and proceedings of tribunals and executive authorities. However, as the mistake was apparent on the record which

was attributable to the educational institution, the Court while using paternal jurisdiction referred the matter to Vice-Chancellor/Admission Board of the university for further consideration.

4) Riaz Hanif Rahi vs. Federation of Pakistan etc.

(PLD 2015 Islamabad 7)

Athar Minallah, J

This decision comes to limelight as the Learned Court laid down the tests to examine the vires of legislation. It was held that while examining vires of legislation enacted through legislative process provided under the Constitution, powers of court were limited to examine whether primary legislation was repugnant, inconsistent or in conflict with provisions of the Constitution, whether legislature had legislative competence as envisaged in the Constitution, and whether the legislation violated or abridged fundamental rights guaranteed under the Constitution. It was also held that Wisdom of Parliament in enacting a law was outside the scope of judicial review. As long as legislature had competence to legislate, grounds or wisdom of legislation remained its exclusive prerogative. Proceedings of sub-committee constituted by Parliament fell within its "internal proceedings" and, therefore, same was outside the jurisdiction of High Court in terms of Art.69 of the Constitution. Constitution mandated that neither direction be given to legislature nor could legislature be dictated to regarding the manner in which it could legislate was further held that Purely political questions are not justiciable. As a rule, political questions, as far as possible, should not be decided by courts and ought to be left for consideration to wisdom of Parliament. Such rule is not absolute and court does not refuse to exercise its jurisdiction of judicial review, if aggrieved person can demonstrate that question raised, though having a political content or complexity, involves a legal or constitutional issue.

5) A.M. Construction Company (Pvt.) Limited through Chief Executive Officer and another vs. The National Highway Authority through Chairman and 2 others

(2015 CLD 130)

Shezada Mazhar, J

This judgment relates to the territorial jurisdiction of High Court. It was held that National Highway Authority was a statutory authority performing functions in whole of Pakistan, therefore, any action or inaction on part of the statutory body could be challenged in any High Court of any Province. Lahore High Court did have territorial jurisdiction to adjudicate upon the present matter.

CIVIL LAWS

6) Messers Pearl Fabrics Corporation through Partner and 3 others vs. Messrs Kasb Bank Limited and another

(2015 CLD 243)

Nazar Akbar, J

In this case the scope and applicability of provisions of C.P.C. in execution of decrees under the Financial Institutions (Recovery of Finances) Ordinance, 2001 were considered. It was observed that powers conferred on an ordinary court under the CPC were alien to the powers conferred on the Banking Court. Authority/power of Banking Court was not subservient to powers conferred on a civil court under the provisions of CPC. Banking courts , as a practice, allowed the Financial Institution to file a formal execution application in terms of O.XXI, R.11 of the CPC for sake of convenience for satisfaction of decree passed by the Banking Court and merely accepting such an application under any provision of CPC would not mean that such proceedings were converted into

execution of a decree in an ordinary suit and did not therefore mean that power conferred on Banking Court under the Ordinance stood nullified or compromised.

7) Abdul Ghaffar Babar vs. Waqar Ayub

(2015 MLD 98)

Abdul Latif Khan and Lal Jan Khattak, JJ

In this verdict principles and scope of power of review u/s 114 CPC have been discussed. It has been held that provisions enumerating the powers of court to review its orders were subject to certain conditions and the same were not meant to correct wrong decisions rather invoked mainly for correcting errors. Order based on erroneous assumption of facts or overlooking something obvious or important or without adverting to the provisions of law or departing from undisputed construction of law and Constitution may be reviewed.

CRIMINAL LAWS

8) Khalid Iqbal and 2 others vs. Mirza Khan and others

(PLD 2015 S.C. 50)

Mian Saqib Nisar, Asif Saeed Khan Khosa, Amir Hani Muslim, Ejaz Afzal Khan and Ijaz Ahmed Chaudhry, JJ

The court while dilating upon the notion of variation of sentence by Appellate Court observed that variation of sentence of a convict could not be termed as double jeopardy and did not attract Art.13 (a) of the Constitution, which could only be applied, if the convict was exposed to a new trial.

Further opining that delay in carrying out death sentence would not be a mitigating factor to reduce death sentence to imprisonment for life. The delay caused by the executive in executing death sentence of convict is not a ground to invoke the principle of expectancy of life to reduce his death sentence to imprisonment for life.

9) Mst. Shahista Bibi and another vs. Superintendent, Central Jail, Mach and 2 others

(PLD 2015 S.C. 15)

Jawwad S. Khawaja, Mushir Alam and Dost Muhammad Khan, JJ

The principle enunciated in this authoritative verdict is that while interpreting a punitive law curtailing liberty of person, court was required to strive in search of an interpretation, which preferred the liberty of a person instead of curtailing the same and that too unreasonably and unfairly, unless, the statutory law clearly directed otherwise. If two equal interpretations were possible then the one favourable to the accused and his liberty must be adopted and preferred. It was also held that provisions of Ss. 35 & 397 Cr.P.C. widened the scope of discretion of the court to direct that sentences of imprisonment or that of life imprisonment awarded at the same trial or at two different trials but successively, shall run concurrently. Once the legislation had conferred the said discretion in the court, then in hardship cases, courts were required to seriously take into consideration the same to the benefit of the accused so as to minimize and liquidate hardship treatment. Court of law could not fold up its hands to deny the benefit of Ss.35 & 397, Cr.P.C. to an accused person as denial would amount to ruthless treatment.

10) Muhammad Ashraf and others vs. The State and others

(PLD 2015 Lahore 1)

Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

Amongst other principles, this division bench verdict lays down principles as to pronouncement of judgment in a criminal trial. It was held that personal attendance of accused was necessary for the pronouncement of the judgment in Criminal Trial, except where his personal attendance during the trial had been dispensed with or where the judgment was of acquittal, or was of fine only, but under subsection (3) of S.366, Cr.P.C., a judgment delivered by a court was not to be deemed to be invalid, merely because of the reason that any party, or his pleader was absent on the date of pronouncement of the judgment, or for any defect in the service of notice on the parties regarding the date and place of pronouncement of the judgment. Application of provisions under S.537, Cr.P.C. had been reaffirmed in S.366(4), Cr.P.C. with the result that the pronouncement of the judgment in a criminal trial in the absence of any party was not at all an illegality; nor same would render any such judgment as invalid. No such provision existed in the Code of Criminal Procedure, such as that contained in S.366, Cr.P.C. for the announcement of judgment in criminal appeal, meaning thereby that the intention of the Legislature was that the judgment in appeal could be pronounced in the absence of the appellant. Presence of party or its availability or its being within the reach of the court at the time of decision of his appeal was not a legal requirement. Court was supposed to do justice after appraisal of evidence; and appellant could not be punished simply for the reason that he had absconded after filing his appeal before the Appellate Court. Appeal filed by accused who had absconded after filing his appeal, could competently be decided on merits by Appellate Court, even in his absence.

DEFAMATION ORDINANCE

11) Liberty Papers Ltd., and others vs. Human Rights Commission of Pakistan

(PLD 2015 S.C. 42)

Jawwad S. Khawaja, Mushir Alam and Dost Muhammad Khan, JJ

In this Judgment, the apex Court while elaborating the concepts of Compensatory, General and Aggravated Damages, laid down the principle that choice of place of instituting suit for defamation was option for plaintiff. Jurisdiction of courts in defamation cases lay both where the newspaper was published and where it was circulated, with the option to be used by the plaintiff. Cause of action needed to arise only in part in a jurisdiction for it to be an open option for the plaintiff. Significant readership and distribution of newspaper in a city qualified as 'cause of action', in part at least.

PUNJAB PUBLIC PROCUREMENT RULES 2004

12) Messrs Habib Rafiq Pvt. Ltd. Etc. vs. Government of Punjab through Chief Secretary and another

(2015 CLD 72)

Abid Aziz Sheikh, J

It was held in this decision that blacklisting of contractor or supplier under R.19 of Punjab Procurement Rules, 2009, entailed serious consequences of forbidding contractor/ supplier from participating in future tenders, which would not only result in deprivation from its business activities but amounted to commercial killing of the company. Blacklisting also tarnished its reputation, credibility and honour in business community,

therefore, such disaster step of blacklisting of contractor/supplier could not be resorted to without observing fair trial and due process of law as envisaged in Arts.4 & 10-A of the Constitution. Words 'mechanism' and 'manner' used in R.19 of Punjab Procurement Rules, 2009, were not meaningless rather it denoted due process and fair procedure which included adjudication by impartial and independent authority…

WEST PAKISTAN FAMILY COURTS ACT, 1964

13) Khalid Bashir vs. Mst. Shamas-Un-Nisa and others

(2015 MLD 11)

Before Muhammad Farrukh Irfan Khan, J

In this judgment, The Honourable Lahore High Court elaborated the meaning and import of the term 'maintenance' and held that to maintain his child was obligation of the father and his responsibility could not be absolved merely on the basis that the mother was an earning-hand. The Learned Court also laid down the principles for determination of quantum of maintenance allowance and held that intent and purport of maintenance allowance to a minor child was to enable her/him to continue living at least, in the same state of affairs as the child was used to live prior to separation/divorce amongst the parents and it would be quite unjust and against the norms of propriety if due to separation amongst the parents the child was to relegate to a lower level of living standard or he/she is declined the level or standard of education which was being achieved by him/her prior to such happening i.e. separation of parents. At the same time, there was no escape from the fact that financial status of the father is also to be taken into consideration while awarding maintenance.

14) Shah Daraz Khan vs. Mst. Naila and 3 others

(2015 MLD 73)

Rooh-ul-Amin Khan and Syed Afsar Shah, JJ

In this judgment the court highlighted the concepts of prompt and deferred dower. It was held that dower was divisible into two parts i.e. prompt dower and deferred dower. Prompt dower was realizable by the wife at any time before or after consummation on her demand while deferred dower was payable on divorce or death of the husband. Husband should pay immediately the entire amount of dower whether prompt or deferred if he had contracted second marriage without prior permission of wife and if same was not paid, then such would be recoverable as arrears of land revenue. Classification of dower as prompt and deferred had been made for convenience of the parties. Normally women did not demand payment of full dower at the time of Nikah and only a portion of dower was paid before consummation of marriage and remaining dower was deferred to be paid later which did not mean that either same was waived or was to be treated as deferred till dissolution of marriage. Deferred dower was a sort of guarantee of a woman against ill-treatment, non-maintenance, desertion or any other abnormality in the matrimonial life including rash and arbitrary divorce. When at the time of marriage it was not settled whether dower was to be prompt or deferred then according to Shia Law whole dower would be treated as prompt and according to Sunni Law part of dower would be prompt and part as deferred. Prompt dower was payable during subsistence of marriage but where no time was stipulated deferred dower did not become prompt merely because wife had demanded the same rather same would be payable in the eventuality of dissolution of marriage either by death or divorce.